

DAVENDRA SINGH

v.

THE STATE

[COURT OF APPEAL, 1999 (Tikaram P, Casey, Thompson JJA)
14 May]

Criminal Jurisdiction

Crime: evidence and proof- pathologist's report- whether admissible as a business record- Evidence Act (Cap 41) Sections 2 (1) & 4.

Crime: procedure- summing up- whether confined by arguments propounded by the parties- Criminal Procedure Code (Cap 21) Section 299 (1).

The Court of Appeal upheld the High Court's ruling (see 43 FLR 257) that a pathologist's report prepared at the CWM Hospital was admissible as a business record. It dismissed the appeal and confirmed that where it is complained that a summing contained comment on a feature of the evidence not previously alluded to by counsel the onus lies on the appellant to show that as a consequence there was a miscarriage of justice.

Cases cited:

Commissioner of Taxation v. Silverton Tramway Co. Ltd. (1953) 88 CLR

Evans (1990) 91 Cr. App. R.173

R. v. Crayden [1978] 2 All E.R.700

R. v. Cristini [1987] Crim. L.R.504

R. v. King (1985) 17 A. Crim. R.184

R. v. Lunn [1985] Crim. L.R. 797

R. v. TJW [1989] 1 Qd. R. 108

R. v. Torney (1983) A. Crim. R.437

Appeal against conviction in the High Court.

A.Gates for the Appellant

J. Naigulevu for the Respondent

Judgment of the Court:

The appellant was convicted of murder and the mandatory sentence of imprisonment for life imposed. He now appeals against the conviction

The appeal proceeded on two grounds. They were:

- "1. That the learned judge erred in admitting into evidence the post mortem report of Dr. Alera when its admission was to be governed by section 191 of the Criminal Procedure Code and not the Evidence Act.

- A 2. That the learned judge erred in putting to the assessors in the closing stages of the summing up an alternative basis of liability or explanation of facts not relied on by the prosecution.”

B The date on which the offence was alleged to have been committed was 25 December 1994. Dr Alera, a pathologist, was then employed by the government of Fiji as a medical officer at the Colonial War Memorial Hospital in Suva. In that capacity he conducted a post mortem examination of the body of the alleged victim (“Prasad”) at the hospital; he then prepared and signed a report of the examination. The report was in the form prescribed previously, but not currently, by the Inquests Rules. By the time the trial commenced on 16 September 1997 Dr. Alera was no longer employed by the government of Fiji, had left Fiji and had declined a request that he return to give evidence at the trial.

C It is pertinent to observe at this point that that situation might well not have arisen if there had not been such an appallingly long delay before the case came on for trial. Although in this instance it is not a ground of appeal that the delay prevented the appellant receiving a fair trial, the period was such that that could have occurred. It is most unsatisfactory that there should be such delays in bringing accused persons to trial when they are within the jurisdiction and thus available for trial.

D Section 191 of the Criminal Procedure Code authorises the admission a report by a medical officer as evidence at a trial if notice of intention to adduce it is given and if the accused person consents to its admission. In this instance consent was refused. After hearing argument by counsel whether the report was admissible under section 4 of the Evidence Act (Cap.41), Pain J. admitted it into evidence on that basis to the extent that it contained statements of fact but not in respect of the opinions expressed by Dr. Alera as to the significance of those facts. Its admission is the subject of the first ground of appeal.

Section 4 of the Evidence Act, so far as is relevant in this appeal, provides:

F “4. In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -

G (a) the document is ... a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied ... by persons who have ...personal knowledge of the matters dealt with in the information they supply; and the person who supplied the information recorded in the statement in question is ...beyond the seas...”

Section 2(1) of the Evidence Act gives the word “business” an extended meaning

for the purposes of the Act in the following terms:

“ ‘business’ includes any public utility or undertaking carried on by any city or town council or by any other board or authority established under the provisions of any Act and any of the activities of the Permanent Secretary for Posts and Telecommunications.”

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Section 4 and the definition of “business” are clearly based on similar provisions of the Criminal Evidence Act 1965 (U.K.). The English Court of Appeal held in R. v. Crayden [1978] 2 All E.R. 700 that, for the purposes of that Act, a medical record kept by a national health service hospital was not a “record relating to trade or business” because it had no commercial connotation. However, courts of Australian States have held that a public hospital is a “public utility” and therefore “a business” for the purpose of their legislation which gives “business” a similar extended meaning (see Bates v. Nelson (1963) and R. v. TJW [1989] 1 Qd. R. 108). Mr. Gates did not contend that Pain J. could not properly have to come to the conclusion that the Colonial War Memorial Hospital was a business for the purposes of the Evidence Act. We are satisfied that he was entitled to do so. It was a “public hospital”, as defined in section 2 of the Public Hospitals and Dispensaries Act (Cap.110); it was maintained out of public funds. By virtue of r.4 of the Public Hospitals and Dispensaries Regulations the Permanent Secretary for Health was required and empowered to exercise general control over its organisation and management. In Commissioner of Taxation v. Silvertown Tramway Co. Ltd. (1953) 88 CLR 559 at 565 Dixon C.J. observed that the word “authority” had “long been used to describe a body or person exercising power or command”. The Permanent Secretary has the power of control by virtue of the Act; so the hospital can properly be held to be a business for the purpose of the Evidence Act.

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Dr. Alera’s report was clearly compiled in the course of the hospital’s business. Section 4 of the Inquests Act (Cap.46) makes clear that it is part of the functions of a public hospital to provide the facilities for a medical officer to perform post mortem examinations of persons dying suddenly and unexpectedly. Mr. Gates did not suggest that it did not relate to the business of the hospital. Both because Prasad was a patient in the hospital from shortly after suffering his injuries until his death, and because in performing the post mortem examination Dr. Alera was undertaking his duties as a member of the staff of the hospital, there can be no doubt, in our view, that the report related to the business of the hospital. The report, therefore, came within the terms of section 4.

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However, Mr. Gates submitted that, even if it did so it was nevertheless not admissible in evidence at the trial because section 4 is overridden by section 191 of the Criminal Procedure Code. He suggested that the Criminal Procedure Code provides a full and self-contained set of rules for the trial of criminal cases. With respect, the first four words of section 4, i.e. “in any criminal proceedings” make it evident that that is not so. The provisions of section 4 expressly apply to - and

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A only to - criminal proceedings. Mr. Gates also submitted that section 191 overrides section 4 because its provisions cover the same matters as section 4 but are more specific. In our view, that is not so; the provisions are not *in pari materia*. Documents which meet the description in one section do not necessarily meet the description in the other, and vice versa. Further, the criteria of admissibility provided for are substantially different. We are satisfied, therefore, that Pain J. did not err in admitting Dr. Alera's report on a factual basis as evidence at the trial. The appeal cannot succeed on the first ground.

B The second ground concerns a part of Pain J.'s summing-up to the assessors in which he referred to certain evidence which had been given during the trial and suggested an explanation of how that evidence might be consistent with the appellant's guilt. There was evidence that Prasad had been alive and well at a certain time, that later he was found lying injured on the floor in the lounge of his flat, that throughout the whole of the period between those two times the
C appellant had been in the flat and that, as far as was known, the only other person in the flat during that period was Prasad. The appellant gave evidence that he had gone to sleep in the bedroom of the flat, leaving Prasad in the lounge, and that, when he had woken, he had found Prasad lying on the floor but had not realised that he was injured. Prasad's grandson gave evidence that he saw a
D man bending over and pushing or striking downwards with his hand at the place where Prasad was later found lying and that, when he subsequently went into the flat, the man was there. He demonstrated to the Court what he saw. There was other evidence from which it could properly be concluded that the appellant was the man he saw. When prosecuting counsel addressed the court, he submitted that what the grandson had seen was the appellant striking Prasad and causing the serious injuries which he was subsequently found to have suffered. In response
E Mr. Gates submitted that someone bending down and punching in the manner demonstrated could not have caused the bone fractures which Dr. Alera found that Prasad had suffered.

F Pain J. in his summing-up suggested that the assessors might agree with that submission of Mr. Gates and that, if the appellant had caused those injuries, he must have used greater force than any of the witnesses observed. He then continued:

G "....one possible explanation is that [Prasad] was lying on the floor injured and moaning with pain. Further, the injuries subsequently found were within a smallish area of the body, but in separate locations. The forehead, the area around the eyes, nose and cheek bone, the lips, the shoulder and the ribs. This may suggest more than one blow. However, nobody has given an opinion and possibly nobody can say at what time throughout this period the various injuries were inflicted. Could one or more of them have been inflicted at the beginning and immediately disabled [Prasad] or were they inflicted over a period of time?"

Neither counsel had suggested that explanation in their closing addresses. Mr. Gates has referred to a number of judgments of appellate courts where convictions have been set aside because the trial judge, without notice to defence counsel, introduced in his summing-up an issue not raised by counsel or suggested a different basis on which the accused person might be found guilty, e.g. as an accessory rather than as a principal offender (e.g. R. v. Lunn [1985] Crim. L.R. 797 and R. v. Cristini [1987] Crim. L.R.504; R. v. King (1985) 17 A. Crim. R.184.) His having done so was held to have constituted a procedural irregularity serious enough to produce a miscarriage of justice. However, in Evans (1990) 91 Cr. App. R.173 the English Court of Appeal observed that, in directing the jury, the trial judge is “not confined to the arguments which are propounded by the prosecution on the one hand or the defence on the other” and that “providing the matters with which he deals are matters which have been given in evidence, it is open to him to comment on them”. Likewise in R. v. Torney (1983) A. Crim. R.437 the Court of Criminal Appeal of New South Wales held that the onus was on the appellant to show that there had been a miscarriage of justice and that there was no reason why a trial judge should not draw attention to the processes of logical thinking which the jury might well themselves have engaged in. We are satisfied that in the present instance the learned trial judge did no more than refer to a view to which logical consideration of the evidence by the assessors might have led them, even without his suggesting it, and that his doing so could not have resulted in a miscarriage of justice.

Accordingly, the appeal cannot succeed on either ground and must be dismissed.

Before we conclude this judgment, however, it is necessary to refer to a matter brought to our attention by Mr Gates. After the appellant’s conviction, Mr. Gates requested by letter a copy of Pain J.’s summing up. The Chief Registrar replied that “the current criminal practice of this Court is that summings up are only typed for the purposes of an appeal”. That practice is clearly wrong. A barrister and solicitor advising a convicted person whether or not he has grounds for appealing against his conviction needs to be able to read the summing up before he can give that advice. Further, section 299(2) of the Criminal Procedure Code provides that, where the trial judge does not write a judgment but simply adopts the opinions of the majority of the assessors, the summing up and the judge’s decision are collectively to be deemed to be the judgment of the court for the purposes of section 157 of the Code. Section 157 requires that upon application a copy of the judgment is to be given to the accused person without delay.

Decision: Appeal dismissed.