GEORGE EDWARD WARID KUTTY

v.

REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 21st April, 4th May]

Criminal Jurisdiction

Criminal law—witness—privilege—communicatians between solicitor and client—privilege of client—waiver—whether duty on judge to advise witness of his rights.

Evidence and proof—privilege—accused cross-examined as to communications to his counsel—questions answered freely and without objection—waiver of privilege—no rule of law requiring trial judge to advise witness of his rights.

The appellant gave evidence on his own behalf during his trial for murder and was cross-examined by counsel for the prosecution as to whether he had made certain communications to the appellant's own counsel in the course of his instructions to the latter. The appellant answered the questions freely and his counsel did not object or request the trial judge to advise the appellant on the subject of privilege.

Held : 1. Privilege attaching to communications between a party and his solicitor is that of the party and may be waived by him.

2. There is no rule of law that in such circumstances a judge must warn the witness that he is not obliged to answer the questions being put to him, though it is open to the judge to do so.

3. Accordingly by answering the questions freely and without objection the appellant waived the privilege upon which he could have relied.

Cases referred to :

R. v. Coote (1873) L.R. 4 P.C. 599; 29 L.T. 111.

Lee Chun Chuen v. R. [1963] A.C. 220; [1963] 1 All E.R. 73.

Appeal from a conviction of murder in the Supreme Court.

K. C. Ramrakha for the appellant.

T. U. Tuivaga for the respondent.

4th May 1971

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

This is an appeal against a conviction for murder entered in the Supreme Court sitting at Lautoka on the 9th February, 1971. The trial was held before a Judge and three assessors. Two assessors expressed the opinion that the appellant was guilty of murder; the third that he was not guilty of murder but guilty of manslaughter on the basis of excessive self-defence. The learned Trial Judge accepted the majority opinion, gave judgment convicting the appellant of murder, and imposed the mandatory sentence of life imprisonment.

The facts may be shortly stated. During the first week of October, 1970, the appellant came upon the deceased, Daya Ram, in the act of committing adultery with the appellant's sister-in-law. The appellant thereupon assaulted Daya Ram, who managed to escape. According to his own evidence the appellant formed the intention then and there of killing Daya Ram, and for that purpose he sharpened a cane knife and obtained some hydrochloric acid. He hid the knife and the acid, but did not use them during the period of a few days for which, according to the appellant, his intention to kill lasted. On the 5th November, 1970, the appellant, who had in his possession the sharpened knife and the acid, accosted Daya Ram and referred to the latter's affair with his sister-in-law. Daya Ram expressed fears of being chopped up, whereupon the appellant threw away the knife and they went to another spot some three chains away. There, after a further discussion, the appellant kicked Daya Ram several times and poured into the latter's mouth a small quantity of the acid which was ejected immediately. The appellant sat on Daya Ram, holding him by the throat. Daya Ram, who had a penknife, struck the appellant with this, though the injuries inflicted were slight. The appellant then seized the penknife and inflicted a deep wound on Daya Ram's neck, severing the jugular vein. Daya Ram was taken to Sigatoka Hospital where he died that same afternoon. The cause of death was haemorrhage and asphyxia resulting from the stab wound in the jugular vein.

A B C D

Later the same night the appellant was charged with the murder of Daya Ram and he made the following statement :—

> "The reason why I killed Daya Ram is he was keeping my brother's wife and I saw him having sexual intercourse with her with my own eyes. I could not control my temper and I killed him with a penknife."

E

The appellant gave evidence on his own behalf at the trial. In the course of his cross-examination of the appellant Crown Counsel asked some questions with regard to communications between the appellant and his solicitor. These are set out verbatim below :—

F

"Q. You mean after the statement was read you wanted to add to it?

A. Yes.

Q. The Policeman did not want you to add to the statement?

A. Yes.

G

Q. These were your instructions to your solicitor?

A. Yes.

Q. He never suggested it to one of the witnesses?

A. No sir.

H

.....

Q. He made this very statement and it appears in the depositions?

A Yes.

Q. And are your instructions to your Counsel that you did not say this to Cpl. Abhilash?

A

A. Yes.

Q. And yet it has not been suggested to him?

A. I told my Counsel that I did not say that part. I only said "I ran and grabbed him."

B Q. The truth is you are now shoving all the blame to your Counsel, and you did say this?

A. No sir, I did not say this.

.....

Q. Now all this evidence was read in the lower Court?

C

A. Yes sir.

Q. You heard it?

A. Yes sir.

Q. Mr. Mishra was present all the time?

D A. Yes sir.

Q. Have you told him, 'Look this that they have written, I did not say all this'?

A. I told my Counsel. He asked me was there someone with you — I said no one.

E Q. Have you told him that you did not say to the Corporal "Today I found my chance and I did what I had intended to do"?

A. I did not say that.

Q. But that is the truth?

A. Yes. No this is not the truth.

F Three grounds of appeal were put forward and argued at the hearing of the appeal. These grounds were set out as follows :—

1. The learned trial Judge erred in law in permitting counsel for the Crown to examine the appellant on instructions to the appellant's own counsel and cross-examining on the basis of what he had or had not told his own counsel, and thereby there was a mis-

G carriage of justice.

2. The learned trial Judge did not address the assessors sufficiently in law, and in fact, on the issue of provocation and thereby there was a miscarriage of justice.

3. The learned trial Judge erred in law and in fact in not addressing the assessors that the case was one of manslaughter, and not

H of murder, and thereby there was a miscarriage of justice.

In support of his argument on the first ground of appeal Counsel for the appellant referred to the principle set out in 12 *Halsbury's Laws of England* (3rd Ed.) 439:

> "Communications made to and from a legal adviser for the purpose of obtaining legal advice and assistance are protected from disclosure in the course of legal proceedings, both during discovery and at the trial." A

It was conceded by Counsel at the hearing of the appeal that no objection had been taken to these questions at the trial by or on behalf of appellant, who answered the questions freely and without hesitation. This Court has then to consider whether there was a waiver by the appellant of the privilege attaching to the communications concerned; it being clear that, B in general, privilege — which would include the privilege attaching to communications between a party and his solicitor — may be waived by the client whose privilege it is : ibid. 48 para. 69. Here there was certainly no express waiver, but one can, in our opinion, definitely be implied. When privilege attaches, as to a communication between solicitor and client, it does not mean there is an absolute prohibition against disclosure, even by the client himself, in any circumstances whatever. It C means that, if the client so requires, neither he nor any other person can be compelled to make disclosure of the communication.

Counsel for appellant submitted that the learned Trial Judge was under a duty to intervene when the questions were put by Crown Counsel. In case it could be suggested that the appellant may have been in ignorance of his rights in the matter, and that the learned Judge should have D given him some warning when the questions were first put, we must say that there is, in our view, no rule of law to this effect. Although it is open to a judge to give such a warning he is under no obligation to do so. This principle was clearly enunciated by the Privy Council in *R. v. Coote* (1873) L.R. 4 P.C. 599 at pp. 607/8 :

> "The Chief Justice indeed suggests, that Coote may have been E ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the Prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not F have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule, recognised as essential to the administration of Criminal Law, 'Ignorantia juris non excusat.' "

Although that dictum referred to incriminating questions, the same principle would in our opinion apply to the questions in issue in these G proceedings.

Coote's case is quoted in *Cross on Evidence* (3rd Ed.) p.230, as authority for this statement :

> "The judge will often warn a witness that he is not obliged to answer H criminating questions, but there is no rule of law to this effect, and the fact that the witness was ignorant of his rights does not prevent the court from utilising his evidence in the case in which it was given, or in subsequent criminal proceedings brought against him."

The same case is cited in Archbold (37th Ed.) para. 1335 as establishing
A that the proper person to take objections to any such questions is the witness himself. In this present case the appellant was legally represented, and Counsel for defence could, had he wished, have asked the Judge to advise the appellant as to his rights. No such request was made.

Accordingly we are of the opinion that by answering the questions freely and without objection the appellant waived the privilege upon
B which he could have relied in refusing to answer. Consequently the appeal on this ground cannot succeed.

We can find no substance in grounds two and three, which were argued together. It cannot in our view be contended that the learned Trial Judge did not address the assessors sufficiently in law and in fact, on the issue of provocation. On the contrary his direction on this point
C was meticulously careful, and the law was explained adequately and correctly. There was in the evidence no credible narrative of events suggesting the presence of the three elements referred to in the judgment of the Privy Council in *Lee Chun Chuen v. R.* [1963] A.C. 220 at 231, 232. The reason first given by the appellant for killing Daya Ram is that he saw the act of sexual intercourse between the deceased and the appellant's sister-in-law. But this was in the first week of October, and it was not
D until a month later that the killing took place. Even if the provocation furnished by that incident would cause an ordinary reasonable man to kill the culprit immediately — which cannot be conceded — appellant's action certainly does not comply with the rule that, to justify the reduction of the charge to manslaughter, the retaliation must follow before there was time for the passion to cool. As to any provocation arising from the trivial injuries inflicted by the deceased upon the appellant with the
E penknife, it must be remembered that the appellant was the aggressor, and was at that time on top of the deceased and holding him by the throat; and, moreover, the retaliation by the appellant could in no wise be considered proportionate to the very mild provocation he had received.

Accordingly the second and third grounds of appeal must fail.

F For these reasons the appeal is dismissed.

Appeal dismissed.