SHIU RAJ

v.

REGINAM

[COURT OF APPEAL* 1969 (Knox-Mawer P., Gould J.A., Marsack J.A.), 21st February, 4th March]

Criminal Jurisdiction

Criminal law—evidence and proof—trial with a trial—ruling that admissions by accused after a certain point of time be excluded—judge's discretion—consistency of ruling—possibility of evidence ruled inadmissible having effect upon judge's mind at trial proper.

Criminal law—practice and procedure—statement by accused—practice of taking accused before Justice of Peace to ascertain whether accused has any complaint concerning police conduct.

Criminal law—trial—summing up—must be looked at as a whole.

The appellant was questioned by the police in the course of their investigation of the killing of the deceased and at first said that he had been hitting a dog with an axe and the axe struck the deceased. He was then cautioned. A few more questions were then put, when the appellant started to cry, remained silent for about fifteen minutes and then confessed to having struck the deceased with the axe in anger. The questioning was continued and further incriminating admissions were made. At the appellant's trial for murder the trial judge ruled that after the admission of having struck the deceased in anger the appellant should have been cautioned again as, after the fifteen minutes' silence the effect of the first caution might have started to wane. The judge therefore excluded from evidence the answers given after the admission last mentioned. On appeal it was contended that that admission also should have been excluded.

Held: 1. That the admission was rightly admitted in evidence. Only three questions had been put since the caution and prior to the fifteen minutes' silence, and the caution must have been fresh in the appellant's mind during that period. The exclusion of the later answers in the exercise of the judge's discretion was more than fair to the appellant.

2. The mere fact that a judge has heard evidence which he decides to be inadmissible cannot be made a ground of appeal in the absence of any indication that he has actually been influenced by the evidence excluded.

Per curiam: (i) The practice of having a Justice of the Peace interview an accused person, after he has made a statement to the police, to enquire whether he has any complaints as to the conduct of the police in obtaining the statement, is one in which certain dangers are inherent.

(ii) The summing up must be looked at as a whole and criticism of isolated sentences is frequently ill-founded.

* Special leave to appeal against the judgment was refused by the Privy Council.

Appeal by leave out of time from a conviction by the Supreme Court on a charge of murder.

B. C. Ramrakha for the appellant.

G. N. Mishra for the respondent.

The facts sufficiently appear from the judgment.

Judgment of the Court (read by GOULD J.A.): [21st February 1969]—

The appellant was given leave to appeal out of time from his conviction by the Supreme Court of Fiji sitting at Lautoka on a charge of murder. He was tried jointly with one Kanda Sami Naikar for the murder of one Mangamma d/o Lalaiya on the 23rd October, 1967, at Lovu, Lautoka, and, on the 19th March, 1968, both accused were convicted of that offence and each was sentenced to imprisonment for life. In Criminal Appeal No. 13 of 1968 this Court dealt with the appeal of Kanda Sami Naikar, which was allowed, a conviction of manslaughter being substituted for that of murder on the 22nd October, 1968.

The facts alleged, so far as they are relevant to the case against the appellant, may be stated briefly. He was employed by and had a house in the same compound as, one Subramani, who was the husband of the deceased Mangamma. Mangamma was found dead in the compound on the 23rd October, 1967, the cause of death being "internal haemorrhage due to rupture of the major blood vessels around the neck". She had suffered two blows from a blunt instrument, one on the chin and one on the anterior base of the neck. Death would have been almost instantaneous and an axe found nearby stained with human blood was the obvious instrument. There was evidence that the members of the family, save only the deceased and the appellant, were absent from the compound on the morning of the 23rd October, 1967; there was also evidence that the sum of £104 had been taken from the house of Subramani and the deceased at or about the same time, though none of this money was found in the possession of the appellant.

The vital evidence against the appellant consisted of oral admissions made by him to Det. Corporal Permal on the night of the 26th October and a written statement made on the 27th October after charge and caution, to which he affixed his thumb-print. The following passage from the record of Corporal Permal's evidence contains the oral admissions:—

"Q: Did you question him again?

A: I did. I asked him in Hindustani —

(q) Do you wish to say to the Police?

(a) Babu, I made a mistake. I was hitting the dog with the axe. The axe struck the Auntie.

At this stage I cautioned Shiu Raj in Hindustani.

(q) You are not obliged to say anything but you may say whatever you wish to do but whatever you would say may be written down and given in evidence.

Q: Did he appear to understand that caution?

A: Yes.

Q: Did you continue the conversation?

A: Yes.

Q: Now tell us what questions you asked?

A: (q) But, Shiu Raj, it is a very small dog and the Auntie is tall and how is it that she was struck?

(a) Auntie was sitting down when I struck the dog.

(q) Which dog did you hit?

(a) The red one.

(q) Why did you hit the dog?

He made no reply to this question and he started crying. He did not utter any words for about fifteen minutes. Shiu Raj then said —

(a) Babu ji, I have made a mistake. Save me.

(q) How did you make the mistake?

(a) In the morning, I returned home after tethering the cattle and was sitting down in the shed. Then Auntie asked why I had tethered the cattle beside the road and said 'You are roaming about like a vagabond'. I became angry and picked up an axe and struck the Auntie. Auntie fell down. I gave her water to drink. She did not drink any water. Auntie was dead."

The appellant was in the habit of referring to the deceased as "Auntie". The cautioned statement is contained in Exhibit F: —

"On Monday morning after having tea I took the cow to tether it beside the sugar cane. After tethering the cow I went home then aunt abused me. It was hot and I could not bear the temper and an axe was lying there which I picked up and hit her. Auntie fell down then I gave her water but she died and then I entered inside the house and opened the cupboard and took out hundred and four pounds. One week before Suleman's wife had told me to kill aunt for some reason and take out the money and give her otherwise her husband will go to gaol. At about 11.30 Suleman's wife came when I gave her the money. I gave her all the money and then she returned me one pound and five shillings and said to keep it for expenses. After taking the money she went away to her house. After killing Aunt and giving way the money I went away to look after the cattle."

Of the case against Kanda Sami Naikar it is only necessary to say at this stage that there was no allegation or evidence he took any physically active part in the attack on Mangamma.

At the trial the admissibility of the oral statements and of Exhibit F was challenged, and, when the question was gone into in the absence of the assessors, the appellant gave evidence that he had been violently assaulted by the police and denied ever having made any of the oral statements or the statement in Exhibit F. The learned trial Judge rejected these allegations of the appellant and ruled that the evidence we have set out above was admissible; he did, in the interests of complete fairness to the appellant, exclude certain answers which he considered had been given at a time not sufficiently proximate to a caution.

The conduct of the trial within a trial was, in our opinion, perfectly proper, the summing-up and judgment contained accurate and adequate directions on the law and on the question of burden and standard of proof. This being our view of the trial generally, we find that five of the ten grounds of appeal argued do not merit specific mention; we will now deal with the remainder.

Ground 1 reads: —

> "That having come to the conclusion in his ruling upon the trial within a trial that the effect of the first caution given by Permal in the particular circumstances of the case might have started to wane and having used language to the effect that certain admissions were made. "But this was after a silence of fifteen minutes", the learned trial Judge ought to have excluded answers to and including the second incriminating admission after the said fifteen minutes silence."

This relates to the passage from the evidence of Corporal Permal quoted above, and to the following portion of the trial Judge's ruling on admissibility: —

> "I now turn to Corporal Permal's interview with the First Accused at the house of Subramani on the night of 26th October. The Crown has satisfied me that this Corporal did administer caution to the First Accused in the terms of Rule II of the Judges' Rules when the First Accused allegedly stated "I was trying to hit a dog with an axe. The axe struck my Auntie". Thereafter the Corporal continued to question the First Accused who made the alleged admission of striking the deceased in anger because of a certain remark by her. But this was after a silence of fifteen minutes. Although the First Accused's answers thereafter are strictly admissible, in my view, on grounds of extreme fairness only and to avoid any suggestion of prejudice, the First Accused ought to have been given another caution after the second alleged incriminating answer as it is probable that by then the effect of the first catuion in the particular circumstances of this case might have started to wane. However, in exercise of my discretion, I would admit answers up to the second incriminating admission. I therefore rule that the Prosecution may not lead any further evidence of any incriminating verbal admission on the part of the First Accused after he stated to Corporal Permal that 'Auntie died'."

It is relevant to note, without going into detail, that Corporal Permal's evidence at the trial within a trial from this point on contained a number of incriminating admissions by the appellant as to the details of the attack and in relation to the missing money — this evidence was excluded at the trial proper, pursuant to the learned Judge's ruling.

As Counsel's argument on this ground was developed before this Court it amounted to a submission that the learned Judge, to be consistent with his reference to a silence of fifteen minutes, should also have excluded what he referred to as the "second incriminating admission". The ruling in this respect may be rather obscure but it is quite clear that the learned Judge intended to admit and did admit (correctly in our view) the "second incriminating admission". As to the logic of

applying the closure at that point, it can only be a matter of surmise that the learned Judge considered that it was after the second incriminating admission that the questioning proper by Corporal Permal recommenced. We see nothing in this which could in any way be said to have occasioned a miscarriage of justice. The appellant was no mere youth — he gave evidence that he was forty-nine years old. Only three questions had been asked of him since he was cautioned, prior to the fifteen minute silence, and the caution must have been fresh in his mind during that period, when he was obviously deciding what to say. The decision of the learned Judge to exclude, in the exercise of his discretion, the subsequent admissions, was perhaps rather more than fair to the appellant.

Ground 4 of the Notice of Appeal reads:—

> "That having ruled that the prosecution were not entitled to lead evidence from Ganga Dharam Reddy to show that the appellant confirmed the contents of his charge statement (exhibit F) as being his (the appellant's) statement and as being true, the learned trial Judge wrongly allowed the prosecution to lead evidence that showed or tended to show that the appellant confirmed the contents of his charge statement as being his (the appellant's) statement and as being true in the sense that he did not complain about it to the said Ganga Dharam Reddy and the learned trial judge placed great reliance on this evidence in his summing up and more particularly in his judgment and thus there was a miscarriage of justice."

This refers to a matter upon which this Court commented in its judgment in the appeal of Kanda Sami Naikar who was tried jointly with the appellant. There the Court said:—

> "Grounds 1, 2 and 3 as put forward refer to the circumstances under which a Justice of the Peace interviewed appellant at the police station after he had made his second statement to the police. It seems that, in cases of serious charges, a practice has developed of having a Justice of the Peace interview the accused, after he has made a statement to the police, to enquire from him whether he has any complaints as to the conduct of the police in obtaining the statement. In this case, when appellant challenged the admissibility of the statement upon the ground of inducement, intimidation and even fabrication, and the learned Judge took a trial within a trial on this issue, the Justice of the Peace was called to say that appellant made no complaints to him of these matters when he so called upon him. In fact, his evidence in the trial within a trial went beyond that. Having heard all the evidence and ruled that the statements were admissible, the learned Judge very properly directed that anything in this witness's evidence that went beyond a mere statement that appellant did not make any complaint to him of the conduct of the police in respect of the statement should not be led in the trial proper by the Crown. He, of course, placed no restraint upon the right of counsel for the defence to cross-examine. We do not think that the admission of the evidence of this witness in the trial led to any injustice, and consequently do not uphold this as a ground of appeal."

We do not think there is any difference in this aspect of the matter

between the cases of the two accused. Counsel for the appellant complained that the evidence actually led in the trial proper went further than the Judge's ruling permitted, in that before the appellant was asked by the Justice of the Peace whether he had any complaints to make he read to the appellant the statement in Exhibit F. This, Counsel argued, would lead the assessors to believe that the appellant was confirming the truth of his statement when he said he had no complaints to make, thereby giving, by implication, evidence which the Judge had ruled could not be given specifically. We think this is carrying the matter too far — to anyone acquainted with the particular type of witness it is obvious that it would be futile to question him on the subject of complaints without linking the questions up with the statement allegedly made by him. It ought not to be necessary to read the statement to him if it can be identified otherwise but, as we said in the Kanda Sami Naikar case we do not think that the admission of the evidence in the form it took, led to any miscarriage of justice.

Ground 5 reads :—

> "That the learned trial Judge was unknowingly affected by the evidence of Ganga Dharam Reddy adduced in the trial within a trial and this is reflected in his judgment and there was thus a miscarriage of justice."

We refer specifically to this ground only because it obviously arises from comment made by this Court in the Kanda Sami Naikar judgment, upon the danger which may be inherent in the practice of calling a Justice of the Peace to give such evidence as is mentioned above. We said (inter alia) that a judge might unknowingly be affected by something he had heard the Justice of the Peace say in the trial within a trial even though it was not repeated in the trial. This position may, of course, arise after a trial within a trial at which evidence is ruled inadmissible, quite apart from any question of the evidence of a Justice of the Peace. A judge by his training is able to divorce in his own mind the inadmissible from the admissible evidence and if, in an extreme case, he found himself unable to do so, he would take appropriate action. The mere fact that a judge has heard and ruled certain evidence inadmissible cannot be made a ground of appeal in the absence of any indication that he has actually been influenced by the evidence excluded. The present case is entirely devoid of any such indication. This Court's comment in Kanda Sami Naikar really related to the likelihood of a judge being placed in such a position unnecessarily or to little purpose by evidence (of the type mentioned) given by a Justice of the Peace. Counsel for the Crown called our attention to paragraph 842 of *The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria by Brett and McLean* (1963) which indicates that a not dissimilar practice has the approval of courts in those territories; for our own part we adhere to the view that it is a practice in which certain dangers are inherent.

Ground of Appeal No. 10 reads :—

> "That the learned trial Judge did not direct the assessors and himself that what Kanda Sami Naikar said to his father Abbu Naikar in the absence of the appellant was not evidence against the appellant."

The case against Kanda Sami Naikar included evidence that he had received £20 from the appellant. In his defence Kanda Sami Naikar called as a witness his father Abbu Naikar. The only evidence given by the latter to which this ground of appeal could refer is that, in cross-examination, Abbu Naikar stated that the police told him, in the presence of his son, that his son had got the money from the appellant, and that his son then remained mute. All this amounts to no more than that Kanda Sami Naikar might be deemed to have made an admission by his silence. This is in fact covered by the general direction given and stressed in the summing up: "an admission by one accused is *not*, and I repeat *not*, evidence against his co-accused". This silence by Kanda Sami Naikar so far as it may have amounted to an admission, was a small matter in a long trial, and the absence of a more specific warning in relation to it was immaterial.

Finally, we refer to ground 11, which reads :—

> "That the learned trial Judge misdirected the assessors and himself as regards the burden and standard of proof when he said in his summing up (page 384 of the record line 21) as follows :—
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> > "You may accept his evidence as truthful and exculpatory, then you must advise me he is not guilty. He may create a reasonable doubt in your mind; even then you must advise me he is not guilty. On the other hand his evidence may have the effect of strengthening the prosecution case."

The only complaint by Counsel for the appellant was that the second sentence in the passage quoted may have left the assessors with the impression that there was an onus on the appellant in this respect. As has often been said, a summing-up must be looked at as a whole, and criticism of isolated sentences is frequently ill-founded. That is the case here. The passage quoted, which was intended to assist the assessors in their contemplation of evidence given by the defence, must be read in the light of the immediately preceding words :—

> "Whilst there is no onus on the Accused person to prove his innocence, however, once he choses to give evidence on oath and does give evidence, you are entitled to consider the effect of his evidence."

Earlier the learned Judge had directed the assessors that the burden or onus of proof rested fairly and squarely with the Crown and never shifted to the accused. There is no merit in this ground of appeal.

In our view the appellant was convicted after a fair trial upon ample evidence and there is nothing in any of the grounds of appeal which would warrant interference by this Court. The appeal is accordingly dismissed.

Appeal dismissed.