SUBHAS CHAND

v.

REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 22nd April, 4th May]

Criminal Jurisdiction

Criminal law—practice and procedure—election of accused not to say anything—statement by counsel for accused in presence of assessors concerning his instructions—irregularity—no miscarriage of justice—Criminal Procedure Code (Cap. 14) s.275(2)—Court of Appeal Ordinance (Cap. 8) s.23(1).

Criminal law—counsel—election of accused not to say anything at his trial—divulgence by counsel for accused of his advice to accused—irregularity—no miscarriage of justice.

At the close of the case for the prosecution in the appellant's trial on a charge of murder, after his rights has been explained to him, the appellant stated that he did not wish to say anything. His counsel then in the presence of the assessors, addressed the trial judge in words (set out in the judgment below) to the effect that he had wished to call evidence but that his client had instructed him not to do so or to call the appellant himself.

Held: 1. The statement by counsel was a departure from correct procedure as it was not for him to divulge the result of what must have been privileged communications between himself and his client.

2. The course of the trial was not altered in any way by the incident and in view of the strength of the evidence against the appellant the irregularity did not prejudice the appellant or cause any miscarriage of justice.

Case referred to:

Tuckiar v. The King (1934) 52 C.L.R. 335.

Appeal against a conviction of murder in the Supreme Court.

K. C. Ramrakha and H. M. Patel for the appelant.

T. U. Tuivaga for the respondent.

4th May 1971

Judgment of the Court (read by Gould V.P.):

In this appeal counsel for the appellant conceded that he found no ground of law or fact relating to the summing up or judgment upon which the appeal could be supported.

He did, however, by consent and with the leave of the Court, formulate and submit a further ground of appeal based upon what is best described as an alleged irregularity in the course of the trial.

At the close of the case for the prosecution in the Supreme Court, the rights of the appellant, as to giving evidence, making an unsworn statement and calling witnesses, were explained to him as required by Section 275(2) of the Criminal Procedure Code (Cap. 14). He replied that he did not wish to say anything. Counsel for the appellant then addressed the learned trial Judge in the presence of the assessors, as follows :—

> "*MR. CHANDRA:* I want to go on record that I wished to call witnesses — to call at least one witness on behalf of the defence but the person whom I am defending does not wish me to call any witnesses on his behalf — not only that, My Lord, he has instructed me not to call him in the box. He has made it quite plain that he does not wish to give any evidence. Indeed, My Lord, he told this to me yesterday and I thought that overnight he may have changed his mind and he may let me conduct the case as I wanted but even this morning he was quite adamant and he has given me instructions to that effect. That is how I stand in this case."

He was told by the learned Judge that his instructions were a matter between himself and the accused person and replied that he would not be calling any witnesses.

Counsel for the appellant submitted that in consequence of this episode, a re-trial should be ordered. The irregularity in the trial, if what happened amounted to that, not being a question of law or related to any question of evidence, can only be the basis of a successful appeal if it is found to be within the scope of the words, "that on any ground there was a miscarriage of justice", in section 23(1) of the Court of Appeal Ordinance (Cap. 8).

We do not doubt that what defence counsel said can be described as an irregularity. It was not for him to divulge, in the hearing of the assessors, the result of what must have been privileged communications between himself and his client. The assessors are concerned only with relevant and admissible evidence and with the submissions made by counsel in relation to that evidence. Counsel may have thought his action would in some way be in the interest of his client, but that does not alter the fact that the statement he made was a departure from correct procedure. The important question, however, is whether a miscarriage of justice ensued.

Counsel for the appellant referred to *Tuckiar v. The King* (1934) 52 C.L.R. 335. This was a remarkable case in which, on the trial of an aboriginal native for murder, evidence was tendered by two witnesses of confessional statements by the accused, acceptance of one of which might well lead to a conviction of murder, and of the other, to a conviction of manslaughter only. At the conclusion of the evidence of the witness who gave the more damning evidence, the learned Judge, for some unknown reason, asked counsel for the defence if he had talked this evidence over with the accused — he suggested counsel should do so to "see whether it was correct." After an adjournment for this purpose, counsel said he had an important matter which he desired to discuss with the Judge, and that he was in the worst predicament he had encountered in his legal career. This was only one of a number of matters

which led to the quashing of the conviction, but would clearly have been sufficient in itself. The jury would most assuredly draw the inference from what it heard, that the accused had admitted to his counsel the truth of the more damning statement.

Though the principle involved is the same, that case is in quite a different category from the present. Counsel in the Supreme Court said nothing which could be construed as an admission by his client. The course of the trial was not altered in any way, effect being given to the appellant's free choice not to give or call evidence. In his address to the assessors, counsel for the appellant told them that it was the appellant's legal right not to give evidence; in the summing up the learned Judge gave a full direction on the question of onus of proof and did not comment on the absence of evidence from the appellant.

In these circumstances, it is hard to see that any possible prejudice to the appellant could have arisen from the incident under consideration. Counsel for the appellant suggested that there was some ambiguity in the evidence as to whether a stick or a heavy yoke had been used in the admitted killing of the deceased. He suggested also that the assessors might have thought the appellant was afraid to go into the witness box. It is, of course, possible that they may have thought that, in any event, in spite of his legal right not to do so.

In our opinion, the matter complained of must be weighed in relation to the whole case against the appellant. This was of the strongest. There was no eye witness, but the deceased, who was the appellant's wife, was killed by several blows by some heavy implement on the head, neck and chest; they were severe in nature and one of them broke the neck of the deceased and must have caused instant death. The appellant made no secret of the fact that he was responsible and five witnesses gave evidence that he told them he had killed his wife. To Lal Mohammed he used the word "murdered" and said that he had been in his senses at the time. He also used that word to Mohammed Ali, and said he had used a wooden yoke, giving as his reason, that his wife had been making allegations of infidelity against him. To Mohammed Azam Khan he said "Whatever I have done is good to me, there will be no more trouble every day". The only semblance of a defence is contained in a statement made to a police officer, in which he said that he had picked up a stick and hit his wife by throwing it at her — that he did not know she would die. This is entirely inconsistent with clear medical evidence; whether the yoke, which was found in the canefield nearby, or some other substantial implement was used, does not appear material.

On this evidence, we are satisfied that no reasonable assessors could have come to any other conclusion than that the appellant caused the death of his wife, intending to do so, or at the very least, to cause her grievous harm. Against this background, the incident complained of on behalf of the appellant, lacks any real significance, and we are entirely satisfied that it did not in any way prejudice the appellant or cause any miscarriage of justice.

The appeal therefore fails and is dismissed.

Appeal dismissed.