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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 10 of 1983

Between:

SUNIL KUMAR s/o Shiri Dayal — Appellant

- and -

R E G I N A M — Respondent

G.P. Shankar for the Appellant
D. Thorley for the Respondent

Date of Hearing: 31st October, 1983.
Delivery of Judgment: November, 1983.

JUDGMENT OF THE COURT

Jeffries, J.A.

Appellant was convicted of murder in the Supreme Court of Fiji, sitting at Lautoka, following a 13 day trial which was completed on 9th February, 1983. The majority opinion of the three assessors was "guilty of murder", with which the learned trial judge concurred, and convicted appellant of the offence of murder, as charged.

He was sentenced to imprisonment for life. He appeals against the conviction and sentence.

The facts are these. The victim was a 14 year old boy named Mukesh Chand. He lived with his parents and other relatives at Field 40, Lautoka. At the date of his death on 7th April, 1982, he was a high school student. Appellant lived in a house with his wife and other relatives within very few yards of the victim's home. On 8th April, 1982, the victim's body was discovered by a workman near a rum factory. His clothes were in some disarray, with his trousers lowered around his buttocks' region. Medical evidence called at the trial established death resulted from multiple stab wounds to the body.

Appellant was first interviewed by a police officer on 22nd April, 1982 at the Lautoka Police Station. The officer made notes for himself of the interview, the contents of which were denials by appellant of any involvement in the victim's death. He sought to establish an alibi for the events of that day. He was released, but re-interviewed on 25th April, 1982 when he again, at first, repeated his earlier denials, but on threat of confrontation with witnesses, the Crown case was that he recanted and made a full confession in oral admissions and a written statement.

The facts as recounted in the admissions of appellant are now briefly set out. On the morning of 7th April appellant said he overheard the victim's aunt instructing him to make contact with her husband because she was unwell and required attention. Appellant understood this would mean a bus journey for him and he determined to synchronize his movements so as to meet the victim. Even at that point appellant nurtured feelings of animosity towards the victim arising out of alleged intrusion into appellant's private affairs by teasing and insolent remarks when, appellant claimed, the victim had observed appellant assaulting his

wife. Before leaving home appellant armed himself with a knife, whose handle had been especially encased in wire by him to prevent finger imprinting. That knife was recovered within a few yards of the victim's body with human blood on it although no blood grouping analysis could be performed. There was other independent evidence concerning the knife, and wire, linking them to appellant.

The contrived meeting at the bus terminal took place and appellant sexually propositioned the victim, which he said he later accepted. After a bus ride they both alighted and walked to a spot not far from where the victim's body was found. There, according to appellant's statements, he sodomised the victim. Immediately following the act appellant said he confronted the victim with his offensive conduct at the house and received from him what amounted to cheeky retorts. He said he thereupon struck the victim about the mouth and then assaulted him with the knife he was carrying producing wounds which resulted in loss of blood and death. Before leaving the body he removed the wrist watch which he said he sold later.

Appellant was arrested and charged with murder being an offence contrary to section 199(1) of the Penal Code, Cap. 17. He denied the charge and the trial took place as recounted above. There was some circumstantial evidence, such as the knife and wire, linking appellant with the crime, but undoubtedly the central evidence for the Crown comprised the oral and written confessions of appellant given to police officers more than two weeks after the offence was committed.

Although five grounds were advanced, two were abandoned at the hearing, and arguments for appellant

proceeded on the following grounds :-

1. THAT the learned trial Judge erred in law and in fact in admitting the alleged confession of the appellant, having regard to the fact that the appellant was in an unlawful custody and the method or manner in which he was interrogated and all other facts and circumstances of the case.

2. THAT the learned trial Judge erred in law and in fact in not directing the assessors on the issue of manslaughter since there was sufficient material before the Court to establish the required elements of manslaughter.

3. THAT the learned trial Judge's direction on the alleged lies told by the appellant is incorrect in law.

Ground 1 - Admissibility of Confession

For convenience of argument this ground subdivides into two parts, namely, first, that appellant was in unlawful custody at the time the confessions were given, and, secondly, the method, or manner, in which he was interrogated made the statements involuntary; and there was, moreover, unfair treatment at the hands of the police officers. It was submitted for these reasons the statements ought to have been excluded.

before dealing with the arguments on this ground it is necessary to refer in greater detail to facts. Appellant was first interviewed on 22nd April, 1982, at the Lautoka Police Station. He then made exculpatory statements which were the subject of notes by the officer. He was released.

The police say that around 9a.m. on 25th April, 1982, they went to his home and it was not in dispute that

he went willingly with the officers to the Lautoka Police Station where they arrived just before 10a.m. Appellant's recollection was that he was collected from his home earlier, but that is not really in issue. The police evidence is that he remained in the Police Station all day without being questioned, and that began at around 10p.m.

DSP Salik Ram was investigating officer in the case, and in charge of the interrogation. He again recorded notes in question and answer form which were produced in the lower court. They recorded a repetition of the denials first given on 22nd April, but on being threatened with confrontation by witnesses who allegedly supported appellant's alibi he recanted, and then there followed a full confession of the events which led to the killing of the victim.

At the beginning, and at several intervals in the course of interrogation appellant was cautioned by DSP Salik Ram pursuant to Rule II of the Judges' Rules. There was a break for about 45 minutes at 11.18p.m. and the interview continued shortly after midnight. The formal interview was terminated at about 1.45a.m. and appellant went willingly with police officers to the scene of the killing where he gave an account of the events and was able to point in the direction he threw th knife, and it had been found in that direction when an area search had taken place. He took the officers to where he had obtained the knife, probably by theft some years earlier, and to another house where he had used an emery wheel to grind the knife. He also had told the police from whom he had obtained the wire used on the handle. The party returned to the Police Station and in the early hours of the morning the appellant was charged with murder. When asked if he wished to make a statement he said he did and then made a written statement confessing fully

to the crime.

Admissibility of the statements was challenged at the proper place in the trial, and thereafter in the absence of assessors a trial within a trial took place. The Crown's evidence was in accordance with the facts already set out. The evidence of appellant himself was very different. He said the interrogation of him on 25th April commenced shortly after his arrival, probably between 12 and 1p.m. He said he again attempted to present his denials, but was subjected by DSP Salik Ram, and others, to beatings, and threats of torture and violence if he did not confess. Among other things he alleged his head was banged against the wall which produced damage to the wall, and that a blanket was wrapped around his mouth to prevent him calling out. He also made allegations of being forced to adopt a difficult posture whereby he was ordered to place his hands between his legs, hold his ears and raise his buttocks. In the course of these beatings he alleged his shirt and trousers were damaged and that replacements had to be obtained from his home. Some independent evidence was called in the voir dire to support his allegation about the clothes. He did not give a precise starting time but said the beatings continued until about 1-2a.m. the next day.

The learned trial judge dealt fully with the evidence given at the trial within a trial and quite clearly rejected the accused's version of assaults, and the suggestion that the statements were fabricated by police from information in their possession. He also rejected allegations that the statements had been obtained by unfair or oppressive means, but not without recording concern over the fact appellant was kept at the Police Station for some 12 hours before interrogation began, according to the police. At this point he even made a direct finding that he thought the effect of

this must have been that the appellant was at that time in police custody. We will return to this issue. With that ruling the trial continued with the result already recorded above.

We deal with custody at the time of interrogation. First, he was not formally taken into custody by arrest. As stated earlier he went willingly with the officers to the Police Station on 25th April. We think the facts of this case are materially different from Daulat Khan v. Reginam (Unreported, Fiji Court of Appeal, Criminal Appeal No. 3/76, 16 March, 1976). It was decided in the English Court of Appeal in R. v. Houghton and Franciosy (1979) 68 Cr.App.R. 197 the police may not arrest a person solely in order to question him. Also appellant made no attempt to leave the police station. DSP Salik Ram said accused never asked for interview to be stopped. We think what brought the trial judge to declare in the course of his ruling on the voir dire that he was in effect in Police custody was his retention at the station for 12 hours before interrogation began, without a satisfactory justification for that long period. We on this Court share the unease of the trial judge at this police procedure and hope the authorities will take such necessary steps to ensure it is avoided wherever possible. Having said that questioning in custody, on certain conditions, is permitted by Rule I of the Judges' Rules. We are also satisfied the trial judge was very much aware of the effect the long wait might have had, and would have given it the proper weight in exercising his discretion on overall admissibility. See R. v. Convery /1968/ N.Z.L.R. 426.

We come now to the question of the voluntariness of the admissions. First some observations on the confessions

themselves. They were given after quite vehement denials by accused of any involvement in the crime. The effect of these denials, as lies is dealt with hereafter. The confessions are quite unambiguous in their content, and if accepted are to the crime of murder. They contained much corroborative detail which in the circumstances of this case could hardly be otherwise in the possession of the police. The absence of other direct evidence coupled with little circumstantial evidence has already been commented upon. The point of departure for appellant from denial to confession occurred as a result of an impending confrontation with witnesses whose relevance arose out of appellant's own previous denials and advancement of alibi. On its face that furnishes a reasonable explanation for such an apparently dramatic switch of stance.

It is contained in the Judges' Rules, that a suspect is able to be questioned after suspicion is aroused if he is cautioned that he is not obliged to say anything unless he wishes to do so, and the results if he does so choose. The record shows appellant was on several occasions on the 25th and 26th April, administered this caution. However, the allegation against the police in this case goes beyond mere breach of the Judges' Rules to accusations of straightout violence, actual and threatened, to obtain the confessions which are in fact untrue.

The voluntariness of the confessions was a very live issue at the trial. The common law evidential rules applied, and interpreted in the light of the Judges' Rules of 1964, as amended, impose certain limitations on the mode of interrogation acceptable in the courts. It is clear law, and has been for a very long time, that a confession obtained through violence, actual or threatened, must be excluded

irrespective of its truth, or reliability. This has recently been reaffirmed in the Privy Council in Wong Kam-ming v. The Queen [1980] A.C. 247, 261; [1979] 1 All E.R. 939, 946 in the judgment of Lord Hailsham of St. Marylebone.

The basic control over admissibility of statements is found in the evidential rule that an admission must be made voluntarily, i.e. not obtained through violence, fear of prejudice, oppression, threats and promises, or other improper inducements. See dictum of Lord Sumner in Ibrahim v. R. [1914-15] All E.R. 874 at 877. It is to the evidence the court must turn for an answer on the voluntariness of the confessions.

The defence challenged the admissibility of the statement at the appropriate point inthe trial. It is for the prosecution to establish beyond reasonable doubt the confessions were voluntary. See D.P.P. v. Ping Lin [1975] 3 All E.R. 175 and Wong Kam-ming v. The Queen (supra).

At the trial within a trial the Crown called 8 police officers, the substance of whose evidence was that the confessions were given, after initial denials, as outlined earlier in this judgment. Each officer with knowledge of the interrogation denied the use of violence in any form maintaining the confessions flowed after the possibility of confrontation with alleged alibi witnesses. The length of time appellant was detained at the station before questioning began has already been commented upon, but it should be said it was not the gist of appellant's complaint, which was he was subjected to actual physical beatings and threats of torture from a senior police officer to make the confession, which was in fact untrue. Although he called some evidence from witnesses to support his account it resolved on the

central issue of violence into a swearing contest between him and the officers. It is able to be said he apparently bore no external, or visible signs of injury, and made no complaint when first brought before a Court on 26th April, 1982, within hours of the alleged beatings. This evidence emerged later in the continued trial.

The trial judge unhesitatingly rejected appellant's account of the alleged physical violence thereby basically deciding the issue on credibility. He ruled the confessions admissible. We must now decide whether that was correct.

Although counsel's argument covered unfairness, and we refer to it below, as in R. v. Convery (supra) and R. v. Wilson /1981/ 1 N.Z.L.R. 316 nevertheless the central allegation was subjection to downright physical beatings and threats of torture. This was indisputably an issue of fact. There was no credible evidence to support such allegations, but simply assertions by the accused. Neither were there present other indicators which might alert a court, or disturb it in rejecting appellant's story. Rather the contrary. The degree of detail contained in the statements themselves together with evidence of the visit to the scene of the crime at which time appellant displayed an assured and accurate knowledge of the events of the crime would influence the court in its finding there was no violence and that the confessions were voluntary. The evidence of alleged damage to clothing bringing about a need for replacement was indecisive. As stated it was an issue of fact and the decision turned basically on credibility, after the relevant evidence was before the trial judge, and he made his decision, one which we do not feel ought to be disturbed.

In so far as the unfairness point can be isolated away from the violence allegation we do not believe the trial judge exercised his discretion incorrectly. He gave the length of time at the station before interrogation commenced weight but nevertheless his decision was to admit, and we think correctly. See R. v. Rennie [1982] 1 All E.R. 385 for the proper approach of the trial judge to the question.

Ground 2 - Failure to direct on the issue of manslaughter

The ground of appeal as worded does not disclose precisely the argument of appellant. It was that the trial judge failed to put to the assessors the issue of provocation, which if accepted, would have reduced the verdict from murder to manslaughter. Mr. Shankar unhesitatingly acknowledged that the issue of provocation was never raised by counsel with the trial judge at any stage of the trial, in addresses or otherwise, and no evidence was given by accused directly relevant to such a defence. Rather to further confound the issue the evidence given by appellant was that there was no enmity at all between him and the victim, and went so far as to deny any teasing, or the like. The entire defence, as already indicated by this judgment, was a categorical denial of any involvement with the victim, in any way, on the day he met his death. The defence of provocation would have been necessarily destructive of the primary defence if it had been considered by the assessors. We are of the opinion there was so little merit in provocation, it was deliberately avoided by the defence at the trial because of the dilemma it would have produced.

Counsel cited to us Munsami and Another v. Reginam (1963) 9 F.L.R. 120 as authority for the proposition that notwithstanding the issue is not raised by the defence the trial judge should put the issue to the assessors if there is evidence to support it. There are several material factual similiorities in the conduct of the trial in that case, and the instant one. We accept that case as authority for the proposition advanced. In a criminal trial it is quite proper for defences to be advanced in the alternative and it is not logically contradictory to do so, if the facts and law permit it. However we do not accept it was open in this case.

Provocation, if established reduces murder to manslaughter. See section 203 of the Penal Code Cap. 17. Provocation is defined in section 204 of the Penal Code. Counsel argued there was evidence to support the proposition and the judge ought to have left it with the assessors. In the statements of appellant he said he had been the subject of what constituted jeering, abusive calls from the victim on being caught assaulting and quarrelling with his wife. In his written statement he said it had been happening over the last 8-9 months, and it could be inferred frequently. This evidence was contained in the statements to the police and counsel submitted these parts of the statements, which were exculpatory, ought to be accepted as true. On the other hand counsel argued there was no independent evidence from witnesses to suggest there was such a state of enmity between the two he preplanned the killing. Counsel seemed to suggest that against the background of animosity the cheeky retort from the victim immediately following the indecent act constituted provocation. It was indeed a dainty argument. We have no doubt whatever that there was no requirement in the facts of this case

for the judge to have put the issue of provocation to the assessors. The so-called provocation seems to us to amount to no more than irritating, insolent conduct not infrequently encountered from young adolescents and not of the kind "... to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered." (Section 204 of the Penal Code). That was essentially a question for the judge.

We think, with respect, the law is plainly stated in Lee Chun Chuen v. R. [1963] A.C. 220 (J.C.) at page 231 and 232 by Lord Devlin :

> "Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from Holmes v. Director of Public Prosecutions [1946] A.C. 588, 597. In Mancini v. Director of Public Prosecutions [1942] A.C. 1; 58 T.L.R. 25; the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate."

That case was applied in this Court in Ramendra Dutt v. Reginam (1971) 17 F.L.R. 41, and neither do we find in the evidence in this case a credible narrative of events suggesting the presence of the ingredients of provocation. See also D.P.P. v. Camplin (1978) 67 Cr.App.R. 14 in the speech of Lord Morris of Borth-y-Gest commencing at p.21, and Ibrams (1982) 74 Cr.App.R. 154.

Ground 3 - Direction on lies

It is already evident to this point in the judgment that at the trial there was a confrontation in the evidence between Crown witnesses, mostly policemen, but not exclusively, on the one hand, and appellant on the other. Several civilian witnesses were called to give evidence in opposition to appellant's alibi. The confrontation referred to was massive, and not capable of reconciliation or explanation. Appellant's account contained in his first statement dated 22nd April, and in his evidence given in the witness box at the trial before the assessors was that he was entirely innocent of the crime having spent the day with others, and not in the victim's company at any stage. On his version the lies, were contained in the statement of confession he allegedly made to police officers, and in his written statement to the same effect. A slight qualification was that he admitted in the course of the evidence he had in fact given a wrong account to the police concerning the knife sharpening and wire, but those matters could be put to one side. In short the evidence given from the witness box simply repeated the exculpatory declarations made earlier out of court. The Crown case was that the exculpatory statements of 22nd April, 1982, and at the beginning on 25th April were lies and that because of the proposed confrontation with

so called alibi witnesses the switch was made and the inculpatory statements were in reality the truth. They were confessions to murder.

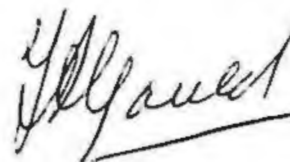
In such a trial situation it was clear a direction to the assessors on their approach to lies told by an accused in the course of police investigations, and from the witness box was called for. The learned judge drew these matters to the attention of the assessors and most importantly warned them that because an accused told lies "... that does not on its own go anywhere near proving the accused guilty of the offence with which he is charged."

Mr. Shankar's argument for appellant was that the trial judge did not direct assessors on the distinction between evidence given in the witness box which they could reject, and a lie told outside of court. We do not think there is substance in this submission. First, the assessors were told by the judge that assessment of witnesses' evidence given in Court was for them. They would have known the cautionary direction on their approach to lies embraced evidence given in the witness box. They must have understood they could reject appellant's evidence, and by the majority verdict they did.

There was the further issue of lies told by the accused before his trial. When an accused voluntarily and intentionally offers an explanation, or makes a statement tending to show his innocence, and this explanation, or statement, is later shown to be false the assessors could have considered whether that circumstantial evidence pointed to a consciousness of guilt, but that it was not sufficient of itself to prove guilt. The assessors were in effect told this by the judge. The motivation for

making a false, or misleading statement, can be other than guilt. Ordinarily it is reasonable to infer that an innocent person does not find it necessary to import or fabricate an explanation, or statement, tending to establish his innocence. By the direction of the trial judge we think all the foregoing would have been understood by the assessors.

For the above reasons we dismiss the appeal against conviction, and necessarily against sentence.



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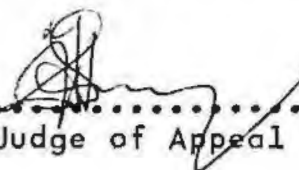

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