IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 67 of 1976

BETWEEN:

VISHAL CHANDRA (s/o Ram Sewak) — Appellant

A N D

REGINAM — Respondent

M.S.D. Sahu Khan for the Appellant
M. Jennings and E.E. Gleave for the Respondent

Date of Hearing : 31st October, 1977
Delivery of Judgment: 25th November, 1977

J U D G M E N T

MARSACK J.A.

This is an appeal against conviction for murder entered in the Supreme Court sitting at Suva on the 2nd December, 1976. The Court comprised the learned trial Judge and five assessors. The assessors unanimously expressed the opinion that the appellant was guilty of murder. The learned trial judge accepted that opinion and entered a conviction accordingly, passing sentence of life imprisonment.

The facts may be shortly set out as under. The deceased was the wife of the appellant. On the morning of 10th March, 1976 the appellant with his wife and small child went for a picnic at what is known as the Colo-i-Suva pool near the small village of

Colo-i-Suva, which is some ten miles north of Suva. There are in fact two pools at this spot; one a small and shallow pond and the other a deep adjoining it. During the morning there was an occasional shower of rain but the rain was not heavy. The appellant parked the car about 100 yards from the pool to which they walked, the wife carrying the child and the appellant carrying a basket with foodstuffs and other gear. This was about half past ten in the morning. Early in the afternoon on the 10th March the appellant drove to the Police Station at Nausori and reported that his wife had been drowned. A search was made for the deceased's body which was found the following day. During the questioning by the police the appellant maintained that his wife had been accidentally drowned; that she was a good swimmer; and that when he saw that she was in difficulties, he was unable to go to her assistance because he was at that time holding the baby. Later the police showed him the photographs of the injuries on his wife's body and he then made a long statement to the police admitting that he had murdered his wife. The case for the prosecution relies very largely on this confession by the appellant.

Some 20 grounds of appeal - including those set out under sub-headings - were put forward by counsel for the appellant, but we do not find it necessary to refer to these in detail. Those requiring consideration by this Court may be shortly summarised as follows:-

(1) That the learned trial judge erred in admitting the confessional statement, as this could not be considered voluntary in that it was obtained by oppressive conduct on the part of the police;

(2) that the learned trial judge erred in directing the assessors that this confessional statement and the statement made by the appellant when charged, "must stand or fall together";

(3) that the learned trial judge failed to direct the assessors correctly as to the effects of the medical evidence;

(4) that the learned trial judge failed to direct the assessors on the issue of manslaughter;

(5) that the learned trial judge did not put the defence case adequately to the assessors;

(6) that the learned trial judge erred in law in not complying with Sections 153 and 154 of the Criminal Procedure Code in giving the judgment of the Court in as much as the purported amendment of the Criminal Procedure Code by Criminal Procedure Code (Amendment) No. 16 of 1973 is unconstitutional as section 53(6) of the Fiji Constitution was not complied with.

It will perhaps be convenient to deal with this last ground first as, if it is found to have substance, it will not be necessary to consider the other grounds at all. The burden of the argument of counsel for appellant on this point is that an amendment to the section of the Criminal Procedure Code under which the learned judge gave judgment had no legal validity; and that the judgment was therefore

invalide as not complying with the law as it stood prior to the amendment. Section 53(6) of the Constitution provides:-

> "No law made by Parliament shall come into operation until it has been published in the Gazette."

It is counsel's contention that there was in this case no publication in the Gazette; that the only reference in the Royal Gazette No. 41 of 17th August, 1973 is in these terms:

> "The following acts are issued with the Gazette ... an act to amend the Criminal Procedure Code."

Counsel points out that there is a special provision that subsidiary legislation will be brought into force if the legislation in question is issued with the Gazette; but as no such provision exists in the case of general legislation then, on the principle of <u>expressio unius est exclusio alterius</u>, the provision that publication with the Gazette is sufficient to bring the subsidiary legislation into force does not apply to any legislation which is not subsidiary. In the present case it is common ground that the Criminal Procedure Code amendment was issued with the Gazette. The question for determination is accordingly this; does the issue of the amendment act together with the Gazette, but on separate sheets, amount to "publication in the Gazette" within the meaning of section 53(6) of the Constitution?

If counsel's contention is correct, it is clear that a large volume of legislation which is considered operative in Fiji, will

not legally have come into force; but the resultant disorder - pending perhaps the passing of validating legislation - is not a matter which can affect the strict legal construction of the phrase in issue.

It is quite clear that the purpose of the section is to ensure that full notice of the legislation must be given to all concerned by publication in the official journal, the Royal Gazette. It is also clear that any person receiving a copy of the Royal Gazette will also receive a copy of the Acts or regulations issued with it. Does this amount to "publication in the Gazette" within the meaning of the section? In our view the sending forth of a copy of an amending Act together with the Gazette definitely amounts to publication in the Gazette. Reading of the Gazette itself makes it clear that a copy of the Act is being supplied with or forwarded to the person concerned together with the Gazette itself; and in such a context there is no material difference between "issued with" and "published in". Accordingly we can find no merit in this ground of appeal.

We now turn to the first ground of appeal. In this connection it must be observed that the appellant in his evidence in the trial proper denied that he had made the lengthy statement - amounting in the record to three pages of single-spaced foolscap - and said that this had been a fabrication on the part of the police. Reading of the statement itself shows that it gives a great many details of the domestic life of the appellant and his wife, which it is hard to imagine, could have been

fabricated by the police. According to his evidence, the appellant's signature to the statment was obtained only after he had suffered a series of assaults at the hands of the police and was afraid that further violence would follow if he did not put his name to the document.

The question of how the statement came to be made is entirely one of fact. The trial within a trial was very lengthy; the record of the voir dire covers 160 pages. In the course of it the evidence of some 15 witnesses, including those for the defence, was heard, and the hearing occupied a total of nine full days, over the period 5th to 26th October, 1976. The learned trial judge gave a lengthy judgment examining very carefully evidence that had been given for the prosecution and for the defence. At the commencement of his ruling the trial judge said:

> "Defence seek the exclusion from evidence of two confessional statements allegedly made by the accused, one forming the concluding part of an interview and the other the formal charge statement recorded soon afterwards. Both are admittedly signed by the accused.
>
> This is yet another case where the accused denies making either of the two statements, alleging fabrication on the part of the police, but at the same time seeks their exclusion on grounds of violence, oppression and denial of constitutional rights."

Although in his lengthy ruling the learned trial judge discusses legal authorities which had been put forward by counsel, we do not find it necessary to refer to these. The

basic requisites of the law concerning the admissibility of confessional statements have been so well established since the judgment of the Privy Council in Ibrahim v. R. (1914) A.C 599 and the many subsequent cases in which the principles there laid down have been followed, that it seems unnecessary to consider in detail the authorities quoted in the argument before us. Reference however, can now properly be made to the decision of the House of Lords in DPP v. Ping Lin (1975) 3 All E.R. 175. At p. 185 Lord Hailsham says:

> "The real question, as formulated by Lord Sumner, at first instance, is one of fact to be decided by the judge, normally in the absence of the jury, and, on appeal, whether the judge was entitled in law to come to the conclusion of fact in the context of all the facts as found by him on consideration of the whole of the evidence before him."

The principle to be applied by the Court of Appeal is, in our respectful opinion, adequately and correctly set out by Lord Salmon on page 188:

> "....The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle - always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."

In the present case the learned trial judge, in giving his ruling at the conclusion of the voir dire, correctly and adequately considered the principles it was his duty to apply in determining the issue of admissibility; and in this connection the submissions made to him, based on the finding that as from a certain points in the series of interviews, the police would not have permitted the appellant to leave, Counsel argued strongly that the admissibility of evidence obtained, in his submission unfairly and in disregard of a constitutional right should depend on the extent to which that constitutional right had been disregarded. We are satisfied that the learned judge gave full consideration to all relevant factors when exercising his discretion to admit the evidence. In our view there is nothing appearing on the record or urged in the painstaking argument of counsel for the appellant showing that the ruling of the learned trial judge was wrong. As a result this ground of appeal fails.

With regard to the second ground of appeal, the two statements concerned were the lengthy and detailed confession to which reference has already been made, and what is called the charge statement. The charge statement was in these words:-

> "My wife Malti Devi made my life very very miserable; I got fed up of her. I got rid of her. I have given my statement to the police already. That is all."

The appellant in evidence denied that he had made this statement but said that it was a piece of fabrication by the police; he signed

it only because he had been told earlier by Inspector Singh that if he did not, the beatings would start again. The judge's summing-up on this matter to which exception was taken by counsel for the appellant, was in these words:-

> "You will have noticed that this charge statement has the sentence 'I have given my statement to the police already'. I must warn you therefore that if you are not satisfied beyond reasonable doubt that the accused did in fact make the confessional statement recorded by Cpl. Pillay in his notebook, then you must necessarily disregard the charge statement as well. The two statements must stand or fall together."

Counsel's argument was that by this direction the learned trial judge meant that if the charge statement were accepted, then the confessional statement must be accepted also. This however is not what the judge says. He says that if because of reasonable doubt the assessors reject the long confessional statement, then they must also reject the charge statement. It is not possible, in our opinion, to draw the inference that acceptance by the assessors of the charge statement must necessarily lead also to the acceptance of the long confessional statement. There is in fact some ground for the submission of counsel for the respondent that this ruling is favourable to the appellant in that the assessors might have been disposed to reject the confessional statement but to accept the charge statement. The direction of the learned trial judge was that this might not be done. This ground of appeal also fails.

The third ground of appeal, that the assessors were not adequately directed on the subject of the medical evidence, was argued before us at considerable length. It consisted largely of the testimony of Dr. Gounder of the Colonial War Memorial Hospital, Suva and Dr. Roberts of Wellington Public Hospital, New Zealand. Dr. Gounder gave evidence for the prosecution, Dr. Roberts for the defence. In the contention of counsel for the appellant these two medical witnesses did not agree as to the probable cause of death and as a result the assessors were not entitled to find, as a matter of fact, that death occurred in the manner set out in the confessional statement. Dr. Gounder conducted a post-mortem examination of the deceased. He found considerable facial injuries and formed the opinion that they were caused before the death of the deceased. In his internal examination of the body he found the lungs full of excessive blood. He expressed the opinion that the cause of death was asphyxia due to drowning of the type he described as "dry drowning".

Dr. Roberts had not seen the body but had to base his opinion on the findings made by Dr. Gounder. He said that with a naked eye examination one could not say whether the facial injuries were post-mortem or ante-mortem. Dr. Roberts also stated that the conditions disclosed in the post-mortem examination of the body by Dr. Gounder would be present also where death occurred from heart failure due to vagal inhibition caused by water suddenly going up one's nostrils, or where death was caused by myocarditis which is a diseased condition of the heart.

In the course of his summing-up the learned trial judge set out the medical evidence in great detail. Counsel for the Crown conceded that the learned trial judge was not fully justified in directing the assessors that the prosecution alleged that the appellant had drowned the deceased in the shallow pool and thrown her body into the deeper pool later. The case for the prosecution was that the appellant's confessional statement was a truthful account of what had taken place. The relevant passage in the confessional statement is as follows:-

> "To this I got angry on her and came back and seated our child on the ground and grabbed my wife, lifted her up and took her to the smaller pool next to the large pool. I was so annoyed on her that I burst her up, knowing that she will never improve her attitude. Then I tried to drown her but due to less water was not able to do so there. From the smaller pool I carried my wife to larger pool and threw her in it. I then picked my child and the luggage and headed for the road towards my car."

However, we agree with counsel that no harm was done by the direction by the learned trial judge as to the basis of the case for the prosecution. The learned judge wound up his discussion of the medical evidence by saying:-

> "To summarise, you have two issues before you. Has the prosecution satisfied you beyond reasonable doubt, firstly, that the alleged confession was made by the accused from his own mouth? and secondly, is the alleged confession true? Did the deceased die in the manner it describes?

This makes it clear that the case for the prosecution rests substantially on the confessional statement made by the appellant, and does not seek to alter or amend any of the chain of circumstances set out in detail in the confession.

In the argument of counsel for the defence, he contended that the assessors should have been directed as to the possibility of death having caused by myocarditis. We do not think that there was any obligation on the learned trial judge to consider this hypothesis. There was no evidence whatever tending to show that the deceased woman may have suffered from any diseased heart condition. The fact that no water was found in the lungs in no way indicates the death was not due to drowning. In fact both doctors referred to "dry drowning" as one of the three possibilities. The possibility that there was present in the deceased woman the heart condition known as myocardis must be considered extremely remote. In any even it was clear from the medical evidence that any myocarditis present could well have been brought about by sudden shock; and in the extremely unlikely event of any myocarditis being present, it would be accounted for by the shock caused to the deceased by the appellant in the manner set out in his confessional statement. There is, in our view, no ground for any suggestion that death may have been due to myocarditis brought about by some anterior cause.

Moreover, though there is some diversity of medical opinion between that of Dr. Gounder and that of Dr. Roberts, in

neither case does the doctor express the view that the facts disclosed in the confessional statement are in any way inconsistent with the medical findings. It has not been shown to us that the summing-up of the learned trial judge was inadequate as to any aspects of the medical evidence. The whole of the medical evidence on both sides was before the assessors and the question was fully canvassed by counsel on both sides. That being so, we can find no substance in this ground of appeal.

On the issue of manslaughter counsel contended that this was a possible verdict on the basis that by pushing his wife into the deep pool he may not have intended to cause her death, as he thought she could swim, and therefore did not consider the possibility of her drowning. Moreover, he submitted, if her death were due to myocarditis that may well have been caused by shock which could not have been within the contemplation of the appellant. In our view there was nothing in the evidence to justify either of these propositions and nothing upon which a verdict of manslaughter could have been based. Accordingly, in our opinion, there was no obligation on the part of the learned trial judge to direct the assessors on the issue of manslaughter, and this ground of appeal fails.

The next ground is that the learned trial judge did not adequately put the defence case to the assessors. That was, of course, his duty; but it has frequently been pointed out in this Court that the trial judge is under no obligation to explain in detail the case for the defence provided that his

summing-up as a whole is fair. In this respect we adopt as an accurate statement of the law what was said by the New Zealand Court of Appeal in R. v. Raymond (1956) N.Z.L.R. 527 at 531:

> "It is sufficient if we can say here, as was said by this Court in R. v. Radich (1952) N.Z.L.R. 193, that 'the summing-up was fair and adequate, bearing in mind that it is impossible for any judge to traverse all the details of a case so complicated as this' (ibid.,206). Moreover it is pointed out in R. v. Anderson (1951) N.Z.L.R. 615, that in some cases if the Judge discusses an argument put forward in defence of the accused, he may be forced to introduce factors which strengthen the Crown Case rather than assist the accused. To require the Judge to make reference to every such argument might have the effect of compelling him to discuss also the answers thereto; and, so long as every question of fact is left open for decision by the jury; the Judge may legitimately elect to be silent with regard to matters of defence rather than to reveal his opinion that they are groundless, or to appear to argue the case in favour of the prosecution."

Counsel for the defence properly conceded that there is no obligation on the trial judge to put all details of the defence to the assessors; but said that in the present case he placed too much emphasis on the case for the prosecution, referring at length to the confessional statement, but saying little of appellant's evidence at the trial. An examination of the summing-up however, shows that this is not quite correct. He referred in considerable detail to the evidence of the appellant as to his interrogation by the police and his reasons for putting his signature to a paper

containing a statement which he had not made. The trial judge then went on to say:-

> "As I have already said it is for you to decide for yourselves the extent to which you can rely upon the evidence of any particular witness. In this regard you will no doubt keep in mind that it is not for the accused to prove that the confession is fabricated. It is for the prosecution to satisfy you beyond reasonable doubt that the statement is genuine and that it was in fact made by the accused."

A little further on he directed the assessors that if on the totality of the evidence they thought that the accused did not make that statement, or if they had any reasonable doubt on the issue, they must completely disregard it. Later he directed the assessors that if they had a reasonable doubt as to whether he made the statement, they need go no further; they should form the opinion that the accused was not guilty.

The prosecution had put forward as a possible motive for murder the association of the appellant with a woman Sharda Raman. In his summing-up the learned trial judge drew the attention of the assessors to the evidence of the appellant on this subject and finished his comment by saying:-

> "You may therefore think that the accused's relationship with Sharda Raman ..... is insufficient to support the suggestion that it positively did provide a motive for murder."

With regard to the picnic at Colo-i-Suva the learned trial judge pointed out that there was nothing whatever in the evidence to suggest that the deceased was taken to Colo-i-Suva against her wish; and the assessors might therefore, think that there was nothing in this part of the evidence to indicate premeditation or planning on the part of the accused that the deceased should die. It might perhaps have been better if the learned judge had summarised the evidence given by the appellant as a whole. He elected not to do this in detail, but did make reference to such part of it as he considered relevant:

> "You have heard his version of what happened at the pool that morning. He and the deceased took turns at swimming - one swimming while the other looked after the baby. He described in detail how she took that last jump into the water before getting into difficulty. He was unable to go to her help."

In our opinion the summing-up as a whole was both adequate and fair to the defence, and could not lead, of itself, to an inference such as that suggested by counsel for appellant, namely that the defence had no merit.

There remains for consideration the effect of the confessional statement if it be received in evidence, as it was - in our opinion, correctly - in the present case. It is well established that a person may be convicted of any offence, even murder, on his own confession alone. But as this Court has had occasion to point out in previous cases, it is usual for the Court to look

around for other evidence which may be taken as corroboration, or at least as being consistent with the story told by the accused. In this present case the surrounding circumstances as proved, in our opinion, tend strongly to show that the accused's confession was true.

In the first place it is common ground that at the time of the drowning of the deceased the only persons in the vicinity were the appellant, the deceased and the baby. Therefore, if the death of the deceased were brought about by some action on the part of another person, that other person must necessarily have been the appellant.

Then there is the appellant's own evidence to this effect:-

> "When she went under the first time I called out. I went towards the pool when she went under the second time. I moved because she was in difficulty as she did not lift her head when I called out. When she went down the second time, I did not see her swimming. She went down the third time as I tried to grab her. She was 3 ft to 4 ft. away from my stretched arm. My baby was in my other arm. The child was not able to sit up on its own."

It is impossible to understand why the appellant could not have lain the baby on the ground and moved across the necessary three or four feet to save his wife who was, according to his own story, obviously in danger of drowning. Moreover, if the confessional statement is accepted, it is clear that the appellant had previously seated the child on the ground before seizing his wife.

Then there is the sharp conflict of evidence between that of the appellant and that of deceased's father and sister as to deceased's ability to swim. The appellant's evidence is to the effect that his wife could swim well and that she had jumped into the deep pool of her own volition. But deceased's father says in evidence:-

> "My daughter did not know how to swim. I knew her from childhood. I am certain she did not know how to swim. If someone says she knew how to swim that would be an absolute lie."

Deceased's sister in the course of her evidence says:-

> "Not true that the deceased knew how to swim. I am sure she could not. She never went into the river."

If these witnesses were believed by the assessors then the evidence of the appellant that the deceased jumped into the deep water pool must have been rejected.

One aspect of the summing-up has caused us some concern, though it does not appear to have been specifically made a ground of appeal. After dealing with the evidence of Dr. Gounder and Dr. Roberts the learned judge said:-

> "You will no doubt remember that the accused has to prove nothing. It is not for the defence to prove that the injuries on the deceased were caused after death or that they were received in the deeper pool. Having heard Dr. Roberts, what you have to ask yourselves is: Has Dr. Gounder's evidence proved beyond reasonable doubt

that the deceased received all those injuries while she was still alive struggling against someone who was attempting to drown her in the knee-deep water of the shallow pool? That is the basis upon which the prosecution have presented their case and it is for them to satisfy you of it beyond reasonable doubt.

If you are so satisfied then you may place full reliance on the alleged confession made by the accused to the police in which case you may form the opinion that the accused is guilty.

If however, you do not accept that the deceased received her injuries in the manner suggested by the prosecution, or even if you have any reasonable doubt on the issue, you will form the opinion that the deceased did not receive those injuries while pinioned to the bottom of the shallow pool by the accused as he was attempting to drown her.

Should you come to that view, you will reject the alleged confession as unreliable and, therefore, unsafe to act upon. In that case you will advise me that the accused is not guilty."

In this passage the learned trial judge would appear to be saying that unless the assessors accept Dr. Gounder's evidence as to the manner in which the injuries to the deceased were caused, or even have a reasonable doubt on the subject, the confessional statement made by the appellant should be rejected. In our opinion, the learned judge has put this question on too narrow a base. It is certainly true that the medical evidence could provide substantial corroboration of the confession, or at the least be entirely consistent with it. But in our view the assessors might well, if they thought fit, accept the confession

as substantially true irrespective of what view they took of the medical evidence. If, as they were entitled to do, they totally disbelieved the narrative of events given by the appellant in his evidence, this in itself would give them some reason to accept the only other explanation, that put forward by the appellant in his confession and his charge statement. Though, as we have said, we think that the learned trial judge adopted too narrow an approach, this was, if anything, unduly favourable to the appellant; and no miscarriage of justice could have resulted from it.

Briefly summarising the position we find that the crown case rests substantially on the confessional statement made by the appellant; that in our opinion the learned trial judge exercised his discretion judicially and correctly when he admitted that confession in evidence; that the surrounding circumstances which we have detailed go far to support the truth of the confession or at least are entirely consistent with it; that the appellant at his trial was not prejudiced by any misdirection or lack of direction on the part of the learned judge; and that none of the grounds of appeal has been established.

For these reasons the appeal is dismissed.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL

Suva,
25 Nov. 1977