A

INAITH HUSSAIN

v.

B

REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Spring J.A.), 9th, 15th December]

Criminal Jurisdiction

C *Criminal law—witness—prejudicial statement volunteered—whether assessors should be discharged—witness not called at preliminary inquiry—statement not necessarily inadmissible because not included in notice of additional evidence—necessity for trial within trial—Criminal Procedure Code (Cap. 14) ss.246, 270—Court of Appeal Ordinance (Cap. 8) ss.23(1), 23(2)—Criminal Appeal Act 1968 (Imperial—c.19) s.2(1):*

Criminal law—evidence and proof—notice of additional evidence under section 270 of Criminal Procedure Code (Cap. 14)—evidence given not included in notice—not necessarily inadmissible.

D *Appeal—criminal appeal—trial unsatisfactory—order for new trial—Criminal Procedure Code (Cap. 14) ss.246, 270—Court of Appeal Ordinance (Cap. 8) ss.23(1), 23(2)—Criminal Appeal Act 1968 (Imperial—c.19) s.2(1).*

In the appellant's trial for murder a witness (who had not given evidence at the preliminary inquiry) volunteered a statement prejudicial to the appellant and one which was at variance with the brief of the witness' E proposed evidence supplied by the prosecution. It was to the effect that the witness had heard the deceased say that the appellant was hitting him with a knife. The trial judge refused an application for the discharge of the assessors but later directed them that the statement appeared to be one of opinion or belief and was therefore inadmissible. He further suggested that it might be a lie.

F *Held:* 1. The directions that the words complained of were either opinion or belief or lies did not necessarily follow from the fact that they were not included in the notice of additional evidence given by the prosecution.

2. Whether assessors should be discharged when an inadmissible statement is volunteered depends on the nature of the statement, the circumstances in which it has been admitted and the circumstances of G the case as a whole. The trial judge had not erred in this respect, but as the words complained of may have been admissible as part of the *res gestae* he should have held a trial within a trial to determine the question.

3. The failure to do so, together with aspects of the trial judge's directions to the assessors in the summing up and to himself in his H judgment concerning the words complained of had rendered the trial unsatisfactory and there should be a new trial.

4. It was not a case in which the proviso to section 23(1) of the Court of Appeal Ordinance should be applied.

Cases referred to:

R. v. Peckham (1935) 25 Cr. App. R.125; 52 T.L.R.159.

R. v. Firth [1938] 3 All E.R.783; 26 Cr. App. R.148.

R. v. Wattam [1942] 1 All E.R.178; 28 Cr. App. R.80.

R. v. Weaver R. v. Weaver [1968] 1 Q.B.353; (1966) 51 Cr. App. R.77.

R. v. Palmer (1935) 25 Cr. App. R.97.

R. v. Parsons [1962] Crim. L.R.631.

R. v. Palin [1969] 3 All E.R.689; 53 Cr. App. R.535.

Bharat v. The Queen [1959] A.C.533; [1959] 3 W.L.R.406.

R. v. Beecham [1921] 3 K.B. 464; 16 Cr. App. R.26.

R. v. Cane [1968] N.Z.L.R.787.

R. v. Cooper [1969] 1 Q.B.267; [1968] 3 W.L.R.1225.

R. v. Cooper [1969] 3 All E.R.118; [1969] 1 W.L.R.977.

Appeal from a conviction of murder.

K. C. Ramrakha for the appellant.

G. Mishra for the respondent.

15th December 1971

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

This is an appeal against conviction for murder before the Supreme Court of Fiji sitting at Labasa on the 8th October, 1971. At the trial three of the four assessors gave as their opinions that the appellant was not guilty of murder but guilty of manslaughter on the grounds of provocation, and the fourth assessor gave as his opinion that the appellant was not guilty of murder but guilty of manslaughter on the grounds that he had no intention and no malice aforethought. The learned trial Judge rejected the opinion of the assessors and entered a conviction for murder, and imposed the mandatory sentence of life imprisonment.

The facts may be shortly stated. The deceased, Bidesi alias Papa son of Kallu, an Indian aged about 45 years lived at Balebasoga Labasa in close proximity to the home of the appellant. He was found on the night of the 11th December, 1970 at 9 p.m. or thereabouts at a spot about 16 chains away from the house of the appellant with his right leg almost completely severed. He was taken to Labasa Hospital where he died at 12.45 a.m. on the 12th December, 1970. According to medical evidence the cause of death was massive haemorrhage due to severed right popliteal vessels, that is, the main blood vessels which run at the back of the bones; in the opinion of the doctor their severing was caused by a single blow with a sharp heavy knife.

The notice of appeal contained 8 grounds but at the hearing counsel for appellant abandoned grounds 7 and 8.

The remaining grounds of appeal were argued but for reasons which will appear we propose to deal only with Ground 2 which reads :—

> "The witness Manik Chand said in his evidence that he heard a voice calling out to the effect that Inaith (the appellant) was hitting the deceased; this evidence was inadmissible and prejudicial to the appellant, and the learned trial Judge erred in not discharging the gentlemen Assessors and commencing the trial de novo and thus there was, notwithstanding the subsequent directions of the learned trial Judge, a miscarriage of justice in law and in fact."

It is necessary to refer briefly to the facts. The learned trial Judge found that on the night of the 11th December, 1970 the deceased went to the home of the appellant and consumed some liquor and there was a "quarrel" between them; the deceased became very abusive to the appellant using some most objectionable words. After this "quarrel" the deceased was seen to walk in the direction of his home and towards some bamboo trees. At a spot near these bamboo trees the deceased was found, with the injuries above described, by Chain Singh, Manik Chand, Gaj Raj Singh and Maan Singh. These four last named persons were called by the prosecution to give evidence.

There were no eye witnesses of the infliction of the injuries on the deceased.

Manik Chand had not been a witness at the preliminary inquiry. Notice was given on 25th August, 1971 by the Crown, pursuant to Section 270 of the Criminal Procedure Code (Cap. 14 Laws of Fiji Revised Edition 1967) that it proposed to call him as a witness at the trial in the Supreme Court. The substance of the evidence which the witness intended to give was supplied to appellant. Manik Chand stated in evidence at the trial :—

> "On Friday 11th December, last year, in the evening, I was at home. I had visitors, Maan Singh and his wife. I was in the sitting room. In the evening I heard someone shouting from outside. I went out with my brother and others and saw Papa. When I first saw him he was coming from the direction of Inaith Hussain's house towards our house yelling and shouting. He was under the influence of liquor. He was abusing. When he came close, his breath smelt of liquor. My brother spoke with Papa. When Papa was coming, I saw Inaith Hussain's wife and his wife's brother and Inaith in their compound. I saw Papa first and then saw them. Saw them in their yard, on the flat area after seeing Papa. It was a bright night but not completely clear. I did not see anything in particular about Inaith Hussain. Papa came abusing Inaith and said he was hit by clod of soil by Inaith and said, "Sala, Musalman, today you hit me and I am going to chop you in pieces," Papa said this.
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> Then Inaith came closer and said, "Let him go and I will straighten him out."
>
> We were pacifying Papa not to cause trouble and to go. We sent him away. We pacified him and put him on track and he went away. When he had gone away to some distance, there were other relations of accused there. Some one from them spoke and said, "He is going there." (Witness uses, 'He is going there' in English). Then they advanced towards the way Papa was going.

After we pacified.

Q: When you were speaking to them did you see any of them with anything? A

Objections — leading.

DAVIES :

Not leading, difficulties with witness. B

COURT :

Put it in another form.

Q: When you were speaking to them did you see anything with any of them? C

A: From distance, I have seen Inaith had a knife and I heard a noise. I saw this when Papa had come into our yard and when we pacifying Papa. When Papa was there then I saw this.

When Papa came into my yard then I saw knife in Inaith Hussain's hand. D

I heard after about 8 or 9 minutes, Papa saying: "Inaith hitting me with a knife."

It was at this point in his evidence that learned counsel for the appellant made an application, in the absence of the assessors, to the learned trial Judge to have the assessors discharged on the ground that the statement "Papa saying Inaith hitting me with a knife" was prejudicial to E the appellant. From the record it would appear that learned counsel for appellant argued that as this evidence was not included in the brief of evidence filed pursuant to Section 270 (supra) it was therefore inadmissible and further was highly prejudicial to the appellant. It was conceded by counsel for the Crown that the prosecution had no inkling that Manik Chand would give this piece of evidence and the Crown certainly did F not lead it.

The learned trial Judge considered the application for the discharge of the assessors and for the trial to start de novo; but he refused to discharge the assessors and the trial continued. It is pertinent to note that when the trial was resumed the learned trial Judge made no comment to the assessors as to the admissibility or otherwise of this piece G of evidence which they had heard. Manik Chand continued his evidence and said :—

"Yes, at that time, Inaith had a knife with him. It seemed that he had a knife. It was a bright night and when noise was made then I thought it was a knife. I saw knife from distance.

Q: I put to you, Inaith Hussain did not say anything apart from H that what Papa said was no good.

A: Yes, he did not say anything else.

REX :

A I saw knife when I was 2 chains away. He had come down the slope. When I saw knife at the same time the noise was made."

The learned trial Judge in his summing up to the assessors commented on the evidence given by Manik Chand as follows :—

"The witness Manik Chand (10th P.W.) whose evidence I have just stated did not give evidence in the Preliminary Inquiry in the Magistrate's Court when the accused was committed for trial by this Court. He was called as an additional witness after the prosecution gave notice to call him as an additional witness. In that notice it is stated that this witness was going to say that after the quarrel when this witness was standing in his compound he heard shouting from a distance *"Gaj Raj save me."* Then he ran towards where the voice came from and the others also ran with him. In this Court when he was giving evidence in his examination-in-Chief you will remember him saying that he heard the deceased saying "Inaith hitting me with a knife." At this point I asked you to retire. The prosecution did not anticipate that answer from the witness and they were really surprised when the witness uttered it. There is nothing to show that that answer is not the witness' opinion or belief. It appears it was his opinion or belief and therefore it is inadmissible in evidence I direct you gentlemen to disregard that piece of evidence completely, i.e. the evidence of Manik Chand (10th P.W.) when he said that he heard the *deceased saying "Inaith hitting me with a knife,"* Take this out completely from your mind and pay no attention to it. Treat that as never been said by this witness and don't be influenced by it in arriving at your opinions, that is if you rely on the other evidence of this witness Manik Chand (10th P.W.). But in the light of the evidence of Chain Singh (9th P.W.) and what I have said in regard to the notice of additional evidence, what Manik Chand said that is that he heard the deceased saying "Inaith hitting me with a knife" appears to be a lie. If Chain Singh heard these words "Gaj Raj Singh, Gaj Raj Singh, look somebody is hitting me, these people are hitting, I am hit," and when the prosecution in their notice of additional evidence stated that Manik Chand (10th P.W.) was going to say that he heard shouting "Gaj Raj save me" then what Manik Chand said in this Court must be a lie. Again Manik Chand said that he saw the knife with the accused. Then he said it seemed that he had a knife and when "noise was made then I thought it was a knife." Chain Singh did not see the accused with the knife at all. These are some of the things you must take into account when considering the evidence of the witness Manik Chand."

The learned trial Judge further directed the assessors :—

"Applying this to the evidence of Manik Chand (10th P.W.) if you are in doubts as to his reliability in the sense that if he has told lies in one or two things he might be telling lies in other matters also, the safest course to adopt is to take no cognisance and place no reliance on his evidence at all and reject his evidence completely. These are all matters for you to consider. If you do decide to put reliance on Manik Chand's evidence remember what I said earlier that you must take out of your mind what he has said that he heard the *deceased saying "Inaith hitting me with a knife."* This piece of his

evidence is inadmissible in evidence gentlemen and treat that as no evidence before this Court."

In our view when Manik Chand said "Papa saying Inaith hitting me with a knife" and there was objection to its admission the proper course would have been for the learned trial Judge to hold a trial within a trial in the absence of the assessors. The defence could then test the admissibility of the statement and the learned trial Judge would have ruled on the question of its admissibility. The mere fact that the words complained of were not included in the brief of Manik Chand's evidence submitted pursuant to Sec. 270 of the Criminal Procedure Code does not in our opinion, per se, render the statement inadmissible. One can think of a variety of reasons, any one of which could account for the inadvertent omission or non-inclusion of the said words in the brief of evidence supplied by the Crown. Objection was taken before us that the learned trial Judge did not hold a trial within a trial when objection was taken; nor did he make any comment to the assessors upon the objection until he summed up. In the course of the summing up the learned trial Judge said (inter alia) "It appears that it was his opinion or belief and therefore it is inadmissible in evidence." Later he directed the assessors that what Manik Chand said "must be a lie." In our view the directions given to the assessors that the words complained of were either opinion or belief or lies do not necessarily follow from the fact that they were not included or omitted from the notice supplied to counsel for defence.

In our view the words complained of may well have formed part of the *res gestae* and a trial within a trial should have been held to determine the matter.

It may be argued that the learned trial Judge's summing up on this particular matter was favourable to the appellant and that the Judge's comments worked no injustice or prejudice so far as the appellant was concerned. It is worthy of note that Manik Chand swore in evidence that Papa said to the appellant: "Sala, Musalman, today you hit me and I am going to chop you in pieces." This may be considered as evidence of a threat by the deceased to do bodily harm to the accused. If this evidence was believed one could well ask how would the assessors or the learned trial Judge have treated such a threat on the issue of provocation whch figured prominently in the trial.

Comparing the above piece of evidence with the brief of evidence supplied by the Crown, which is included in the record — it is there claimed that Manik Chand would say and we quote from the substance of the brief, that he heard the accused said 'Papa is swearing never mind what happens today I will chop him into pieces.' This statement is the complete antithesis of the sworn evidence. We appreciate that the brief of Manik Chand's evidence is not, and cannot become, evidence in the trial, but here is a glaring contradiction between what Manik Chand said on oath and what the Crown claimed he would say.

Learned counsel for the appellant urged upon us that the learned trial Judge erred in not discharging the assessors when application was made and that this Court should ipso facto quash the conviction and order a new trial. In support of this submission Counsel relied on the decisions of *R. v. Peckham* [1935] 25 Cr. App. R.125.

R. v. Firth [1938] 3 All E.R.783

A *R. v. Wattam* [1942] 1 All E.R. 178.

We are aware of the general principles enunciated in these decisions, but we would prefer to be guided by the decision of *R. v. Weaver, R. v. Weaver 51 Cr. App. R.77* (which case was not referred to us by either counsel) where Sachs L.J. says at p.82 :—

B "Cases parallel to the present one have been brought before the Court of Criminal Appeal on a considerable number of occasions in the course of the last few years and the modern practice has become well defined. In each of those cases, of course, it has been natural for counsel for the appellant or applicant to cite a trio of cases which are mentioned in *Archibold's Criminal Pleadings* etc., 36th ed., S.603; *Peckham* (1935) 25 Cr. App. R.125; *Palmer* (1935)
C 25 Cr. App. R.97 and *Firth* (1938) 26 Cr. App. R.148. Those cases cannot, however, be looked at in isolation. As already stated, the modern practice evolved in the light of these cases is that in essence, as has now often been said (see for instance a passage which appears in *Parsons* [1962] Crim. L.R.632 whether or not to discharge the jury is for the discretion of the trial judge on the particular facts and the court will not lightly interfere with the
D exercise of that discretion.

It follows, as has been repeated time and again, that every case depends on its own facts. It also, as has been said time and time again, thus depends on the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in the light of the circumstances of the cases as a whole, is the
E correct course. It is very far from being the rule that in every case where something of this nature gets into evidence through inadvertence the jury must be discharged."

We refer also to *R. v. Palin* [1969] 3 All E.R.689 where it is stated at p.691 :—

F "It is to be hoped that for the future counsel will not cite the passage in LORD HEWART, C.J.'s judgment in *R. v. Peckham* to which I have referred. The proper case to be cited when this matter comes up for consideration is the more recent and more authoritative case of *R. v. Weaver, R. v. Weaver.*"

With the above statement of the law we respectfully agree and do not
G conclude, therefore, that the learned trial Judge erred in his ruling in not discharging the assessors at the time when application was made. We believe, however, that at that point of time the learned trial Judge should have held a trial within a trial in the absence of the assessors to decide the question of the admissibility of the piece of evidence in question for the reasons we have given.

H It is the subsequent treatment of this matter by the learned trial Judge in his summing up which concerns this Court. We have already set forth his direction to the assessors as to how the evidence of Manik Chand was to be treated. The Privy Council in *Bharat v. The Queen* [1959] 3 W.L.R. 406 at p.409 says :—

"What is the consequence of the misdirection given by the judge to the assessors? According to Section 246 of the Criminal Procedure Code the trial is by the judge "with the aid of assessors." The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw."

In his judgment the learned trial Judge says: "I have directed myself in the same manner as I have directed the gentlemen assessors."

Dealing with Manik Chand's evidence he says :—

"The witness Manik Chand (10th P.W.) who no doubt was there that night went bit beyond than what he actually heard and saw that night in my opinion. In three respects I find he exaggerated in his evidence and I am doubtful about his truthfulness in those three respects. I have directed myself as I have directed the gentlemen Assessors on this point and I reject the evidence of Manik Chand as unreliable when he said —

(1) That the accused uttered the words "Let him go and I will straighten him out;"

(2) that he saw the knife with the accused;

(3) that he heard the deceased saying "Inaith hitting me with a knife."

In any case this piece of evidence was inadmissible and I have excluded it from my mind as I have directed the gentlemen Assessors. Apart from the above I accept the rest of Manik Chand's (10th P.W.) evidence. In accepting it I have directed myself in accordance with my direction to the Assessors in my Summing Up."

We are of the opinion that the learned trial Judge erred in the way he dealt with the objection as to the admissibility of part of Manik Chand's evidence and in his subsequent evaluation of it as being one of opinion or belief, lies or exaggeration.

The assessors were directed by the learned trial Judge at one stage in his summing up that Manik Chand's evidence "Papa saying Inaith hitting me with a knife" was the witness' belief or opinion. At another stage in the summing up he directed the assessors that the statement made by Manik Chand "appears to be a lie."

In his judgment the learned trial Judge found that Manik Chand was exaggerating and that he was doubtful about his truthfulness on three matters. In our view the learned trial Judge did not direct himself in the same manner on this issue as he directed the assessors. Had a trial

within a trial been held and the statement complained of found admissible and Manik Chand believed as a truthful witness, this may well have resulted in a different approach being taken by the learned trial Judge in the evaluation of Manik Chand's evidence; how this would have affected the opinions of the assessors and the judgment of the learned trial Judge it is not for this Court to speculate.

There is another matter which was not alluded to by either counsel in their argument before this Court and that is in the evidence of Chain Singh who gave evidence in the trial in the Supreme Court immediately before Manik Chand.

In his cross-examination the following questions and answers were given :—

"Q: When you first saw Papa, did he complain accused assaulted him?

A: Yes.

Q: How?

A: In the leg.

Q: Was he limping?

A: No.

Q: Did you see any injury?

A: I did not try to look."

Here was a statement by the deceased that Inaith had assaulted the deceased. This statement tends to confirm the evidence given by Manik Chand which was ruled inadmissible. It is to be remembered that the question eliciting this answer was asked by counsel for the appellant. The answer, of course, may well have been inadmissible.

The point which has to be considered by this Court is — was this a satisfactory trial? We have given anxious thought to the arguments urged upon us by counsel for the prosecution and counsel for the appellant. We have also considered what the "interests of justice" demand or require.

In *R. v. Cooper* [1968] 3 W.L.R.1225 the court of appeal dealt with the provision of section 2(1) of the Criminal Appeal Act 1968 which provides: "The Court shall allow an appeal against conviction if they think (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory."

Widgery L.J. (as he then was) says at p.1228 :—

> "However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end

ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it." A

In considering the expression "if the interests of Justice so require" in Section 23(2) of the Court of Appeal Ordinance (supra) we respectfully adopt the reasoning of the learned Law Lord quoted above in *R. v. Cooper* [1968] 3 W.L.R.1225. We have with some reluctance come to the conclusion that the trial was unsatisfactory. The fault did not lie exclusively with the trial judge who did not have the assistance from counsel to which he was entitled. B

Counsel for the Crown urged upon us that if there were irregularities in the trial, there was plenty of other evidence to warrant the appellant's conviction and that we should apply the proviso to Section 23(1) of the Court of Appeal Ordinance (Cap. 8 Laws of Fiji 1967 Revised Edition). C

Counsel referred this Court to *R. v. Beecham* 16 Cr. App. R.26 and *R. v. Cane* [1968] N.Z.L.R. 787. We have considered these cases and also a case which counsel for the Crown did not mention, *R. v. Cooper* [1969] 3 All E.R.118. At p.122 Sachs L.J. says :— D

"That being the situation, and there having been improper admission of evidence and improper directions as raised in the notice of appeal, counsel for the Crown in his usual persuasive manner sought the application by this court of the proviso (2). On that matter it is sufficient to say that the proviso is very rarely applied in murder cases, and then only when there has in every other respect been nothing which can be criticised in the conduct of the trial or in the summing-up. It is not applied where the summing-up has imperfections such as those, already related." E

In our view and treating this case entirely on its own facts we would be slow to apply the proviso particularly in view of the foregoing statement of the law. In the result we have formed the view that the trial was unsatisfactory and in the interests of justice we propose to order a new trial. For this reason we consider it improper to discuss the other grounds of appeal and the evidence generally. F

The conviction therefore is quashed and a new trial is ordered. G

Appeal allowed.