A

NIRMAL

v.

REGINAM

B

[COURT OF APPEAL,* 1969 (Gould V.P., Hutchison J.A., Marsack J.A.), 27th October, 7th November]

Criminal Jurisdiction

Criminal law—evidence and proof—assessment of credibility of witnesses—demeanour of witnesses to be considered in conjunction with the whole of the evidence.

C

Appeal—trial within a trial—evaluation of evidence—appeal court differing from trial judge where demeanour of witnesses not considered in relation to whole of the evidence.

At the trial of the appellant for murder objection was taken to the admissibility of oral and written statements alleged to have been made by the appellant, amounting to a confession. At the trial within a trial held by the judge to determine the question of admissibility, police officers gave evidence of the making of the statements and denied any assault threat or inducement upon or to the appellant. The appellant denied making the statements and said he had been forced to attach his signatures under threats and violence; he called witnesses to prove he had made complaints of ill treatment, and also his mother who said she had heard her son crying out from the tent where he was being interrogated, before she was taken further away by a policeman. Her evidence as to being taken away was supported by one police witness. The appellant said that he complained of ill treatment to a senior police officer who was admittedly in the tent for about fifteen minutes during the interrogation, but the particular officer was not called as a witness at the trial within a trial. The trial judge accepted the evidence of the police denying any threat, pressure or force and said that the appellant gave him the clear impression of giving fabricated evidence, and similarly, the evidence of his mother was suspect. He ruled that the statements of the appellant were made voluntarily and admitted them in evidence.

D

E

F

Held: 1. The assessment of the credibility of witnesses by their demeanour alone is wrong if it can be avoided; all the evidence should be weighed before deciding what to accept and what to reject.

G

2. The proper way to disprove the appellant's allegation that he had, during the interrogation, complained to a senior police officer, would have been for the prosecution to call that officer as a witness.

3. The evidence of the mother of the appellant was supported in part by the evidence of one policeman.

H

* An appeal (No. 46 of 1970 — as yet unreported) by the appellant to the Privy Council against the order for a new trial contained in this judgment, was allowed: a cross-appeal by the Crown against the order quashing the conviction of the appellant was dismissed.

4. The appellant later complained to a solicitor, a Justice of the Peace and to a police officer enquiring into his complaints.

5. The evidence as a whole did not justify the ruling that the prosecution had discharged the onus of showing that the statements of the appellant were voluntary.

6. The conviction would be quashed and a new trial ordered :

Case referred to : *Uganda v. Khimchand Kalidas Shah* [1966] E.A.30.

Appeal from a conviction of murder by the Supreme Court.

B. C. Ramrakha for the appellant.

J. R. Reddy for the respondent.

The facts sufficiently appear from the judgment.

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

[7th November 1969]—

Appellant and another accused were convicted of the murder on the 4th day of September, 1968 of one Davendra Sharma, and appellant appeals against his convictions.

The main argument for appellant was that the learned trial Judge was wrong in admitting evidence of oral and written statements amounting to a confession made by appellant to the police on the 11th September, 1968. Counsel for appellant having stated, at the appropriate stage in the trial, his objection to the admissibility of this evidence, the trial Judge held a trial within a trial to determine the question. He heard the evidence of certain police officers and of appellant and certain witnesses whom he called. In his ruling at the end of the evidence, the learned Judge stated clearly and correctly what the law is on the point —

> "It is a fundamental condition of admissibility in evidence against any person equally of any oral answer given by that person to question put by police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice, or hope of advantage, exercised or held out by a person in authority, or by oppression. The disputed statements amounted to a confession and to be admissible, they must be free and voluntary and it is for the prosecution to show affirmatively that they were made without the prisoner being induced to make them by any pressure or force or by menace or violence or terror."

He then said —

> "The 1st accused (the appellant) gave me the clear impression of giving fabricated evidence which he appeared to have rehearsed in details. Similarly I found the evidence of his mother Shiu Devi suspect. On the other hand I was impressed by the evidence of Sgt. Rameshwar Prasad, Constable Mahendra Singh and Senior Inspector Muniappa who denied applying threat, pressure or force on the 1st Accused or of seeing anyone applying any threat, pressure or force on the 1st Accused. I am satisfied that the 1st Accused had no injuries on his person."

We think that the learned Judge here fell into the error of endeavouring to assess the respective credibility of witnesses by their demeanour and the way they gave their evidence, and by that alone. This is wrong if it can be avoided. We adopt a passage from the judgment of the Court of Appeal of East Africa in *Uganda v. Khimchand Kalidas Shah and Ors.* [1966] E.A. 30 at p.31 —

> "Of course, ... a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject."

We look then at the whole of what occurred on that day, the 11th September, 1968.

Between 6.30 a.m. and 7 a.m. the police took appellant from his house to where they had set up their temporary headquarters, for the purpose of interrogating him. The interrogation started at 9.15 a.m., with appellant asserting that he knew nothing of the murder. At 10.30 a.m. he was confronted by two Fijian witnesses, who made statements the effect of which was to show that part of appellant's earlier statements was untrue; and he admitted this. Then suddenly, according to the police evidence, he embarked on the fully incriminating statement which was recorded on a yellow wireless form. We would not accept his evidence that he signed his name on this in a number of places when it was a blank form, but that, in our opinion, does not necessarily require one to reject the whole of his evidence. It took till 1.15 p.m. to record this statement.

In the meantime, sometime in the morning, appellant's mother, who was in the vicinity, according to her evidence, heard him calling out "somebody assaulting, same me". She says that she then called out "why are you people assaulting my son?" and that she was then led further away by a policeman. Mahendra Singh, then one of the police, gave an answer to a question which supported her on the last point.

At some stage in the morning, that is before 1 p.m., appellant, according to himself, asked for a senior officer to whom he could complain of the actions of the police. Mr. Sutton came in and was there for 15 minutes or thereabouts. Appellant said that he then complained to him that the police were assaulting him. It does not disprove this that one police officer should say that he did not think that appellant and Mr. Sutton talked during that 15 minutes and that another should say that he did not remember them talking. The way to disprove it would have been to call Mr. Sutton, and this was not done.

At 1.50 p.m. after appellant had been given lunch, the statement on the yellow wireless form was put on to the normal police form and this took until 3.15 p.m.

After being arrested, he was charged at 5.25 p.m. He claimed again that here he was compelled to sign the statement that appears above his signature.

At 6.15 p.m. Mr. Govind, a solicitor, called at the police station, presumably summoned by appellant or sent by appellant's relatives. Appellant complained to the solicitor that he had been mishandled by the

police. A Justice of the Peace having been summoned, he complained similarly to him. He was examined by a doctor, who found no obvious signs of injury on him. A police inspector not involved in the interrogation was directed to enquire into the complaint, and appellant complained to him. These complaints were all short, and, as short complaints, they were consistent enough with one another. The police inspector enquiring into the complaint apparently did not consider it part of his duty to ask appellant who the officers were against whom he complained and what the details of his complaints were.

One would naturally, and should, look critically at the evidence given by appellant; and the testimony of the doctor supports the case for the Crown. On the other hand, what really can a person facing a serious accusation do when surrounded by police while he is being interrogated, other than (a) call out, as he and his mother say that he did, or (b) ask for a senior officer to whom he could complain, as he says he did, on both of which matters some facts appear to give him limited support, and what could such a person do afterwards other than complain at the first opportunity, as appellant did, that his statement was not a voluntary one but was forced from him?

For ourselves, with all respect for the view taken by the learned trial Judge, we do not think that the evidence justified his ruling that the Crown had discharged the onus lying on it of showing that the main statement made by appellant was a voluntary one, and, in our opinion, on the case as presented it should have been ruled inadmissible. The statement attributed to appellant when charged with the crime should stand or fall with the earlier statement.

All that it is necessary to say further is in relation to grounds 7 and 8. As to ground 7, we deprecate, as this Court has said in another case, the handing to the assessors of a volume of the Laws of Fiji, and think that, if a trial Judge thinks it necessary to put before assessors any section of an Ordinance, the preferable course is to let them have a typed copy of the section and that only. As to ground 8, it would be wrong for us, as we propose to order a new trial, to discuss the evidence generally.

It would be impossible to say that there was no miscarriage of justice when a piece of evidence so important as this was admitted, when, in our view, it was wrongly admitted. The conviction is therefore quashed and a new trial is ordered.

Appeal allowed — order for new trial.