RAM DULARE, CHANDAR BHAN AND PERMAL NAIDU

v.

REGINAM

[COURT OF APPEAL AT SUVA (Hammett, J. President, Higginson and Bagnall, JJ/A), January 21, 1956]

Appeal No. 5 of 1955

Criminal Procedure Code s. 248—trial by judge with the aid of assessors—rejection of assessors' opinions.

The appellants were convicted of causing grievous harm by the Chief Justice of Fiji, sitting with assessors. It had been the unanimous opinion of the assessors that the appellants were not guilty. Upon appeal it was contended by counsel for the appellants that since the decision of the court must be " the decision of the presiding judge with the aid of such assessors " (section 248, Criminal Procedure Code), the assessors could not be said to be an aid to the presiding judge if he completely disregarded their opinions.

Held.—The legislature had given the trial judge the widest powers to accept or reject the opinions of the assessors and the responsibility for giving judgment was that of the trial judge alone. The appellants submission confused the functions of assessors with those of a jury.

Appeal dismissed.

Case referred to:

R. v. Joseph, 1948 A.C. 215.

A. D. Patel for the appellants.

Justin Lewis, Crown Counsel, for the respondent.

Judgment:

This is an appeal from the judgment of the Supreme Court sitting at Lautoka dated 15th August, 1955, whereby each of the three accused persons were convicted on the following information:—

Statement of Offence

Causing Grievous Harm—contrary to section 245 (*a*) of the Penal Code.

Particulars of Offence

Ram Dulare, f/n Sarbanga, Chandar Bhan, f/n Sarbanga, and Permal Naidu, f/n Narsam Naidu, on the 2nd day of November, 1954, at Barara, Nadi, in the Western District unlawfully did grievous harm to Jaswant Prasad, f/n Niranjan, with intent to do him grievous harm or maim, disfigure or disable him.

The three appellants were granted leave to appeal on 1st September, 1955. They were represented by one counsel and their joint grounds of appeal are as follows:—

1. The assessors at our trial after hearing the evidence and the summing up by His Lordship the Chief Justice gave as their true opinion that we were not guilty of the crime with which we were charged nor did they find us guilty of any other charge. As the case solely turned on the credibility of witnesses His Lordship the Chief Justice should have accepted their opinion and found us not guilty. There were no sufficient grounds for the Chief Justice to reject the opinion of the assessors and convict us.

2. His Lordship the Chief Justice misdirected himself on the question of the defence counsel not putting to Doctor A. J. Hibell as to whether the throwing of the bicycle could have caused any of the injuries found on Jaswant Prasad. The defence never alleged that any of those injuries were caused by the bicycle.
3. Serious discrepancies in the evidence of the prosecution witnesses were such as would throw serious doubts on their veracity and His Lordship the Chief Justice erred in accepting the story of the prosecution witnesses whom the assessors at the trial with their local knowledge did not believe.
4. His Lordship the Chief Justice erred in not taking into due consideration the factors that adversely affect the credibility of the testimony of the prosecution witnesses who implicated us in the commission of the crime with which we were charged and drew wrong and erroneous inferences and failed to give due consideration to the testimony of the defence witnesses and to the inferences resulting therefrom.

The 1st, 3rd and 4th grounds of appeal were argued by learned counsel for the appellants together and are based on fact and on the argument that the learned trial Judge should not have given a decision in this case which was directly against the opinion of the assessors both of whom expressed the view that all the accused were Not Guilty.

Our attention has been drawn to the Criminal Procedure Code, section 248, which reads as follows:—

> " Every trial before the Supreme Court in which the accused or one of them or the person against whom the crime or offence has been committed or one of them is a native or of native descent, or of Asiatic origin or descent, shall be with the aid of assessors in lieu of a jury, unless the presiding Judge for special reasons to be recorded in the minutes of the court thinks fit otherwise to order, and upon every such trial the decision of the presiding Judge with the aid of such assessors on all matters arising thereupon which in the case of a trial by jury would be left to the decision of the jurors shall have the same force and effect as the finding or verdict of a jury thereon."

Learned counsel for the appellants submits that the decision of the court on a trial with assessors must be, in the words of the section, " the decision of the presiding Judge with the aid of such assessors."

He asks, " How can the assessors be an aid to the presiding Judge if he disregards completely their opinions ? "

He has referred us also to the Criminal Procedure Code, section 308 (1) and (2) which reads as follows:—

" 1. When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.
2. The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors."

He submits that by this section a discretion has been given the trial Judge which must be exercised judicially. In a case such as this, where he submits, there is evidence which, if accepted, supports the opinion of the assessors and other evidence which, if accepted supports the contrary opinion of the trial Judge, the trial Judge should follow the decision of the assessors and should not substitute his own view of the evidence for theirs.

If this procedure were to be adopted, the assessors would become saddled with almost the same duties and liabilities as a Jury. Trial with assessors would in effect become, in such cases as this, almost the same as trial with a Jury. If the legislature had intended such a result it could, and undoubtedly would, have said so.

It is clear that the legislature has given a trial Judge the widest powers to accept or reject the opinions of assessors sitting with him. These powers are discretionary. From the terms of the judgment, the learned trial Judge made it quite clear why he came to his decision in this case and why it was that he was unable to accept the opinion of the assessors.

There were discrepancies, as there frequently are in the evidence of the witnesses in this case. These were considered by the learned trial Judge in his careful summing up. We have again considered them in the light of the arguments of learned counsel for the appellants before us on the hearing of this appeal. There was evidence which the learned trial Judge accepted and on which he could properly arrive at his decision. In our opinion it was the correct decision. It certainly cannot be said that the decision was unreasonable nor that it could not be supported having regard to the evidence.

We observe that the learned trial Judge adjourned after hearing the assessors' opinions and referred to them in the course of his subsequent judgment.

In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the *King v. Joseph* 1948, Appeal Cases 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the Supreme Court sitting with assessors is that of the trial Judge and the trial Judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors.

In the terms of the Court of Appeal Ordinance, section 18 (1), it is the duty of the Appeal Court to dismiss an appeal unless it is shown that the decision of the trial Judge either—

(1) is unreasonable; or
(2) cannot be supported having regard to the evidence; or
(3) should be set aside on the ground of a wrong decision on any question of law; or
(4) amounted to a miscarriage of justice on any ground.

In our opinion neither the 1st, 3rd or 4th ground of appeal brings the case within these provisions and they must therefore fail.

The second ground of appeal appears to us to have no merit. It was only the witnesses for the defence who gave evidence concerning the alleged throwing of the bicycle on to Jaswant Prasad as he lay on the ground. Whether any of his injuries might or might not have been caused thereby does not appear to us to be very material in the light of the learned trial Judge's judgment in which he said he did not believe the evidence on this point. In our opinion there was no question of any miscarriage of justice arising out of this aspect of the case.

For these reasons we are of the opinion that the appeals of each accused against conviction must be dismissed.