A

SHIU DAYAL

v.

REGINAM

B

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Spring J.A.), 27th October, 3rd November]

Criminal Jurisdiction

Criminal law—evidence and proof—witness refressing memory—list of banknotes made by witness—no independent memory—list put in as exhibit—not valid ground of appeal.

C

Criminal law—witness—cross-examination to credit—possibility of hearsay answer—statement of witness put in for purposes of cross-examination—warning to assessors.

Criminal law—practice and procedure—trial within trial—knowledge of assessors—discretion of judge—distinction between reference to fact of trial within trial and disclosure of evidence or proceedings thereat—witness—refreshing memory—no independent recollection—practice.

D

It is not a valid ground of appeal that a document written by a witness, listing the numbers of banknotes of which the witness could have retained no independent memory, was put in evidence as an exhibit, instead of being used merely to refresh memory. Such a document may in any event be shown to the assessors.

E

Where counsel for the defence cross-examines a witness for the prosecution to her credit it is not for the trial judge to disallow questions on the ground that a hearsay answer may be forthcoming. If an earlier statement made by such a witness and containing hearsay is put in evidence during such a cross-examination it is appropriate for the judge to warn the assessors that the statement is not evidence of what occurred but only admissible to support or contradict the truth or reliability of the evidence given by the witness in court.

F

It may not always be possible to keep from the assessors the knowledge that a trial within a trial has been held to decide the admissibility or otherwise of evidence. That matter must always be to some extent in the discretion of the judge; and disclosure of the fact of such a proceeding per se would not be the grave irregularity that reference to the evidence or proceedings thereat could be.

G

Sheikh Hassan v. Reginam (1963) 9 F.L.R. 110, considered.

Other cases referred to:

H

The Queen v. Naidanovici [1962] N.Z.L.R. 334.

Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965; 100 S.J. 566.

Chan Wai-keung v. Reginam [1967] 2 A.C. 160; [1967] 1 All E.R. 948.

Appeal against a conviction of murder by the Supreme Court.

A

K. C. Ramrakha for the appellant.

G. Trafford-Walker for the respondent.

The facts sufficiently appear from the judgment of the court.

3rd November 1972

B

Judgment of the court: (read by Gould V.P.) :

The appellant was convicted on the 14th August, 1972, of the murder of Jai Karan s/o Ram Narayan by the Supreme Court at Lautoka. He was sentenced to imprisonment for life and now appeals against his conviction.

C

On the 16th September, 1971, the deceased was lured to a lonely spot called "jail" and there he was virtually beheaded by one stroke of a cane knife. These are the facts as found by the learned trial judge, who rejected entirely the evidence of the appellant that the deceased had been either killed or rendered unconscious at a house in the vicinity, and carried on horseback to "Jail", where the final blow was struck, D the appellant being an unwilling spectator. The three assessors were all of the opinion that the appellant was guilty of murder, and the finding of the trial judge is contained in the following passage in his judgment :—

> "On the whole of the evidence, I find myself driven to an irresistable conclusion that the inculpatory facts are incompatible with the E accused's innocence and are incapable of explanation upon any other reasonable hypothesis than that he deliberately and of malice aforethought told the deceased that he should go into the bush to an unfrequented area known as "jail" for the purpose of buying 500 sovereigns in exchange for 400 dollars, and that he lured the deceased to this place for the purpose either of murdering him himself or, at the very least, enabling or aiding SHIU DAYAL s/o PACHU, or F some other person unknown, to murder the deceased. Proof of motive is not necessary but it might well have been money.
>
> In agreement with all three assessors I find the accused guilty of the murder of JAI KARAN s/o RAM NARAYAN, as charged."

The trial judge had experienced some difficulty in that the prosecution case had been presented almost exclusively on the basis that it was G the appellant himself who struck the fatal blow. It is apparent, however, from perusal of the whole of the record of evidence, that the trial judge was amply justified in the finding that if the appellant did not himself strike that blow he was present and privy to the whole design.

The grounds of appeal do not directly challenge the finding on the facts but are limited to an alleged wrongful admission of evidence and to a H challenge to a very brief passage in the summing up. They read :—

> "(1) Prejudicial hearsay evidence was introduced as to what the deceased had said about meeting the accused at a rendez-vous; such evidence was inadmissible and vitiated a fair trial.

(2) The learned trial Judge erred in law in informing the assessors that he had admitted the oral question and answer session evidence as having been made freely and voluntarily." A

The first ground is directed to the evidence of Dhanwanti, the widow of the deceased. Prominent in the case was the sum of $400 which the deceased had caused to be drawn from his bank account, and which Dhanwanti had in her custody for a period. Her evidence is that she had made a list of the numbers of the banknotes, $200 worth of which were found to have been in the possession of the appellant's wife very shortly after the crime. B

The first complaint is that in the course of Dhanwanti's evidence in chief the list was put in as an exhibit instead of merely being used to to refresh her memory. Further, she gave evidence that the deceased had told her that the money was to be paid to the appellant and she had written on the list, "From Jai Karan to Shiu Dayal f/n Ram Narayan." C Counsel's submission was that the list was inadmissible in evidence. On the pure question of law we would call attention to the case of *The Queen v. Naidanovici* [1962] N.Z.L.R. 334, when the majority of the New Zealand Court of Appeal held that where a witness has no independent memory of the facts recorded by him and relies entirely on the document, his evidence being co-extensive with its contents, the document itself is admissible. In any event the jury may see the document used D to refresh memory. It must be evident that Dhanwanti could have had no independent memory of the numbers of the notes. We agree that the sentence which Dhanwanti had endorsed on the list, based on hearsay, was inadmissible.

Whatever the strict view of the law on the subject may be, the appellant suffered no possible prejudice from the evidence, for it was part of E his own case. He gave in evidence himself that, at the request of one Shiu Dayal s/o Pachu he had informed the deceased that the said Shiu Dayal had 500 stolen sovereigns which he would sell for $400; that the deceased gave the appellant $200 on account of the anticipated transaction. These were the notes which he later handed to his wife.

The second submission under this head of appeal concerned the admissi- F bility of certain evidence given by Dhanwanti in cross-examination which was based on hearsay. Counsel referred to *Subramaniam v. Public Prosecutor* [1956] 1 W.L.R. 965 in which their Lordships said that evidence of a statement by a person not called as a witness is heresay when the object of the evidence is to establish the truth of what is contained in the statement, but not when the object was to establish the fact that G the statement was made.

What happened was that counsel for the appellant cross-examined Dhanwanti on a statement which she had made to the police. The following passage is complained of:—

"It is recorded 'Then I asked my husband what was the valuable H property that SHIU DAYAL wanted to buy with this money. I recall this was there when read back to me. I agreed the statement as correct. I was not told I could alter it. I understood that I could alter it if incorrect. I did ask him. That is correct.

Statement reads:— "He then said he had got 500 sovereigns with him". I think I told police about this before signing the statement, before it was read back to me. I have mentioned my husband's name but it was told by my son before the police came to take the statement. When the van came and PREM came and told me his father killed for the sovereigns. "SHIU DAYAL informed him that the sovereigns were stolen ones." I cannot recall this now. He did not tell me this. Prem had told me something and there was a lot of rumour that sovereigns stolen and my husband was buying them. I am not certain what I told the police. I may have mentioned PREM's name. It was a rumour like that. I do not know if there were sovereigns or not. To me it was just a rumour. Nobody has told me to change my story. I am not frightened of anything."

This was a cross-examination to credit; the statement, which was at a later stage of the cross-examination put in evidence, went a good deal further than the evidence actually given by the witness. Counsel based his cross-examination on the statement, and in those circumstances a judge cannot disallow questions on the ground that a hearsay answer may be forthcoming. Counsel takes that risk.

The answer to this submission is, we think, three fold. First the judge was not in error in not excluding the evidence elicited; second, that in view of the appellant's own case, mentioned above, the matter was not prejudicial to the appellant, and third, that when the statement was put in evidence, the trial judge warned the assessors as follows:—

"Assessors warned that this statement is not evidence of what occurred but is merely admissible to support or contradict the truth or reliability of the evidence adduced by the witness in this Court. Only what is said by *witness in this Court is evidence.*"

We think that in the circumstances this was adequate, and the trial judge was not obliged to go further and warn the assessors that some of the things said by Dhanwanti in evidence under cross-examination may have been repetitions of hearsay allegations in her statement. This ground of appeal must fail.

The second ground, which is set out above, relates to the following passage from the summing up:—

"This Q. & A. Session evidence was admitted in evidence by me as having been made freely and voluntarily. This was, of course after a trial-within-a-trial. It is for you to give it whatever weight you think it deserves."

The abbreviation in that psssage refers to evidence given by Detective Sergeant Permal (confirmed by two other officers) of an interview with the appellant on the day after the crime, at which he questioned him, and at the later stages of which, the appellant made what amounted to a full confession. It was not the case for the appellant at the trial that either this, or the equally incriminating statement in answer to the charge, was elicited by assault or threats but that they were fabricated by the police. They were in each case admitted by the learned judge after a trial within a trial.

It was counsel's submission that the trial judge was wrong in referring to the fact that there had been a trial within a trial at all. He relied upon the decision of this court in *Sheikh Hassan v. Reginam* (1963) 9 F.L.R. 110. In that case the trial judge had, in his summing up, referred to the trial within a trial. He informed the assessors that the accused had challenged the statement he was alleged to have made, only on the ground that it had been induced by fear and unfair means. He added that he was taken aback when the accused in his later evidence maintained that he had never made the statement at all.

This disclosure of some of the evidence given at the trial within a trial and the judge's comment thereon, this court considered to be a grave irregularity. It was not necessary to consider whether it would have been sufficiently grave to warrant the appeal being allowed, as that had been done already on other grounds. The court, however, discussed the question of trials within a trial generally and used this final sentence, upon which counsel for the appellant relies (p.117):

> "We now state that in our opinion any disclosure to the assessors of the fact of holding a trial within a trial and its subject-matter, of the evidence or the arugments then put forward and any comment on that evidence or those arguments either by counsel or by the trial Judge, are improper."

We do not resile from this statement but would qualify it to the extent that, so far as the non-disclosure of the fact that a trial within a trial has taken place, it may be a counsel of perfection. In certain territories, of which Fiji is one, the trial within a trial has become a part of almost every major criminal trial. Assessors would not be unfamiliar with them or their usual purpose. It may not be possible either, so to regulate the course of evidence, that the assessors remain in ignorance of the fact that evidence is being objected to. How the matter is handled must be, at least to some extent, in the discretion of the judge in the particular case. In any event, the disclosure of the fact of a trial within a trial *per se* would not be the grave irregularity that reference to the evidence or proceedings thereat could be.

In the present case the trial judge thought it best to be frank, perhaps because, after Sergeant Permal's evidence had been opened, counsel for the appellant stated, in the presence of the assessors, that he would object to its admissibility. Having held the trial within a trial the learned judge gave his decision, and when the assessors were recalled, he informed them that he had admitted the statement in evidence and that it was for the assessors to attach such weight to it as they considered proper. The reference in the summing up which is complained of, is little more than a reminder of what they had already been told.

It may be that the summing up would have been improved if the passage in question had been omitted, particularly the reference to the statement having been made freely and voluntarily, but the real question is whether the assessors were properly instructed as to their function. We have no doubt that they were. After he had said it was for the assessors to give the evidence the weight they thought it deserved, the trial judge reminded them of the evidence in detail. Then in the following passage he put to them, as matters for their determination, the very issues raised by the appellant :—

"Finally, in regard to these recorded questions and aswers, I remind you that the accused said to his father on 20th September at Police Station according to Sgt. Yakub Khan "I have told all the truth to the Police". Do you believe the Sergeant and do you believe this was "the truth" to which he referred or do you think he may have said something quite different from what was recorded? I do not propose to go over again all the evidence of this witness, ASP Swamy, and Sgt. Yakub Khan who were the other officers present at the interrogation. I am sure you will recall the salient points of their evidence as you will remember the implicit suggestions in cross-examination that this was manufactured evidence. The real issue is whether you believe that after the accused was told that police had information about stolen sovereigns he remained silent and after having been confronted by Romeo Bale he said — "Now I want to tell the whole truth." Do you believe accused then thought to himself that "the game was up" and then came out with what really happened or do you think all these three police officers have conspired to concoct the rest of the alleged questions and answers recorded and signed by them."

In our opinion the direction as a whole was sufficiently in accordance with what was laid down in the case of *Chan Wai-keung v. Reginam* [1967] 1 All E.R. 948, to which this court has referred on a number of occasions. If the passage relied upon in the summing up is subject to criticism, it is of a minor nature and can have caused no miscarriage of justice. The second ground of appeal therefore also fails.

In the result the appeal as a whole is dismissed.

Appeal dismissed.