MUNI KUMAR AND OTHERS

v.

REGINAM

[SUPREME COURT, 1975 (Stuart J.), 22nd August]

Appellate Jurisdiction

Appeal—criminal appeal—objection raised on appeal to original charge—whether Supreme Court has power to entertain such objection if not originally raised before the Magistrate's Court—Criminal Procedure Code (Cap. 14) s.323.

Criminal law—evidence and proof—confession—must be voluntary—discretion to exclude if in breach of Judges' Rules.

Criminal law—evidence and proof—accused in possession of stolen property shortly after the breaking and entering—whether sufficient for court to infer that accused the housebreaker.

Criminal law—sentence—breaking and entering—severity of sentence.

Criminal law—sentence—whether accused able to call additional evidence on appeal against sentence—Criminal Procedure Code (Cap. 14) s.301 (1).

Where no objection to the charge has been raised at the Magistrate's Court by counsel for the accused, it cannot be put forward before the Supreme Court.

In order to admit a confession statement in evidence where objection has been raised, a judge or magistrate must be assured that the statement was voluntary and then, although voluntary, it was not taken in breach of the Judges' Rules. If he is so satisfied, the statement is admissable in evidence, although if there is a breach of the Judges' Rules associated with the taking the judge or magistrate has a discretion as to whether the statement should be excluded.

Where an accused has been found in possession of stolen goods shortly after the breaking and entering has occured, it is open to the court to infer that he was the housebreaker.

Cases referred to :

R. v. Gregory (1972) 56 Cr. App. R. 441 ; [1972] 2 All E.R. 861.
R. v. May (1952) 56 Cr. App. R. 91.
R. v. Prager [1972] 1 All E.R. 1114 ; [1972] 1 W.L.R. 260.
Uganda v. Khimchand Kalidas Shah [1966] E.A.L.R. 30.
Mohammed Abdul Razak v. R. 19 F.L.R. 1.
R. v. Loughlin (1952) 35 Cr. App. R. 69 ; (1951) 95 S.J. 516.
R. v. Sargeant (1974) 60 Cr. App. R. 74.

Appeal against conviction and sentence for breaking and entering in the Magistrate's Court.

S. M. Koya and *S. Anand* for the 1st to 4th appellants.

5th and 6th appellants in person.

S. R. Shankar for the respondent.

STUART J.: [22nd August 1975]—

A In this case the six appellants were charged before the Magistrate's Court at Ba on two counts, first that on 19th and 20th December 1974 they broke into the Sanatan Dharam Primary School at Saravo, Ba and stole therein certain property set out in the charge the property of the Sanatan Dharam Primary School and secondly that they stole certain property set out being the property of the Sarava Sanatan Dharam High School. They were all arrested the following day and were originally charged with a man called B Jikar Ali, but before the trial of the appellants took place the charges against Jikar Ali were withdrawn and I am informed that he pleaded guilty to receiving property knowing the same to be stolen and was sentenced to 9 months imprisonment suspended for 12 months. Mr G. P. Shankar appeared for different accused from time to time, but when the trial began he represented the accused Muni Kumar son of Munsami, Subhan Ali son of Kunjalbi and Farook Ali son of Gul Hassan and the accused Shabash Khan. Gilivono C Ralivanawa and Amani Koro were unrepresented. The police case relied principally upon confessions made by the six accused, and the confessions were challenged by the three accused who were defended by Mr Shankar, and a trial within a trial was held and the statements ruled admissible. In respect of the three accused who were undefended there was no trial within a trial in respect of their interview statements although Shabash Ali did challenge D his charge statements and a trial within a trial was held, as a result of which the statement was held voluntary.

When the learned Magistrate came to deliver judgment he directed himself that the charge had to be proved beyond a reasonable doubt and that statements made by an accused person to the police were evidence only against that accused and not against any of the others, and then he went through the evidence and found each of the accused guilty and sentenced each to 3 years E imprisonment on the first count and 2 years on the second, the sentences to be concurrent.

The six appellants appealed, the Indian appellants against conviction, the Fijian appellants against sentence. Those who appealed against conviction urged that the Sarava Sanatan Dharam Primary School did not fall within the ambit of section 333 (a) of the Penal Code, under which the appellants F had been charged, and that the conviction was unreasonable and the sentence harsh. Mr Koya who appeared for those appealing against conviction, by leave introduced several other grounds and the appeal falls to be decided upon those additional grounds, the original grounds having fallen by the wayside. Those additional grounds may be summarised:

(a) that the learned Magistrate did not deal with each count separately, or with each accused separately;

G (b) that in dealing with the confessions, he misdirected himself by purporting to exercise a discretion which did not exist;

(c) that in the trial within a trial which was held he did not adjudicate upon the objections urged by the appellant Subhan Ali in evidence;

(d) that as regards the appellants Muni Kumar, Farook Ali and Shabash Khan the evidence did not constitute breaking and entering;

H (e) that as regards the appellant Shabash Khan, since he was unrepresented, the Magistrate should have advised him of his right to object to the admissibility of the confessions;

(f) there was no evidence of ownership;

(g) the charge was defective in that the name of the owner refers to a building and not to a person.

Perhaps I can deal with the last two objections shortly. As to ownership Mr Koya said that since the prosecution charged ownership in the school, they had to prove it. In my view they have done so. One witness refers to a clock donated in memory of his father. It is quite clear to me that the property is owned by the school and that the evidence goes so far. I do not regard *Regina v. Gregory* (1972) 56 C.A.R. 441 as any authority for the proposition Mr Koya was endeavouring to assert here. There ownership was charged in one person, and at the trial it was clear that the person named was not owner. Here in my view there is no doubt but that the school was the owner—in one case the Primary School, in the other the High School. Then he says that ownership is laid in a building not in a person or body of persons. But surely this is frivolous, for it is merely a play upon words depending upon the use of the words 'the said school' in the charge, which after laying the breaking and entering into the Sarava Sanatan Dharam School proceeds to charge the stealing of certain things "the property of the said Sanatan Dharam Primary School." I do not think this objection can prevail. In any event it seems to me that section 323 of the Criminal Procedure Code is fatal to Mr Koya's submission—certainly in so far as the first three appellants are concerned. That section is as follows:

> "No finding, sentence or order passed by a Magistrates' Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect "therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless it be found that such objection was raised before the Magistrates' court whose decision is appealed from, nor unless it be found that, notwithstanding it was shown to the Magistrates' court that by such variance the appellant had been deceived or misled, such magistrates' court refused to adjourn the hearing of the case to a future day:
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> Provided that if the appellant was not at the hearing before the magistrates' court represented by a barrister and solicitor, the Supreme Court may allow any such objection to be raised."

In this case my study of the record reveals no such objection as Mr Koya now puts forward as being raised before the learned Magistrate by those appellants who were represented and it cannot be put forward in this Court.

I turn, then, to Mr Koya's substantive submissions. I will deal first with the points about the confessions. Counsel representing Muni Kumar, Subhan Ali and Farook Ali in the Magistrate's Court challenged the confessions, and a trial within a trial was held, with respect to the three confessions on interview and a further trial within a trial with respect to the three charge confessions.

At the end of the first trial within a trial the learned Magistrate gave a ruling wherein he dealt with each accused separately and held in each case that there was nothing in the confessions which suggested that they were involuntary or taken in breach of the Judges' Rules. He ended up in each case with the words "In the exercise of my discretion I rule the interview was voluntary". There are two things about the ruling to which I would advert. The first is that the use of the term 'involuntary' when he said 'there is nothing to suggest that the interview was involuntary' is an unhappy turn of phrase, for it might suggest that it is for the accused to prove a confession involuntary, whereas of course, it is for the prosecution in every case to prove a confession voluntary. I do not think, however, that in this

case any harm was done for the Magistrate in his judgment in respect of each A appellant stated that he accepted the evidence of the policeman who took an interview statement and it follows that he holds the interview statements to be voluntary. But Mr Koya, as I understand him, says that the learned Magistrate has misdirected himself because he has exercised a discretion which he does not possess. It is, I think, perfectly true that normally the consideration of a confession statement involves the judge or magistrate being assured of two matters, first that the statement was voluntary and secondly, that although B voluntary, it was not taken in breach of the Judges' Rules. If he is satisfied that it is voluntary the statement is admissible in evidence according to law, although if it be that there is some breach of the Judges' Rules associated with the taking of it, the judge or magistrate is entitled to exercise a discretion as to whether the statement should not be excluded. See the judgment of Lord Goddard C.J. in *Regina v. May* (1952) 36 Cr. App. R. 91, 93 and *Regina v. Prager* [1972] 1 All E.R. 1114. But the discretion is not as to whether the C statement should be admitted, it is as to whether the statement should be excluded. Perhaps in saying this, I am being pedantic but it is a distinction which has been canvassed in this appeal at some length. However, I am satisfied after examining the confessions and the magistrate's ruling that the appellant's arguments are correct in law albeit they might have been more felicitously expressed.

When it came to the charge statements, the first appellant Muni Kumar D did not challenge his charge statement. The second appellant Subhan Ali did. Again there was a trial within a trial and at the end of it the magistrate ruled that the statement was voluntary. Mr Koya complained that he had made no ruling upon Subhan Ali's allegation that the statement was induced because he was promised that he would be a Crown witness. I do not agree. The magistrate did not believe the appellant and he held the statement to be voluntary. Later on in his judgment he stated that he accepted the evidence E of Constable Abdul Settar, who took the charge statement from Subhan Ali.

The third appellant Farook Ali did not challenge his statement, and so far as he is concerned, since he was represented, the absence of challenge must be held against him. The fourth appellant Shabash Khan, who was unrepresented did challenge his charge statement and again a trial within a trial was held. The appellant said he was assaulted but that he did not complain F or seek medical aid. The magistrate rejected his evidence and held that the statement had been made voluntarily.

Then Mr Koya says that the three accused persons who were not represented were not advised as to their rights in respect of their statements. I am not prepared to accept that. It is true that there is nothing on the record to show that they were so advised in respect of the interview statements, save that Shabash Khan was asked whether he understood what the police G corporal had said, and stated that he had understood it. He was invited to ask the corporal questions but did not do so. The two Fijians also clearly were asked whether they wished to challenge the interview statements and both said they had nothing to say regarding the interview. The fourth appellant Shabash Khan did challenge the charge statement, and a trial within a trial was held, and the statement held to be voluntary and admitted. It is clear also from the record that the two Fijians were each asked whether H they challenged the charge statements. I am not prepared to hold that the magistrate did not advise the accused persons as to their rights in connection with these statements. The accused persons were clearly given an apportunity to challenge the statements, and with one exception they did not wish to do so. I am not persuaded that the magistrate had to do more. I must also

observe that in so far as Mr Koya's submissions apply to the two Fijian accused, they are quite gratuitous, for those accused have not appealed against conviction but only against sentence. I hasten to add that they are none the worse for being gratuitous.

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I pass to what is in effect, Mr Koya's main complaint about the trial, namely that the magistrate did not deal with each count against each accused separately. I will deal with each appellant separately in an endeavour to ascertain what the magistrate did do. The evidence against the first accused Muni Kumar was principally that of Sergeant Salikram who took an interview statement wherein the accused admitted that he went with four others to the primary school, and he stood by while one of the others cut the telephone wire, and he and that other man took out two tube lights. Likewise he cut out tube lights and a big light at the high school. Four electric fuses were found in his house. In my view that is sufficient to fix the accused Muni Kumar with each of the offences charged, and the magistrate clearly dealt with Muni Kumar separately from any other accused. I am unable to see, likewise that he did not deal with him separately as to each count, although in accepting the evidence of Sergeant Salikram he says that Muni Kumar admitted to the sergeant in his interview statement stealing from the two schools and in his charge statement Muni Kumar admitted stealing from both schools.

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The evidence against the second appellant Subhan Ali is also given by Sergeant Salikram who took an interview statement from him. He admitted that he broke into the school building—and it is clear that he is referring to the primary school—and he admitted that he (with others) stole a typewriter, a clock, chalk, forks and other things. He also admitted that he was present consenting when the tube lights were taken from the High School. The magistrate accepted both these pieces of evidence, and has said so separately. In his charge statement, of course, Subhan Ali admits that he broke into the primary school. The magistrate dealt with that separately.

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Mr Koya made some point of the fact that in giving evidence on oath in the trial within a trial of his interview statement Subhan Ali said that he had not broken into the school, and complained that the learned magistrate should have dealt with that in his judgment. It seems to me that it is sufficient answer to say that the magistrate accepted the sworn evidence of Sergeant Salikram that Subhan Ali had admitted the breaking, and further the sworn evidence of Constable Abdul Sattar supported by the signed statement of Subhan Ali that he broke into the school. In so doing he inferentially rejected the sworn evidence of Subhan Ali in the trial within a trial. I can see no reason why he should have specifically referred to that evidence. I do not think that *Uganda v. Khimchand Kalidas Shah* [1966] E.A.L.R. 30, 34, to which counsel for the appellant referred, assists him. In that case there were admittedly points of appeal which had been argued before the Supreme Court and not dealt with because the decision of the Court on another point rendered their consideration unnecessary, and when the decision of the Supreme Court was overruled, it became necessary for the matters which had not been considered to be dealt with. The case was therefore remitted to the Supreme Court. That is not the case here. Mr Koya is saying that because the magistrate did not mention matters in his judgment he did not consider them. I do not accept that at all. It is true that there may be cases in which a magistrate's failure to deal with some particular piece of evidence constitutes a serious omission. But this is not one of them. Perhaps the judgment of the present Chief Justice in *Mohammed Abdul Razak v. Reginam* 19 F.L.R. 1 is instructive in this regard.

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As to the third appellant Farook Ali, he admitted to Sergeant Salikram A that he had acted as watchman while others went to take lights from the school, and while he was waiting his colleagues brought the typewriter from the Primary School. Then he went with others to the High School, and although he may not have cut the lights, he assisted to bring them away. The Magistrate dealt with that evidence and accepted the evidence of the sergeant. Then Farook Ali made a statement to Constable Jag Prasad on being charged, and admitted stealing property from both schools. The Magistrate also accepted B that evidence. Here again it seems to me that the third appellant's case has been evaluated separately from those of his co-accused, and each count considered separately.

Then I come to the fourth appellant, Shabash Khan. He was interviewed by Corporal Ram Sundar Singh on the day following the offence, and he admitted that he went with others to break into Sarava Primary School. He climbed the telegraph post and cut the wire while others went to the school. C After cutting the wire he went to the school. Then he went with others to the High School where he watched while others went to steal and he then came back. Then this appellant got into a car with the others and the stolen property. Then when he was charged by Police Constable Naresh Chand he admitted stealing. Here again the Magistrate dealt with the offences charged against this accused separately from the other accused and he dealt with each count separately. He dealt similarly with the two Fijian accused and noted that D they had made unsworn statements while the other accused had remained silent, as they were entitled to do. When he had dealt with each separately then he summed up the evidence shortly as a whole, and recorded what he has called a finding of the facts. I can see no objection to that.

Mr Koya also submits that there is no evidence of breaking, but only of theft. But there is evidence in the appellant Muni Kumar's interview statement that he was asked 'Who broke into the school?' and he gave the names of E others. Then he was asked 'What were you doing?' He answered 'I was with Shabash who climbed the telephone wire pole and cut the wire'. Then he was asked 'Did you go near the school building?' The answer was 'Yes later I went and only cut one tube light from outside.' In my view that is sufficient to make him guilty of the breaking. If that were not enough there is also the fact that he is found in possession of property stolen from the school soon after it was broken into—see *R. v. Loughlin* (1952) 35 Cr. App. R. F 69, where Lord Goddard, the Lord Chief Justice of England, delivering the judgment of the Court of Criminal Appeal said at p. 70 :

> "Now it is too often the case when a man is charged with housebreaking and the evidence against him is that soon after the breaking and entering he is in possession of the property that the Court directs the jury that there is no evidence that he broke and entered, and "tells the jury to G concentrate on the receiving. That is not the law. If it is proved that premises have been broken into, and that certain property has been stolen from those premises and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which a jury can infer that he is the housebreaker or shopbreaker..........It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking."

H So with the appellant Muni Kumar. There is evidence that the school was broken into. The appellant was found the following day with goods belonging to the school in his possession. Not only so, but he admitted that he had stolen them. In these circumstances it is unnecessary to enter into refinements of 'breaking'. Similarly in the case of Farook Ali who watched to give the

breakers warning and when they brought the spoil helped to load it into Jikar Ali's car. Shabash Khan admitted in his interview statement that he told Jikar Ali that he and others were going to break into Sarava School, and he went there and cut the telephone wires and then went up to the school. In each case there is evidence from which the Court could infer that the appellants were implicated in the breaking into the school.

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Then Mr Koya suggested that the magistrate had not considered the unsworn statements of the two Fijian accused. They have not appealed against conviction and this point is strictly speaking, not open to them. In my view, however, the magistrate did consider their unsworn statements. He refers to the fact that they made them, and thereby I consider that he had them in mind in writing his judgment. I would therefore hold that the appeals against conviction fail.

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I come to the question of sentence. Mr Koya made application under section 301 of the Criminal Procedure Code for leave to call evidence about sentence. He was invited by this Court to produce authority which might assist the Court in deciding whether this course should be adopted. He has not done so. Some assistance may be obtained from *R. v. Sargeant* (1975) 60 Cr. App. R. 74 from which it is clear that evidence can be heard if the police statement as to antecedents is challenged. That, however, is not the case here, for no evidence of antecedents was given. All the accused were given an opportunity to address the Magistrate's Court in mitigation. All of them mentioned various family circumstances, and the effect a custodial sentence might have on their respective families. This is a factor which is often drawn to the court's attention, and in my view the proper answer is that given in several instances namely, it is a pity that those considerations were not taken into account by the accused before they set out on their mission. The association of the appellants with Jikar (Zikar) Ali has also been drawn to the Court's attention. It is certainly curious that the same Court which sentenced the appellants to three years imprisonment should have been able to impose a suspended sentence upon Jikar Ali, even allowing for the fact that he was charged with the lesser offence of receiving stolen property. Unfortunately he appeared before the Court before the appellants had been tried and he pleaded guilty. I was informed that the prosecution intended to seek leave to appeal against the sentence on Jikar Ali and indeed, an application has been made. The English Court of Criminal Appeal has pointed out that the fact that there is a disparity in sentences is not necessarily a ground for interfering with sentence. What has to be shown is that the appellants have received too long a sentence. Sitiveni is 21, but the other appellants are 18 and 19. The evidence suggests that they may have been instigated by a teacher at the school. On the other hand, acts of vandalism by young men are becoming far too common. A school is normally not occupied at night, and would not be expected to be guarded. I am not prepared to have evidence called under section 301 of the Criminal Procedure Code. I have, however, come to the conclusion that the sentences are too severe. The normal range of sentences for breaking and entering lately has been between eighteen months and two years. It is very true that those breakings have become very common and I can well understand that damage to a school meets with the disapproval of the community at large. These appellants are quite young and were treated as first offenders but a custodial sentence is called for. The sentence of the Magistrate's Court is set aside and each appellant is sentenced to two years imprisonment on the first count and fifteen months imprisonment on the second count, the sentences on the first and second counts to be concurrent.

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Appeals against convictions dismissed; appeals against sentences allowed to extent of a reduction in the term of imprisonment.