IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 20 of 1977

BETWEEN: KHUSHI RAM (s/o Mansa Singh)
and
GURDAYAL SINGH (s/o Mansa Singh)
Appellants

A N D

REGINAM Respondent

Date of Hearing : 9th November, 1977
Delivery of Judgment : 25th November, 1977

M.S. Sahu Khan and S.D. Sahu Khan for the Appellants
D. Williams for the Respondent

J U D G M E N T

MARSACK J.A.

This is an appeal against conviction for murder entered against both appellants in the Supreme Court sitting at Lautoka on the 12th May, 1977. The trial was held before a judge and five assessors. All five expressed the opinion that the first appellant was guilty of murder, and four of the five that the second appellant was guilty of murder. The learned trial judge accepted the unanimous and majority opinion respectively, convicted both appellants of murder and imposed sentence of imprisonment for life.

At the outset, and before dealing with the grounds of appeal, we find it necessary to refer to two matters which not only have made the task of the Court more difficult, but also, in our opinion, should not have occurred at all.

The first of these concerns the grounds of appeal submitted on behalf of both appellants. The original grounds were filed, with the notice of appeal, on the 18th May, 1977. On the 7th November, that is two days before the hearing, amended grounds of appeal were filed and it was upon those amended grounds that the argument proceeded. Neither the original grounds nor those amended gave any particulars of the alleged infractions of the rules upon which the grounds were based. For example, one ground reads:

> "That the learned trial Judge erred in law and in fact in not complying and/or not properly complying with the provisions of Section 153 and 154 of the Criminal Procedure Code."

But no information is given as to the manner in which the learned trial Judge is alleged to have failed to comply with those provisions. The same criticism applies to other grounds of appeal. Both misdirection and non-direction in the summing-up were alleged, but no details substantiating these were set out in the grounds of appeal. The result of this is, not only that it makes the work of the Court more difficult, but it also considerably hampers counsel for the Crown in preparing his argument to support the judgment in the Court below. Both the Court and the respondent are entitled to receive notice - in adequate time before the hearing - of exactly what mistakes or omissions the learned trial judge is alleged to have made and of any other ground it is proposed to argue; and if such accurate and sufficient particulars are not given in the notice of appeal, the Court may well be impelled to reject the notice.

The second matter concerns the action taken by counsel for the Crown. At the conclusion of the case for the appellants, counsel intimated to the Court that he was unable to submit any argument in reply. The grounds of appeal were, in his submission, totally inadequate and it was impossible for him to prepare a case answering those grounds. He informed the Court that on the 21st October, 1977 the Director of Public Prosecutions wrote to the Registrar saying, inter alia:

> "I am most concerned regarding the scant particulars given at page 2 in support of the grounds of appeal and I feel I can be of little assistance to the Court of Appeal in arguing the case for the respondent as it appears that the real basis for the appeal will not be revealed to me until the hearing."

Unfortunately no further steps were taken and no effort made at that stage to obtain the full particulars upon which an argument for the respondent could be prepared. Moreover, the Court was not notified of counsel's objections before the hearing commenced, when something might have been done to rectify the position. In the result the Court was completely deprived of the assistance it is entitled to expect from counsel for the Crown in a criminal appeal. In our view counsel, as an officer of the Court, was under a duty to assist the Court in any way possible; and the procedure adopted by him in this case was definitely not a compliance with that duty. However, the Court had no option but to consider and decide the appeal on the material before it.

The relevant facts may be shortly set out. On the 24th November, 1976 there was what was referred to as a party, some form of celebration, at the home of one Lachman Singh at Navatu. A certain amount of drinking took place at this party which became somewhat noisy towards the finish. Some time later members of the party, went across to the property of one Chanan Singh and three of them, including both appellants, entered what was called his compound. These persons appeared to be bent on some form of mischief; both appellants were said to be carrying knives and all had sticks. According to the evidence for the prosecution the appellants and one other attacked Chanan Singh, and when this took place the latter's wife, Balwant Kaur, intervened to try to protect her husband. She was stabbed in the chest and received certain other injuries; she died almost immediately as a result, according to the medical evidence, of the stab wound to the heart. The third member of the party was also charged with murder; a majority of the assessors expressed the opinion that he was not guilty of murder, and the learned trial judge stated that in his view, there was a doubt as to whether the third accused was a participating party in the series of assaults which led to the death of the deceased. He was accordingly acquitted.

It is, in our opinion, unnecessary to set out the grounds of appeal in detail or to consider all the arguments put forward by counsel for the appellants. The matter which, in our view, requires examination by this Court, is that of the adequacy of the summing-up in certain aspects of the case. The first of these concerns the general direction as to the onus of proof. At the commencement of

his summing-up the learned trial judge correctly pointed out that the onus of proof always rests on the prosecution; that the accused person has not to prove anything; and that before the assessors can express the opinion that an accused person is guilty, they must be satisfied that the prosecution has proved its case beyond reasonable doubt. The effect of this direction could however, be considered to be somewhat modified by his saying later:

> "Now you may think that this case has developed in such a way that what you really have to consider is whether you believe Chanan Singh and his daughter-in-law or whether you believe the accused."

The assessors might well draw the conclusion from this direction that if they did not believe the evidence of the accused, then there must be a verdict of guilty. The learned judge did not expressly tell them, as in our opinion he should have done, that if the evidence of the accused was sufficient to set up a reasonable doubt in their minds, then they should express the opinion that the accused were not guilty. What he said in another passage, referring to the evidence of the accused, is:

> "You look at their evidence to see whether you believe it or you don't".

and later:

> "If you think that Khushi Ram and Gurdayal Singh were not telling the truth, you may regard that as an additional reason for believing the prosecution's story."

In our opinion, these directions may well have caused the assessors to overlook what had been said at the commencement of the summing-up on

the subject of reasonable doubt, and left them with the impression that the onus lay on the accused concerned to satisfy the assessors that he was telling the truth. In the result we are of the opinion that the summing-up of the learned trial judge on the subject of reasonable doubt was inadequate, and may have left the assessors with the wrong impression as to their duty concerning the evidence generally.

In another respect the summing-up of the learned trial judge was, in our opinion, open to some objection. Although, as has been stated, he referred at the commencement of his summing-up to the principle that the assessors must be satisfied beyond reasonable doubt before they could find any relevant fact to have been proved, later he uses, on several occasions, the expression "if you think" in such a way that it might, in the minds of the assessors, be taken to modify the direction he had given earlier.

Further argument was directed to a submission by counsel for the appellant that there had not been a full and proper direction on the subject of common intent. The reference to this aspect in the summing-up is in the following words:-

> "Well, now you have heard that any person who aids or abets or assists to commit an offence is a principal. And here, you have the prosecution saying that the first accused stabbed the woman, the second accused hit her with a stick and the third accused hit her when she had fallen down. So that if the prosecution evidence is to be believed the three accused would be principals in this offence. The fact that Balwant Kaur might have got into the way of someone who was trying to attack her husband would be no defence to the person who attacked her. If you think whoever struck Balwant Kaur must, as a

> reasonable person, have thought that serious injury was likely to result to the person whom he struck then he is guilty of murder if Balwant Kaur dies, and as you know she did die."

This type of direction may be adequate when there is only one assailant, or when two or more assailants participate to such a degree that each is shown to have the intent to kill or do grievous bodily harm. In view of the order we propose to make we do not find it necessary to consider the evidence in detail; but there was in this case a great deal of difference in the extent of participation alleged against the first and second appellants. The first appellant was said to have stabbed the deceased three times; the second to have later hit her with a stick. Whether the second is guilty with the first in such circumstances may depend on a number of factors; but in the main it would hinge on whether the second appellant aided and abetted the first appellant in the use of the knife, or whether the two of them and a common unlawful purpose of which death or grievous bodily harm was a probable consequence.

In his summing-up the learned judge read to the assessors section 233 of the Penal Code which deals with malice aforethought and section 21 which includes persons aiding and abetting. He did not mention section 22 which provides for offences committed by joint offenders in prosecution of a common purpose. He did not explain either aiding or abetting or the nature of common purpose; but in the portion of the summing-up we have quoted above he gives a direction that if the first appellant struck with a knife and the other two hit her with sticks they would all be principals.

Presumably this would be on the basis of aiding and abetting, as no reference had been made to common purpose. In our view the learned trial judge did not adequately carry out his duty of explaining the law to the assessors, leaving it to them to apply it to the facts they found, when he directed them, as he did in effect, that if the second appellant hit the deceased with a stick he was a principal in the offence of murder. Moreover, the last sentence in the passage quoted may well have been taken by the assessors to mean that if either accused thought that serious injury might have resulted from a blow struck by either of them, that person would be guilty of murder even though it was not he who struck the fatal blow.

Another passage from the summing-up would appear to indicate that the question of common purpose was in fact present in the learned judge's mind, though he gave no express direction on the point. He said:

> "You may think that Khushi Ram and Gurdayal Singh went into this compound and stabbed Balwant Kaur, but you might not be quite certain about the third accused. If you are not then you will find him not guilty of murder. If you are satisfied that the truth of this matter is substantially what the prosecution have said and that Khushi Ram and Gurdayal Singh went into the compound of Chanan Singh and stabbed Balwant Kaur, you will find them guilty of murder. If you are not so satisfied then you will find them not guilty."

This reference by the learned trial judge to the stabbing of Balwant Kaur by Khushi Ram and Gurdayal Singh may well have tended to confuse the assessors. The only basis in law on which such a direction could properly be made is that the two appellants

acted with a common intent, that is an intent to kill or do grivous bodily harm. But no direction as to common intent was at any time given.

In our opinion this was a case which called for a clear direction on the questions of aiding and abetting and common intent, particularly in relation to the second appellant; although as we have indicated there are other aspects of the summing-up which render it unsatisfactory in relation to both appellants.

Accordingly the appeal is allowed and the convictions quashed. The evidence placed before the assessors was substantial, and upon a proper direction, if accepted, would have justified convictions. In our opinion therefore, the interests of justice will be served by a new trial of both appellants, which we accordingly order.

(Sgd) T. Gould
VICE PRESIDENT

(Sgd) C. Marsack
JUDGE OF APPEAL

(Sgd) T. Henry
JUDGE OF APPEAL

Suva,
25th November, 1977.