**SITIVENI LEWANIVANUA**

*v.*

**REGINAM**

[COURT OF APPEAL, 1962 (Marsack P., Trainor J. A., Hunter J. A.), 12th, 26th February]

Criminal Jurisdiction

*Criminal law—evidence and proof—discrepancies and contradictions in evidence of witness—reluctance of Court of Appeal to interfere with findings of fact of court of first instance which had the advantage of seeing and hearing the witness. Criminal law—sentence—different sentences imposed by Supreme Court upon persons participating jointly in offence—approach of Court of Appeal—manslaughter—sentence of life imprisonment.*

Where discrepancies and contradictions in the evidence of a witness and the witness' explanation thereof have been fully considered and dealt with by the trial judge in his summing up to the assessors, and the assessors have been properly directed upon the onus of proof, a court of appeal will be reluctant to disregard or interfere with the findings of fact in the court below based in part on that evidence, unless it is satisfied that those findings cannot reasonably be justified on the evidence.

*Watt v. Thomas* [1947] 1 All E.R. 582 applied.

In an appeal against sentence, although sentences of imprisonment of differing lengths may have been passed on a number of persons jointly participating in the same offence, the question remains in relation to a particular appellant whether the sentence he received was too long. Sentence of life imprisonment for manslaughter upheld where the court found that it was difficult to conceive a graver case.

Cases referred to: *Bracegirdle v. Oxley* [1947] K.B. 349; [1947] 1 All E.R. 582: *R. v. Richards* (1955) 39 Cr. App. R.191.

Appeal against conviction and sentence by the Supreme Court. The case is reported in relation to only one ground of appeal and to sentence. A portion of the judgment has therefore been omitted, the facts sufficiently appearing from the remainder.

*K. C. Ramrakha* for the appellant.

*K. C. Gajadhar* for the respondent.

Judgment of the Court: (in part) [26th February, 1962]—

The second ground of appeal against conviction concerns the manner in which what is referred to as an identication parade was carried out at the Police Station on the 31st January, 1961. This parade

was supervised by Assist. Supt. Josefata Kubouwata. There were in the line 10 Fijians of similar build and height, and applicant stated that he had no objection to any person in the parade. He did, however, make to the officer the objection that other witnesses had already seen him. The applicant was picked out by Pio, Sirino and Abdul Sakur. In the course of his evidence the applicant says :

> "I was taken to the Police Station by Sgt. Vilikesa. I was taken by Vilikesa to the CID. general office upstairs. When I arrived there in the general office of the CID. there were persons there, the witnesses Pio, Sirino, Sakur and Bela and Cpl. Josefa Boa. They were sitting there yarning with Cpl. Boa . . . Cpl. Boa instructed me to sit down then asked me 'what did you do at Kalokalevu that Saturday night?' I told him 'Sir it is not me it might be you'. He told me why you trying to tell lies. These three witnesses have seen you there that night."

The identification parade followed shortly after. Cpl. Boa, however, says "Sitiveni was in another small office outside the main CID. office. While he was there in my presence Pio was not present, nor Sirino, nor Watekini Bela, nor Abdul Sakur". Later on under cross-examination, Cpl. Boa states that it was on the 30th January that he saw the applicant and that he did not see him at all on the day of the identification parade. Abdul Sakur says that before the identification parade the applicant was brought in to Vilikesa's quarters, and that Abdul Sakur remained in the room with him for some time but there was no conversation. Earlier in his evidence, however, he said that he did not see the applicant in the office when he went in, and that he had not seen the applicant at the station before picking him out at the identification parade. Later in cross-examination he stated that his mind was hazy as to whether he saw applicant before the parade, but was quite definite that Pio, Sirino and Bela were not with him there. Pio denied that he, Sirino, Bela and Sakur were in the CID. office when applicant was brought in.

In the course of his summing-up the learned trial Judge referred to the evidence as to the identification parade and the complaint of the applicant regarding it. In view of the evidence of Asst. Supt. Josefata Kubouwata, Cpl. Boa and the other witnesses, it appears to us at least doubtful as to whether there was in fact any irregularity. In any event, the evidence of identification of the applicant does not depend upon what took place at the identification parade. Both Abdul Sakur and Watekini Bela had known applicant for some years and had no hesitation, because of that knowledge, in identifying him as one of the persons present in the vicinity of Jagdeo's house. The applicant was also recognised on the night of the crime by Pio who said : "I knew Sitiveni prior to this night. He took a girl from Colo-i-Suva to my village and stayed in my village for about a month . . . It was in 1959". Sirino stated that when he saw applicant by the car at the top of the track leading to Jagdeo's house, he addressed him by name and said "Siti what are you doing here?" To which applicant replied, "You carry on".

In our view, the whole of the evidence with regard to the identification parade is hardly sufficient to create even a reasonable doubt as to whether there was an irregularity in the proceeding. Even if

the identification parade was open to criticism we are satisfied that there was ample evidence, totally independent of that of the parade, establishing the fact that it was the applicant who was in company with the 2nd accused in the vicinity of Jagdeo's house on the night Basmati was killed. The ground of appeal based upon the irregularity of the identification parade, therefore, also fails.

As we can find no substance in either of the grounds put forward in respect of the appeal against conviction that conviction must stand.

In support of the appeal against the sentence of imprisonment for life, Counsel for the applicant urges, as his main argument, the disparity between that sentence and the 7 years' imprisonment imposed on the 3rd accused. The Court was referred to the judgment of the Court of Criminal Appeal in *Richards* 39 Cr. App. R. 191. In that case appellant and her mother were both convicted on several charges of false pretences, the mother being convicted on several charges of false pretences, the mother being convicted on more counts than the daughter. Notwithstanding this the mother was sentenced to two years' imprisonment and the daughter to four years. The daughter's sentence was reduced to 3 years' imprisonment. In delivering the judgment of the Court of Criminal Appeal the Lord Chief Justice said :

> "The fact that one of two persons jointly indicted has received too short a sentence is not a ground on which this Court necessarily interferes with a longer sentence passed on the other; what has to be shown is that the prisoner appealing has received too long a sentence."

The Court in Richards' case certainly took the disparity of sentence into account in reducing that of the daughter from 4 to 3 years' imprisonment. The facts, however, were greatly different from those in the instant case. The learned trial Judge in the course of his judgment found that the applicant and the 2nd accused had caused the death of Basmati by an unlawful act, while the guilt of the 3rd accused arose from his aiding and abetting the other two. In passing sentence he says of accused 3 "your culpability, while of very serious degree, is less than that of your co-accused".

Before this Court would interfere with the sentence passed upon the applicant., it would have to be shown that the applicant had received too long a sentence. Counsel for the applicant contends that in passing sentence the learned trial Judge did not take into account the evidence to the effect that the applicant at material times was drunk. It would appear from the opinion of the assessors and the judgment of the Court below that the factor taken into account in reducing the charge from murder to manslaughter may well have been the defence of intoxication; and in fact it is difficult to say what other ground there could have been for a verdict of manslaughter rather than of murder. But, in our view, there is nothing in the evidence to show that the applicant was entitled to consideration in the matter of sentence on account of a state of intoxication at the time the offence was committed. We are in full agreement with the learned trial Judge that it is difficult to conceive a graver case of

manslaughter than the present one. In our opinion, the sentence imposed by the learned trial Judge was the only one fitting in all the circumstances of the case and we can see no good reason for interfering with it.

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For these reasons the application for leave to appeal will be refused.

*Applications for leave to appeal refused.*