A

KANDA SAMI NAIKAR alias GANDHI

v.

REGINAM

B [COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 11th, 14th, 22nd October]

Criminal Jurisdiction

Criminal law—evidence and proof—common intention—no physical participation by accused in attack—statements by accused—whether justified finding of common intention of degree requisite for conviction of murder—Judges' Rules—scope of Rule IV—Penal Code (Cap. 11—1967) ss.21, 22.

C

Criminal law—practice and procedure—statement by accused—practice of having accused interviewed by Justice of the Peace after making statement—purpose of interview—inherent dangers.

D A conviction of murder was reduced to one of manslaughter where the evidence, consisting of statements made by the appellant, was insufficient to show that the appellant, who took no physical part in the assault upon the deceased, had any common intention with the actual assailant, going beyond robbery of the deceased, which could have been effected without the use of any very great force.

E Observations upon the practice of having a Justice of the Peace interview an accused person, after he has made a statement to the police, to enquire whether he has any complaint as to the conduct of the police in obtaining the statement.

Semble: The caution and the written statement referred to in Rule IV of the Judges' Rules,* are the caution and written statement referred to in Rule III.

F Cases referred to: *R. v. Collier & Stenning* [1965] 3 All E.R. 136; 49 Cr. App. R. 344: *R. v. Smith* [1963] 3 All E.R. 597: *R. v. Betty* (1963) 48 Cr. App. R. 6: *R. v. Anderson & Morris* [1966] 2 Q.B. 110; [1966] 2 All E.R. 644.

Appeal from a conviction of murder by the Supreme Court.

G *K. C. Ramrakha and B. C. Ramrakha* for the appellant.

J. R. Reddy for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by HUTCHISON J.A.): [22nd October, 1968]—

H

* What have been referred to as the "new" Judges' Rules were adopted by the judges of the Supreme Court of Fiji with effect from the 1st March, 1967 — see L.N. No. 14 of 1967 — and are set out at Supplement page 31 of the 1967 Volume of the Ordinances of Fiji — Ed.

Appellant along with one Shiu Raj s/o Dhani, was in the Supreme Court convicted of murder. Shiu Raj, who has not appealed was the actual murderer, and appellant, who kept watch, was convicted under s.21 (1) (b) or (c) of the Penal Code, reading : -

> 21 (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —
>
> . . .
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids or abets another person in committing the offence;

or s.22, reading : -

> 22 When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

A number of grounds of appeal were argued, of which the most important was put thus : -

> (10) The evidence at the trial did not disclose any common intention on the part of the appellant, and his co-accused to either kill or cause grievous harm to the deceased Mangamma and the learned trial Judge erred in law and in fact in not directing himself and the gentlemen assessors that the appellant could not thereafter be guilty of murder or manslaughter and the appellant has therefore suffered a miscarriage of justice.
>
> (11) The proper direction which the learned trial Judge failed to give to the assessors and to himself was that if there was a common design to attack the deceased woman Mangamma but not to kill or to cause her grievous harm, then the appellant was not guilty of any crime except robbery with violence.

In dealing with this ground, we shall for the time being disregard all other grounds of appeal, which were mainly as to admissibility of evidence, and take all the evidence in the case as admissible and properly before the Court.

The case for appellant, an illiterate youth of 18 years, at the trial was that he was no party to the killing, that he had agreed, for a sum of £20 out of the proceeds of a robbery from a woman, to keep watch while Shiu Raj robbed her, but that this was as far as his co-operation went.

In fact, Shiu Raj disabled the woman, and then took up an axe that was lying handy and killed her with it. He took the money from inside the house and gave appellant his £20.

The question of whether appellant came within either of the above quoted provsions is, of course, a question of fact, and little assistance can be obtained from other cases all decided on their own facts.

Summing up to the assessors the learned Judge said :-

> "I now turn to the Crown's case against the Second Accused. It is based almost entirely on alleged admissions, oral and written, made by the Second Accused. Some evidence of opportunity and motive has also been tendered in support of the Crown's case. I refer, in particular, to the two written statements signed by the Second Accused, namely Exhibit G and Exhibit X."

Turning later to the law, he directed the assessors in this difficult case — for it had many difficulties — in a way to which no exception could be taken. He said :-

> "Similarly, the Crown must satisfy you beyond any reasonable doubt that the Second Accused had agreed to keep watch and did keep watch with the knowledge that the First Accused intended to kill or do grievous harm to Mangamma. It is a question of fact as to what knowledge the second Accused had if the Crown has first satisfied you that he agreed to or offered to keep watch and did in fact, keep watch. If the Second Accused had agreed and did keep watch merely to enable the actual assailant to assault Mangamma to facilitate theft of money, without the Second Accused forming the common intention of causing the death or grievous harm to her, or if he had no prior knowledge that the assailant had intended to kill or do grievous harm to Mangamma, then the Crown has not proved the ingredient of malice aforethought and the Accused cannot be found guilty of murder. The question of manslaughter would then arise on the basis of aiding and abetting in the commission of an unlawful act causing death, provided, of course, that the Crown has proved beyond any reasonable doubt such aiding and abetting."

When he came to his own judgment he said :-

> "I find that Exhibits G and X contain what the Accused himself told the Police and they are, indeed voluntary statements."
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> .....
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> "The Prosecution has also satisfied me beyond any reasonable doubt that the Second Accused also made incriminating admissions and answers to Corp. Jai Raj, (20th P.W.) on the morning of 31st October, 1967 when the Second Accused, I am satisfied, indicated to Corp. Jai Raj where he was standing when Shiu Raj assaulted Mangamma."
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> .....
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> "The Prosecution has on the whole of the facts and circumstances of this case satisfied me beyond any reasonable doubt that not only was there a common intention on the part of the First and Second Accused that Mangamma should be assaulted, but also that Second Accused knew that the First Accused intended to kill Mangamma on 23rd October, 1967. I am satisfied beyond any reasonable doubt that the Second Accused with this knowledge offered to, and did,

in fact, keep a watch. He was, I am satisfied beyond any reasonable doubt, not only an eye-witness but was in fact, also aiding and abetting the unlawful killing of Mangamma with malice aforethought. I am also satisfied that after Mangamma was grievously wounded or possibly killed, the Second Accused accepted from the First Accused £20 which he lavishly spent the same day. Had I entertained any doubts about the Second Accused's knowledge and intention, I would have unhesitatingly given the benefit of the doubt to the Second Accused and considered whether or not the Second Accused is guilty of manslaughter. I entertain no such doubts and neither, I am sure, did the Gentlemen Assessors. All five Assessors have expressed the unanimous opinion that both Accused are guilty of murder. I am in complete agrement with them."

With all respect, as we consider the two written statements made by Appellant and the oral answers he gave to Corp. Jai Raj, we are unable to find any sufficient evidence that the appellant had any common intention with Shiu Raj that went beyond robbery of this woman, a robbery that could quite easily be effected without the use of any very great force. The first of these statements, which was an untruthful one, was not an incriminating one on the charge of murder; though it might and doubtless did, contain matters that would justify a charge of being an accessory after the fact in accepting money to remain silent about what he had seen. The second statement would justify a charge of manslaughter as a party to a crime in the course of which, though not as a probable consequence, the woman was killed. In the oral admissions to Corp. Jai Raj, the point to which the learned trial Judge gave weight was Appellant's indicating in answer to the Corporal's question that the point at which he had been standing was about six feet from where the body of the woman had been lying. Counsel for the Crown in this Court said that further points that appeared from the evidence were that Shiu Raj actually lived as a member of the family of the deceased woman and that appellant was a near neighbour, from which he suggested that the two would intend to kill her so as to leave no witness of the crime. Counsel for appellant, replying on this point, said that it would be a fallacy to believe that criminals, committing a hastily decided on crime, would pause to consider whether they can make it a perfect crime. Finally, there was no question of Shiu Raj's being armed with any weapon when he assaulted the woman — the axe which he picked up happened to be lying there.

Upon all the evidence, with all respect for the view of the learned trial Judge and of the assssores, we do not find enough on which to hold appellant guilty of murder under S.22. We have dealt with this on S.22, for it would undoubtedly be easier for the Crown in the circumstances of this case to found its charge on that Section than on S.21 (1) (b) or (c), but what we have said applies to those provisions too.

There would then be alternatives open to this Court, the one to find the accused guilty of manslaughter, the other to acquit him and leave him to stand his subsequent trial on a suitable charge such as robbery. Which of these courses should be pursued should not be decided upon without a consideration of certain of the other grounds of appeal. Some of them do not warrant any particular consideration, and we so indicated during the argument, but two of them do.

Grounds 1, 2 and 3 as put forward refer to the circumstances under which a Justice of the Peace interviewed appellant at the police station after he had made his second statement to the police. It seems that, in cases of serious charges, a practice has developed of having a Justice of the Peace interview the accused, after he has made a statement to the police, to enquire from him whether he has any complaints as to the conduct of the police in obtaining the statement. In this case, when appellant challenged the admissibility of the statement upon the ground of inducement, intimidation and even fabrication, and the learned Judge took a trial within a trial on this issue, the Justice of the Peace was called to say that appellant made no complaints to him of these matters when he so called upon him. In fact, his evidence in the trial within a trial went beyond that. Having heard all the evidence and ruled that the statements were admissible, the learned Judge very properly directed that anything in this witness' evidence that went beyond a mere statement that appellant did not make any complaint to him of the conduct of the police in respect of the statement should not be led in the trial proper by the Crown. He, of course, placed no restraint upon the right of counsel for the defence to cross examine. We do not think that the admission of the evidence of this witness in the trial led to any injustice, and consequently do not uphold this as a ground of appeal.

We do however point out the very grave dangers that may be inherent in such a practice. While in the trial within a trial the assessors were not present, it is to be remembered that this was not a case before a jury in which all decisions on the facts rest with the jury, but a trial with assessors, in which the last word on the facts rests with the Judge, and he might unknowingly be affected by something that he had heard the Justice of the Peace say in the trial within the trial even though it were not repeated in the trial. One thing that we thought highly dangerous appears from the witness saying to appellant when he interviewed him — at page 157 :-

> "I told him my name, I told him I was a Justice of the Peace. I said I was not a police officer and he could freely tell me anything he wanted to."

If an illiterate accused like the present appellant took that at its face value and treated the Justice of the Peace as a father confessor and made a fully incriminating statement to him, what would be the position about that?

Ground 5 concerns the application of the new English Judges' Rules, now adopted in Fiji. It was contended for appellant that the questions put to appellant by Corporal Jai Raj on the 30th October after he had taken a written statement from him and the questions put to him by this officer on the 31st October were in breach of Rule IV of the Judges' Rules, and accordingly might have been ruled inadmissible by the trial judge. This, we think, is a misapplication of the Rules. Appellant was not in custody at either time. On the 30th October he was allowed to go home, and on the 31st October he was sought out in the fields where he was working as a member of a cane cutting gang. On both occasions he was, unnecessarily on the first occasion and possibly unnecessarily on the second occasion, cautioned before being asked any questions.

The argument for appellant was that once a caution was administered to appellant on the first occasion as it was, and he made a written statement, Rule IV applied. We do not think that this is so. We think that the caution and the written statement referred to in Rule IV are the caution and the written statement referred to in Rule III, the rules proceeding from the preliminary enquiry, R. I, through the point of time when reasonable suspicion arises, R II, to the point where the person is charged or informed that he may be prosecuted, Rules III and IV. This point was not reached until after the second occasion referred to. What we have said may not be entirely covered by the judgment of the Court in *R. v. Collins R. v. Stenning* [1965] 3 All E.R. 136, but is fully consistent with it.

Even if the view which we have expressed is wrong in putting the position so broadly, we cannot see that the taking of a written statement at the stage of R. I, which was when this written statement was taken, is any different from taking oral answers to questions at that stage. Even at the stage of Rule II questions or further questions may properly be put, subject to a caution, which was here given.

For these reasons, we think that this ground of appeal is not sustainable.

Having reached these conclusions on the additional grounds of appeal, and so dismissed them from consideration, we think that we are now in a position to decide which of the alternatives above referred to should be adopted. We have considered the cases of *R. v. Smith* [1963] 3 All E.R. 597, *Carol Betty* 48 Cr. App. R. 6 and *R. v. Anderson and Morris* [1966] 2 All E.R. 644. Even taking it, as was said in the last named case, that the headnote to *Carol Betty* may be somewhat misleading, we are satisfied that appellant was a party to the common enterprise of using force to rob Mangamma, though not such force as might cause her grievous bodily harm, and that he should properly be convicted of manslaughter.

Appellant's conviction for murder is quashed and a conviction for manslaughter is substituted. He is sentenced to five years' imprisonment.

Appeal allowed — alternative conviction substituted.