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SHIU PRASAD

v.

REGINAM

B

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Bodilly J.A.), 13th, 23rd June]

Criminal Jurisdiction

Criminal law—practice and procedure—judge differing from opinions of assessors—necessity for cogent reasons for doing so founded on evidence and reflected in judgment—judge's own emphatic conclusion sufficient reason—Penal Code (Cap. 11) ss.205(1), 228.

C

Criminal law—evidence and proof—confession—earlier statements ruled inadmissible—possibility of continuing effect of earlier occurrences on mind of accused a question of fact for the judge.

If in a criminal trial the learned judge differs from the opinion of the assessors he must have cogent reasons for doing so and those reasons must be founded on the weight of the evidence and reflected in his judgment; the learned judge's emphatic conclusions upon the evidence are all the reasons which he requires for so differing.

D

Where certain statements of an accused person have been ruled inadmissible by a judge on the ground that he was not satisfied that they were voluntary, the question whether a subsequent statement should also be excluded because earlier occurrences may have had a continuing effect upon the mind of the accused, is one for the consideration of the judge as a question of fact.

E

Cases referred to :

Ram Bali v. Reginam Privy Council Appeal No. 18 of 1961 (unreported) (For Fiji Court of Appeal judgment see (1960) 7 F.L.R. 80).

F

Lum Sik v. Reginam Fiji Court of Appeal Appeals Nos. 14 & 16 of 1971 (unreported).

Appeal against a conviction of murder in the Supreme Court.

G

K. C. Ramrakha for the appelant.

D. I. Jones for the respondent.

The facts sufficiently appear from the judgment of the Court.

23rd June 1972

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

This is an appeal against a decision of the Supreme Court sitting at Labasa and delivered on the 3rd March, 1972.

The appellant was charged with murder contrary to section 228 of the Penal Code and with an alternative count of aiding and abetting the suicide of another, contrary to section 205(1) of the Code.

The particulars of the first count read as follows —

> "SHIU PRASAD s/o MANGRU on or about the 16th day of September, 1971, at Lagalaga near Labasa in the Northern Division murdered NIRMALA WATI d/o JUG RAJ"

and the particulars of the second count read as follows —

> "SHIU PRASAD s/o MANGRU on or about the 16th day of September, 1971, at Lagalaga near Labasa in the Northern Division wilfully aided and abetted the suicide of NIRMALA WATI d/o JUG RAJ."

The appellant in the court below pleaded not guilty to both counts.

Certain facts are established beyond any doubt on the evidence and are not in dispute.

The appellant was affianced to the deceased girl with their parents' approval and it appears that, as she was already pregnant by him, the couple had set up house together and at the material time they were occupying alone the same sleeping house. It was a bure and consisted of a single room with one door which could be shut from the inside by an iron bar. Across the roof of the room was a beam. The room contained one bed and on the floor what has been described as a temporary bed, presumably a sleeping mat. Although they were living together in this way, the couple were not on good terms and quarrels took place. At about 11 p.m. on the 16th September, 1971, as a result of a report by the appellant to a neighbour the police were called to the bure. The police arrived at the scene early the following morning. There they found the body of the deceased suspended by a nylon rope attached to the roof beam of the bure. The rope was tied round the deceased's neck and her body was suspended in such a way that she was in a sitting position with her legs on the floor but her buttocks raised from the level of the floor some three or four inches. Her tongue was protruding and blood had dripped from her mouth. She was dead. The one bed in the room was standing against the wall of the bure and there were marks on the floor showing that the bed had recently been dragged from its position by the wall to a position underneath the roof beam and had then been dragged back again to its original position. In addition to the blood on the mouth of the deceased there was also some blood on the floor of the bure some two and a half feet away from where the body was suspended. Dr. Shaukat Ali, the fourth prosecution witness, who visited the scene and examined the body in the presence of the appellant, spoke to the appellant. The Doctor says this —

> "I asked him (the appellant) where he was and he said that he had been sleeping on the temporary bed on the floor. I asked if he were awakened by any struggling and he said "No." It appeared that the mark on the floor was a drag mark and I asked him (the appellant) if he had dragged the bed and he said "No."

Dr. John Anthony Birch, the ninth prosecution witness, carried out a post mortem on the body the same day and gave evidence to the effect that the cause of death was asphyxia due to strangulation. He did not express an opinion as to whether the strangulation was caused manually or by reason of the rope round the neck.

Those facts are not disputed; and it is not suggested, nor is there any evidence whatever to indicate, that anyone, other than possibly the appellant, or the deceased girl, or perhaps both of them, were implicated in her death.

Having heard all the evidence and determined upon the usual trial within a trial the admissibility of certain statements made by the accused, and having considered the opinions of the assessors, which in this case were not unanimous, the learned trial Judge convicted the appellant on the count of murder. It is against that decision that this appeal lies.

Learned counsel for the appellant has submitted five grounds of appeal. They are as follows —

(1) The learned trial Judge erred in law, and in fact, in directing himself that the assessors had all ruled out the possibility of a suicide and thereby deprived himself of the necessary assistance of the assessors;

(2) The learned trial Judge did not give any cogent reason for differing from the majority opinion of the assessors;

(3) The learned trial Judge erred in law, and in fact, in the trial within a trial in holding that the confessions were admissible;

(4) The learned trial Judge further erred in law, and in fact, in admitting the alleged confession made to A.S.P. Josefa within the trial proper when (a) such confession was by implication ruled inadmissible during the trial within a trial, and (b) the Crown had not sought to adduce such confession as part of its case at any stage;

(5) The learned trial Judge failed in law to direct the assessors and himself properly on the confessions after ruling only certain confessions admissible during the trial within a trial.

It is to be noted that the grounds of appeal do not include a ground to the effect that the learned trial Judge came to his decision against the general weight of the evidence as a whole.

We shall deal with the grounds of appeal seriatim although counsel for the appellant argued the first ground separately and the remaining grounds together.

The first ground of appeal is directed to a passage in the judgment of the learned trial Judge where he says :—

"The opinions which the Gentlemen Assessors gave were these: The first and second Gentlemen Assessors gave as their opinion that the accused was guilty of murder. The third Gentleman Assessor, on being

asked for his opinion of the first count of murder said "I have a doubt about murder." I, therefore, recorded as his opinion that the accused was not guilty of murder. When the third Gentleman Assessor was asked for his opinion of the second count of aiding and abetting suicide he replied "Suicide should be washed right out". I, therefore, recorded his opinion on the second count as not guilty. The third and fourth Gentlemen Assessors each replied the same way when asked for their opinions on the first count of murder, each replied: "I have a doubt about murder." When they were asked for their opinions on the second count of aiding and abetting suicide, both the fourth and fifth Gentlemen Assessors replied without hesitation: "Not guilty."

I understand these opinions to mean that all five Gentlemen Assessors are unanimous in the view that this deceased girl did not commit suicide."

In counsel's submission the Assessor did not all express an opinion as to whether or not the deceased had committed suicide. What they did say was directed solely to the matter of the second charge, namely, whether he had aided or abetted the deecased to commit suicide. It was counsel's contention that as the learned trial Judge had misinterpreted the opinion of the Assessors, he had deprived himself of the benefit of their advice on this aspect of the case. Even if the trial Judge was not justified in drawing the inference which he did draw from the opinions of the Assessors, in our view this can have had no effect on his judgment, in view of the overwhelming evidence, accepted by the trial Judge, that the deceased had not killed herself, but had been murdered. Accordingly, we can find no substance in this ground of appeal.

As regards the second ground of appeal, it is true that if a Judge is to differ from the opinions of the assessors he must have cogent reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment.

In this connection it is relevant to cite a passage from the judgment on an appeal from a judgment of this Court to the Privy Council in the case of *Ram Bali v. Reginam* (Privy Council Appeal No. 18 of 1961) which was cited also in the judgment of this Court in the case of *Lum Sik v. Reginam* (Criminal Appeals Nos. 14 and 16 of 1971). In both of these cases the trial Judge had differed from an unanimous opinion of the assessors. The record of their Lordships of the Privy Council was as follows —

> "This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstances that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or of their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence."

That is the case here. Those "emphatic conclusions" expressed in his judgment are all the reasons which a trial Judge requires for differing from the opinions of assessors. The learned Judge, in his lengthy summing up to the assessors, stressed that he would give weight to their opinions, and we have no doubt that he considered them carefully. It is true that in this case in giving the judgment of the court the learned Judge ex-

pressed a reason why he thought that the assessors might have fallen into error and gave that as a reason why he did not accept the majority opinion. He said — A

> "After a very searching enquiry into the whole of the evidence in this case, I find that I have absolutely no doubt at all."

That is his "emphatic conclusion" on the evidence but he goes on to say —

> "It is my view that the opinion of the third, fourth and fifth Gentlemen Assessors stem from the fact that they lost sight of the main issue in the light of all the cross-examination and evidence concerning the alleged assaults by the police. I therefore do not accept their advice but I do accept the advice given by the first and second Gentlemen Assessors." B

That is of course a mere speculation because the assessors gave no reasons as to why they came to their opinions and it is quite beside the point what the Judge may have thought had swayed them one way or another. It is sufficient that the learned Judge was himself, for good reason given, convinced to the contrary. This ground of appeal fails. C

The third ground of appeal contends that the learned Judge erred in law and in fact in admitting the confessions which he did admit. The law on the matter is well known. If a confession is, as a matter of fact, voluntary, then it is admissible as a matter of law. Admissibility therefore depends upon a finding of fact — was the confession voluntary or not? The subject is hedged round with certain well known rules protective to an accused person relating to caution, absence of threats or inducement and other forms of pressure, the presence or absence of which are all matters of fact. Upon the voire dire the learned Judge found on the evidence that certain alleged admissions made by the appellant were inadmissible by reason of something irregular which may have happened in the bure during the early stages of the police investigaton. The learned Judge says in his judgment — D E

> "I do not believe the accused's allegations in Court which I think were grossly exaggerated. I have a doubt about what happened at the bure, however, and I will give the benefit of that doubt to the accused and accept that something happened in that bure which should not have happened." F

As a result of that doubt the learned Judge ruled in favour of the appellant that certain statements were inadmissible as possibly having been improperty obtained but he found the final charge statement admissible, namely that made at 8.45 p.m. on the 17th September, 1971 to Police Constable Bijay Prasad. Counsel for the appellant says that as regards the charge statement that also ought to have been ruled inadmissible because of the continuing effect on the mind of appellant of the original occurrences in the nature of assaults and threats which the appellant says took place in the early stages of the investigation. This is a question of fact for the Judge to decide. The Judge has clearly given very careful thought to the matter and he gives his reasons for finding to the contrary as regards that statement. He says in his judgment, having seen and heard the appellant in the witness box — G H

"I am completely satisfied that that statement (the charge statement was a free and voluntary statement. I am completely satisfied that anything which may have happened earlier had long since dissipated. This young accused man is a man of considerable confidence and I am completely satisfied that he well aired all grievances which he had at the time, and the further grievances which he now alleges are grievances which he has subsequently fabricated."

The statement referred to was that taken after proper caution at 8.45 p.m. on 17.9.1971. The learned trial Judge clearly did not believe the accused, nor did he think that he was a man of timid or yielding character easily to be influenced. All that is a matter for the Judge. He clearly had evidence before him upon which he could determine that issue in the way he did and he clearly gave very careful consideration to it. This court sees no reason to interfere with that finding of fact. This ground of appeal therefore fails.

We come now to the fourth ground of appeal. This ground concerns a certain statement alleged to have been made by the appellant to Assistant Superintendent of Police Josefa at Labasa on the 17th September, at about 8 p.m. or shortly before the statement referred to in the previous ground of appeal. The admission objected to was as follows in the words of Josefa —

"The accused said 'The man with the yellow shirt pulled my hair. Cpl. Net Ram assaulted me. Anyhow, I killed my wife'."

The trial Judge accepted the possible alternative translation of "hit my wife." Counsel for the appellant says that by implication that statement was ruled inadmissible on the voire dire but nevertheless, to use his words "it slipped in on the trial proper." It is true that according to the record it does not appear that on the voire dire any specific ruling was made as regards that admission either one way or the other. However, defence counsel in the court below asked, notwithstanding the ruling of the trial judge to the contrary, that all statements should be put in in order apparently that the assessors should have the benefit of themselves considering them. This was perhaps a somewhat unusual request and the learned trial Judge certainly thought it so, for admissibility is a matter for the Judge alone as he pointed out to the assessors. But the Judge had to accede to it if the defence so wanted. It seems therefore to us to matter little whether this particular item was ruled inadmissible specifically or not because for what it was worth the defence wanted it. The appellant had made various conflicting statements and therefore at the worst it went to credibility only. We do not think that this ground of appeal is of substance and even if in the circumstances of the defence request and the lack of specific ruling by the trial Judge the statement ought strictly to have been excluded as a subject for examination in chief in the trial proper, we think its effect upon the case minimal and its omission could have made no difference to the final result.

That brings us to the last ground of appeal. This ground of appeal does not specify in what way the learned trial Judge is said not to have properly directed the assessors or simself regarding the confessions and learned counsel did not argue the ground specifically. Certain it is that

the trial Judge made it clear in his summing up to the assessors that although any statement was admitted in evidence, which was a matter for him to determine, it was for the assessors, having regard to all the evidence, to determine what weight they thought should be placed upon it. He says, after outlining the evidence relevant to the taking of the charge statement —

> "Gentlemen, you must consider the whole of the evidence and decide how much weight you will attach to the statement made by the accused to Police Constable Bijay Prasad."

We can see nothing objectionable in such a direction — on the contrary it is, in our view, a very proper direction to give. No doubt he applied it to himself, when considering his judgment.

In the result we are satisfied that, on the overwhelming weight of the evidence before him, the learned trial Judge was fully entitled to come to the decision to which he came and to convict the appellant of murder as charged in the first count and that he has shown cogent reasons, reflected in the evidence, for differing from the majority opinion of the Gentlemen Assessors.

The appeal is dismissed.

Appeal dismissed.