A **MUNSAMY NAIDU (alias KUTTI)**

v.

REGINAM

B [COURT OF APPEAL, 1964 (Mills-Owens P., Marsack J.A., Briggs J.A.), 8th-10th July, 21st August]

Criminal Jurisdiction

Criminal law—evidence—confession—custody of police—whether appellant at liberty to depart.

C *Criminal law—evidence—confession—voluntariness—confrontation of accused by witness.*

Criminal law—misdirection of assessors on matter of fact—no miscarriage of justice.

The appellant was convicted of murder upon evidence consisting almost entirely of his own confessions, which included a signed state-
D ment made in the police station at 7.15 p.m. on the 10th December, 1963, in which he admitted killing the deceased by striking him a number of blows with his cane knife; he claimed to have done this at the instigation of one Y. S. Mani. At the trial the appellant gave evidence that his self-incriminatory statements of the 10th December were the result of threats by the police that he would be hanged the following day if he did not make a statement implicating Y. S. Mani,
E and of pressure by Kamla Wati, a daughter of the deceased, that he should confess and blame Y. S. Mani.

On the appeal it was submitted (inter alia) (a) that the appellant had been in custody from 1 p.m. to 7.15 p.m. on the 10th December or had every reason to believe that he was in custody and (b) that the confessions of the 10th December were the result of a confront-
F ation of the appellant by Kamla Wati arranged with the connivance of that witness and the police.

Held: 1. That though the appellant may have mistaken the effect of a search warrant which was shown to him, there was no reason to interfere with the trial judge's finding of fact that he was not in
G custody.

2. It is well established law that a person who is taken to a police station in such circumstances that he is led by the conduct of the police to believe that he is not at liberty to depart, is in the custody of the police. That had not happened in the present case and the evidence did not show that the police acted in such a way as to make the appellant think that they would detain him if he attempted to
H leave.

3. There was conflicting evidence as to the circumstances leading up to the confrontation of the appellant by Kamla Wati and there

was no reason to disturb the trial judge's finding that none of the threats or inducements alleged by the defence was ever made or held out to the appellant. The court could not accede to the suggestion that it was a subtle form of torture to confront the appellant with his accuser even at his own request.

The trial judge misdirected the assessors as to the implications of one aspect of Kamla Wati's evidence.

Held: That the trial judge's comments would have had no effect on the opinions of the majority of the assessors as to the guilt of the appellant, which were based on evidence independent of that of Kamla Wati, and that no substantial miscarriage of justice had resulted.

Cases referred to: *R. v. Bass* [1953] 1 Q.B. 680; [1953] 1 All E.R. 1064: *R. v. Sargeant* [1963] Crim. L.R. 848: *Smith v. R.* (1956) 97 C.L.R. 100: *Chalmers v. H.M. Advocate* [1954] S.L.T. 177; [1954] S.C. (J.) 66: *Sheikh Hassan v. R.* (1963) 9 F.L.R. 110.

Appeal against conviction.

S. M. Koya for the appellant.

B. A. Palmer for the Crown.

The facts sufficiently appear from the judgment.

Judgment of the Court: [21st August, 1963]—

This is an appeal against conviction for murder on the 18th March, 1964. The trial took place before a judge and five assessors. Four of the assessors gave their opinion that the appellant was guilty of murder; the fifth expressed the opinion that he was not guilty. The trial Judge gave judgment in accordance with the opinion of the majority of the assessors, entered a conviction for murder and passed sentence of death.

Five grounds were set out in the notice of appeal; but they overlap to a certain extent and they can be shortly summarised as follows:

1. That the confessions made by the appellant to the police on the 10th December, 1963, were not voluntary and should not have been admitted in evidence;
2. That the oral admission made by appellant to one Mohammed in the Ba Prison should not have been admitted in evidence;
3. That the verdict was unreasonable and could not be supported having regard to the evidence.

The facts are briefly these. The appellant, who is 19 years of age, had worked for the deceased, Ram Samy, for about two years and during six months of that time he lived at the deceased's house at Tauarau. There was some suggestion of a marriage between the appellant and Kamla Wati, the daughter of the deceased, but the

appellant's parents were not prepared to give their consent. A farmer of some substance in the district, Y. S. Mani, was on friendly terms with the deceased's wife, Subhadra, and used to visit Subhadra when the deceased was absent from the house. On Friday, 6th December, 1963, Y. S. Mani went to Suva taking with him Sumintra Devi, a daughter of the deceased. That evening some Fijians, who were in the vicinity of deceased's house, heard cries coming from the house and immediately went to investigate. This, according to their evidence, was at approximately 8.30 p.m. When they arrived near the house they saw the deceased coming away from the house; he was crying out and in considerable distress. The deceased was admitted to Lautoka Hospital at 11.30 p.m. that same night and died shortly before 1 p.m. the following day. His body showed six separate wounds to the face, right hand and arm, and his back. Death was due to shock following the infliction of these multiple wounds coupled with the collapse of the right lung caused by one of them. All the wounds had been inflicted by a sharp instrument such as a knife. From the nature of the wounds themselves it is impossible that they could have been self-inflicted, and the only conclusion that can be reached is that the person who inflicted them was guilty of murder.

The evidence against the appellant consisted mainly of his own confession, without which there was clearly insufficient evidence to lead to a conviction. The only extraneous evidence against the appellant was that he had sharpened his cane knife the previous night, although he did not intend to cut cane the following day. Blood was found on this knife, but the pathologist was unable to say whether the bloodstains were of human or animal origin.

The appellant in oral statements, and in a signed statement given by him at the Police Station, Ba, on the evening of 10th December, 1963, after he had been charged and cautioned, admitted that he had killed the deceased by striking him a number of blows with his cane knife. He also stated that this had been done at the instigation of Y. S. Mani, whom the appellant called "Grandfather" and treated with deference, and with the connivance of deceased's wife Subhadra.

At the trial the appellant gave evidence denying the commission of the crime and setting up an alibi in that he had been at his own home, approximately a mile away, at the material time. He further deposed that his self-incriminatory statements made on the 10th December were the results of threats by the police that he would be hanged the following day if he did not make a statement implicating Y. S. Mani, and by pressure by Kamla Wati at the Police Station asking him to confess and blame Y. S. Mani.

In his argument on the first ground of appeal counsel submitted that from the time the police served a search warrant on the appellant shortly after 1 p.m. on the 10th December until the making of his statement at the Police Station at 7.15 p.m., the appellant was actually in custody or had every reason to believe that he was in custody. We can find nothing in the evidence to substantiate the argument that the appellant was actually in custody. It is true that the appellant may have mistaken the effect of a search warrant which

was shown to him, but he was told what it was and the comprehensive search of his house followed immediately. No doubt, also the police had received statements from Subhadra and Kamla Wati implicating the appellant but it cannot be said that they were of such undoubted reliability that the appellant should have been forthwith arrested and charged. The appellant accompanied the police thereafter to the house of the deceased where he remained until 5.45 p.m. At no time was any complaint made by him that he was being restrained and he went later, quite willingly, to the Police Station. The trial Judge made a definite finding of fact in his judgment that the appellant was not in custody and we can see no reason for interfering with that finding.

No specific reference to custody was made by the judge in his ruling admitting the statements following the trial within a trial, but he had been addressed by counsel for the defence on the matter of custody. In view of this, and in the light of the specific finding in his judgment, to which we have just referred, he must clearly have formed the opinion upon the conclusion of the trial of the issue of admissibility that the appellant was not in custody. It would not, of course, follow that the statements would automatically fall to be excluded if in fact the appellant was in custody; it would remain for the judge to exercise his discretion whether to exclude them (*R. v. Bass* [1953] 1 Q.B. 680; *R. v. Sargeant* [1963] Crim. L.R. 848).

Counsel for the appellant referred us to the Australian case of *Smith v. R.* (1956) 97 C.L.R. 100 where, at p.129, Williams J. states in the course of his judgment:

> "The term 'in custody' in the Judges' Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody. This was decided in England in *Reg. v. Bass* [1953] 1 Q.B. 680 and in Scotland in *Chalmers v. H.M. Advocate* [1954] S.L.T. 177."

It is certainly well established law that a person who is taken to a police station in such circumstances that he is led by the conduct of the police to believe that he is not at liberty to depart, is in the custody of the police. That is not the case here. The appellant was asked to accompany the police when his house was searched, as was proper. He then went willingly with the police officers to the deceased's house where he remained until early evening. It was only after that time that he went with the police to the Police Station. The evidence does not show that the police acted in such a way as to make the appellant think that they would detain him if he attempted to leave.

Counsel also relied on the decision of this Court in *Sheik Hassan v. R.* (1963) 9 F.L.R. 110 in which a confession was held inadmissible

because of the manner in which it had been obtained by the police officers. The facts in that case are entirely different from those in this present appeal. There the accused person was detained for several hours and subjected to prolonged and substantial pressure by police officers in the course of an almost continuous interrogation. Nothing of that sort is alleged in the prseent case.

Upon the issue of admissibility counsel for the appellant had used the further argument that the confessions made to the police on the 10th December could not be held to be voluntary in that they had been induced by an accusation by Kamla Wati as the result of a confrontation of the appellant by Kamla Wati arranged with the connivance of this witness and the police. There is considerable conflict between the evidence for the prosecution and the evidence for the defence as to the circumstances leading up to this confrontation. Sub-Inspector Chandra Deo deposed that following a statement to him by Kamla Wati he said to the appellant "Why is it that Kamla Wati says that you, Y. S. Mani and her mother planned to murder Ram Samy". The appellant replied "She is lying can you confront her to me". The police witnesses throughout maintain that it was at the appellant's direct request that Kamla Wati was brought before him. The appellant in his evidence denied this. Kamla Wati in evidence stated that before the confrontation Inspector Koya had told her that when she saw the appellant she was to get hold of him and start crying and get him to admit that he had done it. She also said that the police had told her that she should ask the appellant to say that he had committed the crime at the request of Y. S. Mani; and to tell him that he would then be released and the police would catch Y. S. Mani. When the confrontation actually took place Kamla Wati states that she was crying and does not remember all that she said to the appellant.

In the course of his judgment the learned trial Judge expresses himself as entirely satisfied that none of the threats or inducements alleged by the defence were ever made or held out to the appellant and we can see no reason for disturbing that finding. We certainly cannot accede to counsel's suggestion that it was a subtle form of torture to confront the young man with his accuser even at his request.

The signed statement which was taken at 7.15 p.m. on the 10th December, 1963, was given by the appellant after he had been charged with murder and after he had been cautioned in due and proper form. We are satisfied that this statement was properly admitted in evidence.

Some 20 minutes previously, before the appellant was charged with murder, the appellant picked up one long-handled cane knife out of three which were beside the table of Detective Sergeant Prakash at the Police Station. The appellant then said to Inspector Chandra Deo "This is the knife with which I chopped Ram Samy". This statement, which followed his interview with Kamla Wati and preceded his being charged with murder, was an important link in the chain of the prosecution evidence. As we have already stated, in our view

there was nothing in the interview with Kamla Wati which would render a subsequent statement by the appellant inadmissible. There was no reason in law for the rejection of this oral confession.

In the result we can find no substance in the first ground of appeal. A

The second ground of appeal concerns an oral admission made by the appellant to one Mohammed in the Ba Prison on the 17th December, 1963. This, it will be remembered, was a week after the oral admission to Inspector Chandra Deo and the cautioned statement taken on the evening of the 10th December. Mohammed stated in B evidence that he went to Ba Prison to see the appellant and had asked Inspector Koya's permission to do so. The Inspector agreed and suggested that Mohammed should find out what the appellant had to say. Mohammed deposed that he said to the appellant "I have heard you killed that man". The appellant thereupon replied "What could I do? Y. S. Mani and that woman have been pestering me for a long time to kill that man". The appellant also said, according to this witness, "I C have told you what police have told me to say". Inspector Koya, in the course of his evidence denied any arrangement with Mohammed that he should attempt to obtain information from the appellant or that he should give the appellant any "message of good cheer".

In the course of his judgment the learned trial Judge states that he accepted the evidence of Mohammed and did not believe that Moham- D med had been carefully tutored by Inspector Koya. He finds that the evidence of Mohammed was corroborated by that of Isoa Tute, a prisoner in the Ba Gaol, who deposed to hearing what the appellant said to Mohammed; although he directed the assessors that this witness's evidence as to a conversation with the appellant on the 11th December was unreliable and should not be accepted without corroboration. At the same time the trial Judge believed that Inspector E Koya had encouraged Mohammed to visit the appellant in gaol and that it was most desirable that police officers should not place themselves in positions where their actions could be miscontrued as having been done in bad faith. We associate ourselves fully with the critical comment of the learned trial Judge. The evidence of Mohammed contradicts that of the police in some material particulars and is in some respects unsatisfactory. At the same time it does little to F strengthen the case for the prosecution and, in our view, there would still be ample evidence justifying a conviction if the evidence of Mohammed were eliminated entirely.

The other admission concerned in this ground of appeal is that made to the fellow prisoner Isoa Tute. On the 11th December, 1963, he and the appellant were in adjoining cells in the Ba Gaol. Accord- G ing to Isoa, he said to appellant that he had heard that the appellant had been charged with murder "and the reason why he had done it". The appellant replied to the effect that he had carried out the murder and he gave Isoa the reasons why he had done so. The appellant made no complaints to Isoa except "about the deceased's wife and the Master", i.e. Y. S. Mani, who he said had been telling him for a long time to kill Ram Samy. H

In the course of his summing up the learned trial Judge directed the assessors that although they would be entitled to accept this evi-

dence it would be unwise to do so; and he himself would decline to accept Isoa's evidence unless there were some other independent corroborative testimony. As there was no corroboration of this evidence regarding the conversation on 11th December, it is clear that the trial Judge has given no weight to it in his judgment.

Turning now to the third ground of appeal, the pattern of the argument for the appellant was that there was so great a conflict between the evidence of the prosecution witnesses Subhadra Devi (the wife of the deceased), Kamla Wati, Emmal Naidu (the father of the appellant) and Muniamma (the mother of the appellant) and the other prosecution witnesses on material matters raised at the trial that this should have created a reasonable doubt in the minds of the trial Judge and the assessors with the result that the appellant should have been acquitted.

It is a little difficult to find adequate reasons for the calling of the appellant's father and mother as witnesses for the prosecution against him, and a conflict between their evidence and that of other witnesses for the prosecution could perhaps hardly have been unexpected. The most important matter upon which these discrepancies are apparent is that of the time at which the assault on the deceased took place. This importance is due to the defence of alibi. Subhadra Devi who said she was unable to identify the assailant as he ran away after inflicting the wounds on her husband, stated that the assault took place some few minutes after 9 o'clock, as they had already switched off the radio on the conclusion of the Hindustani programme at 9 p.m. Kamla Wati says that the assault took place about 5 minutes after she had turned the radio off at 9 p.m. Emmal Naidu deposed that the appellant came back to his house at about 20 minutes to 9 p.m. while the Hindustani programme was still on. Muniamma testified that the appellant returned to the house while the radio programme was still on and went to bed at about 9 p.m., shortly before they switched off the radio at the conclusion of the Hindustani programme.

On the other hand the Fijian witnesses Anare Naisau and Venasio Vananalagi both gave evidence that the assault must have taken place at 8.30 p.m. or possibly a little earlier and they fixed the time definitely because of the meeting of the fishermen's club which was scheduled to take place at 8.30 p.m. and Ram Samy had called out very shortly before the meeting was due to commence. Counsel for the appellant drew our attention to the terms in which the appellant was charged, just before making his statement to the police on the 10th December. There the time of the murder was given as "about 9.30 p.m." on Friday the 6th December. In his judgment the learned trial Judge holds as a fact that the attack on the deceased took place a little before 8.30 p.m. There is evidence to justify this finding, and it is the evidence of independent witnesses. The trial Judge held that neither Kamla Wati nor Subhadra Devi were witnesses of truth. Nothing has been put before us which should cause us to disturb the Judge's assessment of the credibility of the witnesses concerned or his finding of fact as to when the assault was committed.

The other discrepancies to which counsel has drawn our attention are of little moment compared with that referring to the time of the

assault on the deceased. The evidence of some of the witnesses for the prosecution, and particularly Kamla Wati and Subhadra Devi, was undoubtedly unsatisfactory; but the prosecution does not depend on that evidence to establish the guilt of the appellant. That being so, we cannot find that the inconsistencies and contradictions in the evidence of the witnesses referred to by counsel in his argument on this ground of appeal were such as should have given rise in the minds of the assessors and the trial Judge to any reasonable doubt as to the guilt of the appellant.

For these reasons we can find no substance in any of the grounds of appeal put forward on behalf of the appellant.

There remains one matter which had not been put forward as a ground of appeal but to which our attention was very properly drawn by counsel for the Crown at the hearing of the appeal. In the course of his summing up to the assessors the learned trial Judge in discussing the evidence of Kamla Wati draws inferences from that evidence which were unjustified, as based on mis-stated facts. The learned Judge states:

> "Let us first consider Kamla Wati. Her evidence is to the effect that she agreed to put on "an act" and to cry and beg the accused to confess to a murder she says he had not committed and to blame Y. S. Mani, a friend of her deceased father and mother, and her mother for instigating him to commit it so that the accused would be released and Y. S. Mani would be arrested."

Upon this statement the trial Judge comments that if Kamla Wati really believed that as a result of this Y. S. Mani would be arrested she must have known that her mother also would be arrested. Further he says in his summing up; if Inspector Koya had asked Kamla Wati to put on an act to the appellant and beg him to confess falsely that he had killed the deceased at the instigation of Y. S. Mani and Kamla Wati's mother did the assessors think it logical and reasonable that he would have done so in the presence of Kamla Wati's mother?

In fact at no time in the course of her evidence did Kamla Wati say that her mother was involved with Y. S. Mani in the plot to kill the deceased. There is no evidence that Kamla Wati suggested that her mother had been involved in the plot or that her mother should be incriminated.

We have given anxious consideration to this misdirection of the assessors in the matter of the implications from Kamla Wati's evidence. We have, however, concluded that the assessors could not thereby have been induced to place any wrong construction on the evidence upon which the appellant was liable to be convicted and, in our view, was rightly convicted. Kamla Wati's evidence was, we have already pointed out, thoroughly unsatisfactory and could not have been relied on in proof of the guilt of the appellant. Further critical comments on the value of her evidence by the learned trial Judge would accordingly, in our view, have had no effect on the opinions which the majority gave as to the guilt of the appellant, and which were based on evidence independent of that of Kamla Wati. We are satisfied that no substantial miscarriage of justice has

occurred as a result of the misinterpretation of that section of Kamla Wati's evidence by the learned trial Judge. Consequently, though we consider that counsel for the Crown acted with great propriety in pointing this out to us, we cannot find any reason for
A disturbing the verdict on the account.

For these reasons the appeal will be dismissed.

Appeal dismissed.