A

KRISHNAIYA alias ENGLAND

v.

B **REGINAM**

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.), 23rd October, 7th November]

Criminal Jurisdiction

C *Criminal law—accomplice—whether witness an accessory after the fact—necessity for active act of assistance from which assent to felon's going free can be inferred—Penal Code (Cap. 11) s.233.*

Criminal law—summing up to assessors—witness of doubtful character—warning to assessors.

Criminal law—principles of criminal liability—accessory after the fact—assistance must be active and support inference of assent to felon's going free.

D *Criminal law—evidence and proof—lies told by accused person—significance of—direction.*

At the appellant's trial for murder Ram Shankar, a prosecution witness, testified that the appellant approached him a few hours after the body of the deceased was found, admitted that he was responsible, and asked for advice to get himself free of it. Ram Shankar advised him to look for a witness who would say that he was with him on the day deceased E was alleged to be missing; Ram Shankar reported the matter to the police the next morning. Ram Shankar had once been taken into custody on a charge of murder, but was released without being brought to trial. The trial judge emphasized to the assessors that, "you must consider most carefully whether you can believe Ram Shankar, bearing in mind the sort of man he must be". The judge approached the matter similarly in his judgment. F

On the subject of lies allegedly told by the appellant the trial judge told the assessors:

> "Of course the mere fact that an accused has lied is not by any means sufficient to justify a conclusion that he is guilty of the offence charged. Nevertheless the Crown lays stress upon the significance of such lies in the light of the circumstantial evidence to which G these prosecution witnesses have testified."

Held: 1. (a) Nothing done by Ram Shankar could be construed as an active act of assistance to the appellant; nor could it be inferred that he assented to the appellant going free. He was not therefore an accessory after the fact or an accomplice.

H (b) The warnings given by the judge to the assessors and himself arising from considerations of Ram Shankar's character were all that were called for in the circumstances.

2. The reference in the summing up to the significance of lies was fair and correct.

Cases referred to : *Davies v. Director of Public Prosecutions* [1954] A.C. 378; [1954] 1 All E.R. 507: *Sykes v. Director of Public Prosecutions* [1962] A.C. 528; [1961] 3 All E.R. 33: *Mawaz Khan v. R.* [1967] A.C. 454; [1967] 1 Al E.R. 80: *R. v. Wattam* (1952) 36 Cr.App.R. 72.

Appeal from a conviction of murder by the Supreme Court.

V. Parmanandam for the appellant.

G. N. Mishra for the respondent.

The facts are sufficiently set out in the judgment of the Court.

Judgment of the Court (read by MARSACK J.A.) :

[7th November 1969]—

This is an appeal against conviction for murder in the Supreme Court sitting at Suva on the 14th August, 1969. The trial was held before a Judge and three Assessors. All three Assessors were of the opinion that the appellant was guilty of murder as charged. The learned trial Judge accepted this opinion, convicted appellant of murder, and imposed the mandatory sentence of life imprisonment.

The deceased was a small girl named Meena Kumari, 7 years of age, who lived with her parents in Lautoka. On the morning of January 11th, 1969, Meena was last seen at Namoli Park, Lautoka, about 11.30 a.m. The girl was not seen again until her partially decomposing body was found in a cane-field rather more than a mile away, in the late afternoon of Tuesday, 14th January. The girl's pants had been packed into her throat or mouth and, according to the medical evidence, death had resulted from asphyxia. Owing to the state of the body it was not possible to determine whether or not she had been sexually assaulted.

There was evidence of the movements of the deceased and her association with the appellant on the morning of Saturday the 11th January. A taxi-driver, Hiralal, saw the girl, whom he knew, close to the appellant, and at about 11.30 a.m. saw the accused going towards the market with the deceased two or three yards behind him. One Bal Ram saw the appellant speaking to a small girl sometime after 11 a.m. and taking something out of a paper bag which he held in his hand. The girl was wearing "a green sort of dress". Munsami Pillay saw the appellant on Vakabale Street (which is near the market) between 11 a.m. and 11.15 a.m. and a small girl, wearing a dress which was "a little bit greenish in colour" was three or four yards behind him. Her mother described the child's dress as "a green floral dress — it was cream, pink and yellow in colour". The Pathologist described the dress in which the body was found merely as "a floral dress".

Shortly after mid-day on Saturday the 11th January Andrew Dayanand, a motor mechanic, and a passenger in his car, Joni Low Wong, saw the appellant jumping a drain which borders the cane-field in which the deceased's body was subsequently found, and at a point not far from that spot. There is no footpath and he jumped the drain from the side of the cane-field towards the road. As has been mentioned, this point was over a mile from the places near the market where the appellant had previously been seen; there is no evidence as to how the appellant

A and (presumably) the deceased covered the intervening distance, but it may not be without significance that there is a bus stop on the road near the cane-field. Later that afternoon (from 4 p.m. to 4.30 p.m.) the appellant was seen by Shiu Nandan at the junction of Drasa Avenue and Nadovo Road, which is not very far from where he was seen jumping the ditch.

B At the trial all this evidence was alleged by the appellant to be fabricated for one reason or another and he gave an account of his movements which was entirely at variance with that of the prosecution witnesses. We do not detail his case in this respect as his alibi was rejected by the Assessors (implicitly) by their opinions, and specifically by the learned Judge in his judgment, in the course of which he said :—

> C "In arriving at the conclusions to which I have referred I have, of course, given the fullest consideration to the evidence adduced by the defence, bearing in mind that the onus of proof lies throughout upon the prosecution. I have rarely encountered defence evidence which is so blatantly a mass of fabrication, and I reject the so-called "alibi" as a tissue of lies."

D The remainder of the evidence against the appellant was contained in the testimony of one Ram Shankar. As indicated above, the body of the deceased was found after 4.30 p.m. on Tuesday the 14th January, and at about 11.30 p.m. on that night Ram Shankar said that the appellant came to him, said that he was involved in the matter of the missing girl, and asked for advice to get himself free of it. Ram Shankar asked the appellant who was responsible and the appellant said that this work was done by him. Ram Shankar advised him to look for a witness E who would say the appellant was with him on the day in question. The next day Ram Shankar sent a message to the police and divulged what had taken place between appellant and himself the previous night. Appellant in evidence denied having gone to Ram Shankar's house or having sought his advice.

F The original grounds of appeal put forward by the appellant were abandoned and substituted grounds were, by leave of the Court and without objection by the Crown, adduced at the hearing of the appeal. The grounds of appeal were very lengthy and we do not find it necessary to set them out in full. They can be shortly summarised as under :—

(1) That the evidence of Ram Shankar should not have been accepted without substantial corroboration in that :—

G (a) on his own statement he had become an accessory after the fact of the crime and an accomplice in the commission of it;

(b) Ram Shankar was a person of known bad character;

(c) no substantial corroboration of Ram Shankar's evidence was adduced.

H (2) That the case for the prosecution was substantially based on circumstantial evidence each item of which was capable of innocent explanation, and such evidence did not lead irresistibly to the conclusion that the appellant was guilty.

(3) That the learned trial Judge had misdirected the assessors and himself in directing them that an intention to cause death or grievous harm could properly be inferred from the evidence against the appellant.

(4) That the learned trial Judge had misdirected the assessors as to the inferences they might draw if they found that appellant had told lies in the course of his evidence.

(5) Generally, that the verdict was unreasonable and could not be supported having regard to the evidence.

The other grounds set out in the amended notice of appeal, such as that concerning the adequacy of the proof of the cause of death, were in our opinion of no substance and we do not find it necessary to refer to them in this judgment.

We now turn to the first of these grounds of appeal, that referring to the evidence of Ram Shankar. There is no doubt that the evidence of this witness was of very great importance to the case for the prosecution and that without it the assessors and the learned trial Judge may well have come to a different conclusion from that which was the basis of the verdict of the Court. In this respect it is significant that the appellant in his evidence did not make any attempt to explain away what he is alleged to have said to Ram Shankar or to give another version of the conversation. He flatly denied that he had been to Ram Shankar's house and flatly denied that any such conversation had taken place. In the result, if Ram Shankar's evidence is accepted it must be accepted on the basis that the appellant had spoken the words attributed to him by the witness.

The first question which requires determination is whether Ram Shankar can be properly described as an accomplice of the appellant in the crime which the appellant is charged with committing. Counsel for the appellant has referred us to the authoritative definition of the term given by the House of Lords in *Davies v. D.P.P.* [1954] 1 All E.R. 507 at p.513 in which it was held :—

> "...that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category :—
>
> (i) On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term "accomplice"."

The contention of counsel for the appellant is that if the evidence of Ram Shankar be accepted it stamps him as an accessory after the fact and therefore an accomplice. It is necessary to examine carefully what acts are required to constitute a person an accessory after the fact. In *Stephen's Digest* of *Criminal Law*, 9th Ed. at p.18, an accessory after the fact is defined as one

> "who, knowing a felony to be committed by another, receives, comforts, or assists him in order to enable him to escape from punishment; or rescues him from an arrest for the felony."

In *Sykes v. D.P.P.* (H.L.) [1961] 3 All E.R. 33 the subject of accessory after the fact is dealt with fully and authoritatively by Lord Denning at p.40 :—

> "These are all active acts of assistance from which it can be inferred that he assented to the felon going free, in contrast to misprision, which consists of concealment only, from which no inference of assent need be drawn."

Applying these definitions we can find no basis for the argument that, on the facts disclosed in the evidence, Ram Shankar could be held to be an accessory after the fact and therefore an accomplice. The actual passage in the evidence of Ram Shankar reads as follows :—

"A. He said he had come for one important matter.

Q. Did you ask him what it was?

A. Yes.

Q. What did he say?

A. He said it was in connection with the alleged missing girl.

Q. What else did he say?

A. He said that he was involved in that matter and he asked for my advice to get himself free of it.

Q. Did you ask him who was responsible for this matter?

A. Yes.

Q. What did he say?

A. He said this work was done by him.

Q. Did you offer him any advice?

A. Yes.

Q. What advice did you offer?

A. I advised him to look for a witness who would say that he was with him on the day the girl was alleged to be missing from Lautoka.

Q. What did he say to your advice?

A. He asked for further advice from me and I said "I have got no further ideas".

Q. What did he do after that, after you told him that you had no further advice to offer?

A. He said he was going and would see somebody else."

It cannot in our opinion be held that what Ram Shankar said and did on this occasion could possibly be construed as an "active" act of assistance. In fact he refused to say anything further than to tell the appellant to go and see somebody else. Nor can it be inferred that he assented to the felon going free. According to his own evidence he had first thought that the appellant was joking. A few hours later, after thinking it over, he concluded that he had better send word to the police about the matter, and he did so. Nothing in his conduct could

in our opinion be said to come within the generally accepted definition of accessory after the fact. That being so, he could not be treated as an accomplice of the appellant.

The other branch of the argument of counsel for the appellant that Ram Shankar's evidence should have been rejected is based on what was put forward as Ram Shankar's general reputation as a man of bad character and one not worthy of credence. It is true that this witness was once taken into custody on a charge of murder; but he was later released without being brought to trial. It is true that counsel for the prosecution used the words "fixer of alibis" when he was referring to the witness, but it is equally true that Ram Shankar has never been convicted of any offence. Even so the learned trial Judge was careful to explain to the Assessors, and to direct himself, of the necessity or at least desirability of scrutinising the witness's evidence most carefully. To the Assessors he said :—

> "As I have emphasized, you must consider most carefully whether you can believe Ram Shankar, bearing in mind the sort of man he must be."

In the course of his judgment the learned Judge says :—

> "I have given the most anxious consideration as to whether Ram Shankar's evidence is to be believed. In so doing I have, of course, borne foremost in mind the sort of character this witness must be. Learned Crown Counsel himself referred to Ram Shankar as a fixer of alibis and I have meticulously reviewed all that has been said — much of it with justifiable emphasis — against this witness. Nevertheless I have concluded that beyond reasonable doubt his account of the conversation between him and the accused, set out above, is true."

We can find no grounds for the rejection of the evidence of this witness. In all the circumstances we are of opinion that the learned trial Judge did all that he was called upon to do when he directed the Assessors and himself that they must give the matter serious thought before accepting his evidence. Having done that the trial Judge was fully entitled, if he considered that the witness was telling the truth, to accept his evidence and to act on it.

We now turn to the second ground of appeal. We agree that a considerable part of the evidence against the appellant was circumstantial. We do not, however, accept his contention that each item of the circumstantial evidence should be considered by itself and disregarded as against the appellant if it is capable of an innocent explanation. It is the chain of circumstantial evidence which must be considered; although no one link in that chain standing by itself might be of great probative value, the links when added together might well have great probative force. This ground is a question of fact which is peculiarly within the province of the Assessors and the learned Judge.

The summing-up could, we think, have been improved by a specific direction that before there can be a conviction in a case depending on circumstantial evidence the Court must find that the inculpating facts are inconsistent with the innocence of the accused and incapable of

explanation upon any other hypothesis than that of guilt. However, the learned Judge did in effect direct the Assessors on these lines when he said :—

> "The Crown submits that upon the whole of the evidence there is only one inference and no other to be reached beyond reasonable doubt namely that Meena Kumari was murdered . . . . . If Gentlemen — only if — the prosecution has established beyond reasonable doubt that this is so, that no other inference can possibly be drawn beyond reasonable doubt, if that is to say the Crown has established its case beyond all reasonable doubt against the accused, then — and only then — would you be justified in concluding that he is guilty of murder as charged."

The case was not one based entirely upon circumstantial evidence. Apart from such inference as might legitimately be drawn from the appellant's attempt to give a false explanation by way of alibi, there was the direct evidence of his admission made to Ram Shankar. In the circumstances, we consider that the Assessors were sufficiently directed and in his judgment the learned Judge approached the matter as one of "the only inference to be drawn beyond reasonable doubt".

The case was not one based entirely upon circumstantial evidence. to cause death or grievous harm, proof of such intent being necessary to justify a conviction for murder. If this intent was not proved beyond reasonable doubt, but it was found as a fact that the appellant was the author of the injuries to the deceased girl, then in counsel's submission the learned trial Judge should have directed the Assessors, and himself, on the issue of manslaughter. It is clear that this was not an issue left by the learned Judge to the Assessors; there is no copy available of the submissions of defence counsel at the trial, but we are satisfied that had he made any request for the issue to be left, the request would have been noted. Counsel on the appeal has submitted that the issue ought to have been left on the basis that the gag used might have been thought to prevent ingress of air through the mouth of the deceased but not through the nasal passages. This necessitates further references to the evidence. We quote two extracts from the evidence in chief of the Pathologist who conducted the post-mortem, upon which he was not cross-examined :—

> "Q. Did she have any underpants on?
>
> A. No.
>
> Q. Apart from these — her floral dress and ribbon, did you find anything else?
>
> A. Yes I found in her mouth a pair of pinkish coloured pants. Exhibit H — identified by the witness (pink coloured panties).
>
> Q. These panties were packed into the throat?
>
> A. Yes.

Q. From your examination of the body what do you form the opinion as to the cause of the death?

A. In my opinion this was Asphyxia from gagging.

Q. This was caused by pushing of the underpants in her mouth?

A. Yes."

Photographs of the body as it was when found, showed it to be facing partly downward and partly covered with what appears to be dried cane debris.

In a case in which the defence was that the appellant had nothing to do with the matter we do not think it was incumbent upon the Court or Assessors to conjure up fanciful possibilities upon which a verdict of manslaughter might be based.

The first passage of the Pathologist's evidence, when he said the pants were packed into the throat, indicates a state of affairs in which death was certain to ensue unless help was immediately forthcoming as the nasal passages as well as the mouth would be cut off. The deceased was left in a condition (in all probability at least a state of unconsciousness) in which obviously she was unable to help herself or to stagger the short distance to the roadway. In the absence of cross-examination on the point we are unable to attach any significance to the use of the word "mouth" in the second passage of the evidence as detracting from what had already been said. The definition of "Malice aforethought" is in section 233 of the Penal Code which reads :—

"233. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances :—

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

Putting the matter at the very lowest it is manifest that the person who left the deceased in such a parlous condition was completely indifferent whether death ensued or not. It must also have been obvious to him that the deceased was unable to help herself and, unless aid arrived in some miraculous way, death was a probability if not a certainty. We consider the use of the word "packed" in relation to the gag to be significant and, in the absence of evidence from the appellant on the subject, we do not think it is now permissible to conjure up a theory that he may have thought he was only inserting the gag to a limited degree. In our view, therefore, the learned Judge was fully justified in not leaving the issue of manslaughter to the Assessors.

On the fourth ground of appeal the submission of counsel for the appellant was that the learned Judge attached undue importance to the lies told by the appellant in his defence. In our opinion the summing-up was in this respect perfectly fair. The learned Judge reviewed all the

evidence both for prosecution and defence and stressed that no onus lay upon the appellant to establish an alibi; the onus was on the Crown, and any doubt the Assessors had must be resolved in favour of the accused. He told the Assessors that it was for them to decide where the truth lay, and again reminded them of the reasonable doubt principle. He then gave the following direction :—

> "Of course the mere fact that an accused has lied is not by any means sufficient to justify a conclusion that he is guilty of the offence charged. Nevertheless the Crown lays stress upon the significance of such lies in the light of the circumstantial evidence to which these prosecution witnesses have testified."

This is in accord with what was said in the judgment of the Privy Council in *Mawaz Khan v. The Queen* [1967] A.C. 454 at 462 :—

> "Telling lies to the police when enquiries are being made about a crime is of great significance, but as Oliver J. pointed out in *Haydon Wattam's* ((1952) 36 Cr.App.R. 72, 76) case "There must be something more than the telling of lies to the police before a man is convicted of any crime, let alone murder"."

Further their Lordships said that the concerted attempt to give a false explanation by way of alibi was evidence of guilt to be taken into consideration with the other evidence given in the case. In our opinion the summing-up of the learned Judge on this question was quite fair and correct, and in his judgment he drew no inferences that he was not entitled to draw from that part of the evidence of appellant which he characterized as "a tissue of lies". On this point we can find no misdirection on the part of the learned trial Judge and this ground of appeal must fail.

There remains for consideration the general ground that the verdict was unreasonable and could not be supported having regard to the evidence. For reasons which already appear in this judgment we are satisfied that there was ample evidence which, if it was accepted by the Assessors and the learned trial Judge — and it was so accepted — pointed to no other conclusion than the guilt of the appellant on the charge of murder. There is, therefore, in our view no substance in this ground of appeal.

Accordingly we find that no ground submitted on behalf of the appellant has any validity and the appeal is therefore dismissed.

Appeal dismissed.