RAJJAB SHAH

v.

REGINAM

[COURT OF APPEAL, 1965 (Mills-Owens P., Marsack J.A., Gould J.A.), 11th May, 16th June]

Criminal Jurisdiction

Criminal law—direction to assessors—provocation—burden of proof—summing up to be read as whole—Court of Appeal Ordinance (Cap. 3) s.18(1).

A summing up must be read as a whole. Appeal allowed where a passage in the summing up may have left the assessors in doubt as to where the burden of proof of a defence of provocation lay and the defect was not cured by any later passage of the summing up.

Cases referred to: *Bullard v. The Queen* [1957] A.C. 635; 42 Cr. App. R. 1: *Bharat v. The Queen* [1959] A.C. 533; [1959] 3 All E.R. 292.

Appeal from a conviction by the Supreme Court.

S. M. Koya for the appellant.

G. N. Mishra for the Crown.

The facts appear sufficiently from the judgment.

Judgment of the Court: [16th June, 1965]—

The appellant was on the 10th day of March, 1965, convicted of the murder of one Sahib Dass at Nabatolu, Ba, on the 1st December, 1964. The trial took place at Lautoka before a Judge and five Assessors. Three of the Assessors gave their opinions in favour of a verdict of murder and two of manslaughter. The trial Judge, in a written judgment, expressed agreement with the majority of the Assessors, entered a conviction for murder and passed sentence of death.

The appellant and the deceased both lived at Nabatolu and were near neighbours. There had been ill-feeling between them for some time and it is common ground that the deceased had, some nine days prior to his death, passed some objectionable remarks about the wife of the appellant. Early in the afternoon of the 1st December, 1964, the deceased left his house and walked along a track to the cane fields. Shortly afterwards the appellant followed along the same track. The appellant was carrying a cane-knife and a file, while the deceased was not carrying anything in his hands. Shortly afterwards cries were heard from the direction of the track and the deceased was found suffering from very severe wounds in both legs. The left leg was, according to the medical evidence, practically severed from the body by reason of a cut behind the knee. On the right leg there was

a deep cut some six inches below the knee. The arteries and veins in the left leg were completely severed. The deceased was taken to the Lautoka Hospital where he died the same evening. The cause of death was shock due to very severe haemorrhage from the two wounds.

The finding of fact by the learned trial Judge that the blows had been struck by the appellant was amply justified on the evidence and was not contested at the hearing of the appeal.

In a statement to the police and in evidence at the trial the appellant testified that when he and the deceased met on the track he asked the deceased a question about the derogatory remarks the deceased had made concerning the appellant's wife; and that the deceased thereupon jumped at the appellant and tried to throttle him. The appellant said that he thereupon struck out with the knife in order to free himself from the deceased's grasp, but did not know where the blow struck. The trial Judge found as a fact that the appellant had not been acting in self-defence, and this finding was not challenged at the hearing of the appeal. In the result the only issue left open was that of provocation.

Three grounds of appeal were put forward, including two which were added by leave at the hearing of the appeal. These may be summarised as under :—

1. That the trial Judge was in error in holding that the derogatory words passed about the appellant's wife nine days previously, coupled with the assault by the deceased on the appellant, did not amount to provocation in law;

2. That the following passage in the trial Judge's summing up amounted to misdirection on the subject of the onus of proof —

> "No onus on accused to prove anything but where defence does put forward a defence of provocation, as in this case, it need only go so far as to raise a reasonable doubt as to whether or not there was such provocation in law as reduces murder to manslaughter. Lower standard of proof is looked for from defence than the high standard required of Prosecution."

3. That the learned Judge's failure to direct the Assessors in accordance with the formula suggested in *Lobell* 41 C.A.R. 100 at p. 104 amounted to misdirection.

We can find no substance in grounds 1 and 3 which do not appear to require further consideration.

With regard to ground 2, it must be observed that the record purports to give only a note of that portion of the summing up and not to quote it verbatim. Neither counsel appearing before us, however, made any suggestion that the note did not accurately set out what was said. Although it is conceded that the first sentence in the passage quoted is not open to criticism, counsel for the appellant contends that its effect is undermined to such an extent by the second sentence that the whole passage might well impress on the minds of

the Assessors the understanding that there was a definite onus of proof on the defence, even though the standard of proof required in that case is not so high as that required from the prosecution. The argument is that the phrase "lower standard of proof is looked for from the defence" imports an obligation on the defence to assume a certain onus of proof in the matter then in issue, namely provocation. Counsel for the appellant asks this Court to consider the effect of that phrase when used in conjunction with a further direction later in the summing up in these words :—

> "Before an accused can benefit from the defence of provocation in law, to reduce the offence of murder to manslaughter, it must be shown that
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> (a) the act causing death was caused by provocation of a sudden kind;
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> (b) the act causing death must be done in the heat of passion;
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> (c) there must not have been sufficient time for the passion engendered by the provocation to cool; and
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> (d) the retaliation by the accused or the mode of resentment must bear some reasonable relationship to the sort of provocation that is given."

Counsel's submission is that the phrase "it must be shown" in the context quoted would almost necessarily convey to the minds of the Assessors that this meant "it must be shown by the accused". That effect on the minds of the Assessors would, in counsel's contention, be strengthened by what had been said a little earlier in the summing up, that the standard of proof looked for from the defence was lower than that required of the prosecution.

It is further contended for the appellant that in the final section of the summing up the learned Judge does not sufficiently clarify the legal position regarding the onus of proof where a defence of provocation is being considered. The Judge says —

> "You must bear in mind what I said to you about the onus of proof being on the prosecution, and on that basis, if you find the deceased received his wounds as a result of an accident or by the accused acting in self defence, you should express the opinion that the accused is Not Guilty of any offence. If you find he acted under provocation in law as I have defined it to you, you should express the opinion he is Guilty of Manslaughter."

In order to determine whether there has been a misdirection on the question of onus of proof required by law when considering the defence of provocation, it is necessary to examine the summing up in its entirety for the purpose of arriving at a conclusion as to what the Assessors may reasonably have understood on the subject when the summing up was concluded. To quote the well-known dictum of Lord Tucker in *Bullard v. The Queen* [1957] A.C. 635 at 645 :—

> "Provided that on a reading of the summing up as a whole the jury are left in no doubt where the onus lies no complaint can properly be made."

Early in his summing up the learned trial Judge used the words which are quoted verbatim in the second ground of appeal. It is conceded — and in fact no other conclusion is possible — that the first sentence taken by itself is an accurate and adequate direction as to the onus of proof. Unfortunately the sentence immediately following does, in our view, tend to water down the effect of the previous direction, and may possibly have caused the Assessors to feel a little unsure of the precise meaning of what had preceded it. They may well have concluded that although they needed only to feel a reasonable doubt on the subject of provocation, there was an onus on the defence to establish by evidence grounds upon which such a reasonable doubt could be based.

Accordingly we think that the remainder of the summing up must be scrutinised to see if it contains passages sufficient to dispel any doubts that might have been raised in the minds of the Assessors by the use of the latter portion of the extract quoted. That portion of the summing up which deals with the questions of accident and of self-defence is not open to criticism and is in any event immaterial for the purposes of this appeal.

On the issue of provocation the only references in the summing up are the three already quoted. Nowhere else in the summing up is any specific direction given to the Assessors on this material point. Those are the only passages which will require consideration in the determination of this appeal.

In our opinion counsel's contention as to the effect of the second sentence of the extract quoted, in ground 2 in the notice of appeal, is well founded. The use of a rather unfortunate choice of words, where the learned trial Judge refers to the lower standard of proof required from the defence, may well have served to create in the minds of the Assessors some misunderstanding as to the real meaning of what had preceded it. In other words, we are unable to say that the Assessors were left in no doubt as to where the onus of proof of provocation lay.

Consideration must now be given to the effect of the later extracts quoted and to ascertain if they could reasonably be said to have dispelled any doubts raised by the earlier passage. The first of these is the passage commencing —

> "Before an accused can benefit from the defence of provocation in law, to reduce the offence of murder to manslaughter, it must be shown . . ."

The learned trial Judge does not make it clear by whom the various matters detailed must be shown and it is a possible inference that when he says that before an accused can benefit from the defence of provocation certain things must be shown, he means that they must be shown by the defence. The only corrective to any such construction is supplied by the trial Judge's insistence throughout his summing up that the onus of proof is always on the prosecution and that that onus involves proving the case beyond all reasonable doubt. It is a very difficult matter to decide whether those general directions can be considered adequate to set aside the inference which might

otherwise be drawn from the extracts quoted. We conclude, with some reluctance, that the general directions were insufficient for this purpose and that the Assessors may well have felt, notwithstanding those directions, that there was some onus of proof on the defence with regard to the plea of provocation.

The final passage for consideration is that occurring at the end of the summing up, where the relevant portion reads :—

> "You must bear in mind what I said to you about the onus of proof being on the prosecution, and on that basis . . . . . If you find he acted under provocation in law as I have defined it to you, you should express the opinion he is Guilty of Manslaughter."

In our view this direction would be unexceptionable if the Assessors should, at that stage, have had no doubts as to exactly what had been said on the subject of the onus of proof. For the reasons already given, however, we are impelled to conclude that the Assessors may have been in some doubt as to precisely what onus, if any, had been cast on the accused with regard to the issue of provocation. That being so we consider that the cautionary phrase — "You must bear in mind what I said to you about the onus of proof being on the prosecution" — was not in itself sufficient to correct the false impression that might already have been made upon the minds of the Assessors. As therefore we cannot say with certainty that the Assessors must necessarily have understood just what is meant by the onus of proof when the issue of provocation is raised we are compelled to hold that on this point there was misdirection.

As Their Lordships point out in *Bharat v. The Queen* [1959] 3 All E.R. 292 at p. 294, the Judge is not bound to conform to the opinions of the Assessors, but he must at least take them into account. If they have been misdirected on a vital point their opinions are vitiated:

> "He" (the trial Judge) "has in truth by his misdirection disabled the Assessors from giving him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw."

In that case it was held that as a result of the misdirection the conviction could not stand but should be quashed.

Before deciding whether the misdirection is a fatal flaw in the present case, we have to consider the effect of the proviso to section 18(1) of the Court of Appeal Ordinance (Cap. 3):—

> "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

It is submitted for the Crown in the present case that substantial justice has in fact been done; that the evidence proved beyond doubt that the appellant had been guilty of a peculiarly vicious murder and that there was no evidence of any recent provocation sufficient in law to reduce the offence from murder to manslaughter.

In our opinion the provocation arising from the objectionable remarks concerning the appellant's wife made by the deceased some nine days earlier was of a minor nature and was spent before the killing took place; except that it may have had some very slight cumulative effect if the further provocation in the matter of the alleged attempt by the deceased to throttle the appellant did actually take place. As to this it must be noted that the learned trial Judge makes no specific finding of fact that there was no such assault. On the assumption that there was such an assault — and consideration must be given to the case on that basis — it is possible it might have furnished some basis for a defence of provocation. It is true that the trial Judge refers to this as a comparatively minor assault; but even such an assault might well have to be taken into account in deciding as to whether there had or had not been provocation. It must also be remembered that two of the five Assessors were of the opinion that manslaughter was the appropriate verdict.

Upon a consideration of all the circumstances we are unable to say that if the Assessors had been properly directed on the subject of the onus of proof of provocation one or more of those who had expressed the opinion that the appellant was guilty of murder might not have been impelled to advise manslaughter instead of murder. If a majority of the Assessors had then given an opinion in favour of manslaughter it is quite possible, as is pointed out by Their Lordships in Bharat's case, that the trial Judge might have accepted the majority opinion in preference to his own.

The view we take of the case is that the proviso to section 18(1) does not apply. We conclude that the appeal must be allowed, the conviction for murder quashed and a conviction for manslaughter substituted.

Even taking into account everything which, from the evidence, appears in favour of the appellant, it is still abundantly clear that the crime committed by the appellant is a very serious one and calls for a heavy sentence. The sentence passed by this Court upon the conviction for manslaughter is 14 years' imprisonment.

Appeal allowed. Conviction for murder quashed and conviction for manslaughter substituted.