IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 71 of 1983

Between:

KAMLESH LATA d/o
Shiu Norayon — Appellant

- and -

R E G I N A M — Respondent

S.R. Shankar & C.K. Prasad for the Appellant
V.J. Sabharwal for the Respondent

Date of Hearing : 3rd July, 1984.
Date of Judgment : 13th July, 1984.

JUDGMENT OF THE COURT

Barker, J.A.

This is an appeal ogoinst the conviction of the appellont in the Supreme Court ot Lautoka on 29th doy of November, 1983 on a charge of murder.

The principal grounds are that the learned trial judge erred in admitting as evidence confessional statements mode by the appellant to investigating police officers ond that he adopted an incorrect standard of proof in determining their admissibility.

We can summarise the essential facts without having to traverse unnecessary detail.

The deceased was a little girl, aged 3, named Geeta Devi. On the 4th of July 1983 at Waicoba, Sigatoka this child died after receiving severe injury to the left side of the neck which could have been inflicted by an instrument such as a cane knife. Geeta had been living with the appellant and her husband, Rajendra Kumar, in a house at the teachers' quarters at the Waicoba District School. The appellant and her husband had been married for only a few months. Geeta was the ex-nuptial child of Bindra Mati and Hari Kissun - the appellant's father-in-law. Geeta came to live with appellant and her husband at the school after their marriage in January 1983, as did another daughter of Hari Kissun. Geeta stayed with them for two months, she then went back to Hari Kissun, she returned to the home of the appellant and her husband on the day before she died.

At about 10.45a.m. on 4th July, 1983 the appellant asked the wife of the head teacher of the school to come to her house and see what had been done by an Indian woman dressed in a red sari. This witness, a Mrs. Vibase, saw the place in disarray; clothes were strewn about: curry and roti had been thrown around the kitchen. The appellant then invited Mrs. Vibose to see what the woman in red sari had done to the child: the appellant showed her the child lying on the bed with injuries to her arm. The appellant told Mrs. Vibase that the woman had been armed with a dagger and a cooking knife and that the child had also suffered injury to her neck which was covered over with a towel.

A contingent of police arrived about 1p.m. to investigate the homicide. Their enquiries culminated in a written statement taken from the appellant by Detective Corporal Bhagat Singh and witnessed by Senior Inspector Paras Ram. In this statement, the appellant after giving some detail as to her life history, confessed to having killed the child with a cane knife. She claimed that she had committed this appalling crime at the direction of her husband who was unhappy at the presence of Geeta in his house.

After making this detailed confession the appellant gave a cane knife to the police officers which she identified as the murder weapon: later she was formally charged by another police officer: she again confessed to having killed the child. The admissibility of all statements having been challenged, a trial within a trial was held. At its conclusion, the judge gave a ruling admitting the evidence of the statements.

At the conclusion of the prosecution evidence, the appellant made an unsworn statement from the dock, alleging that her husband had killed the child but without giving any details.

A majority of the assessors found her guilty; the judge agreed with the majority. The appellant was convicted of murder and sentenced to life imprisonment.

The learned judge commenced his ruling on the voir dire by expressing disquiet at the situation whereby this young Indian woman had been interviewed and charged

by an all male police party without any other female being present and "without a friendly face for support" in circumstances where friends and acquaintances from the school community were at hand. No female police officer was stationed at Sigotoko.

The learned judge at the start of his ruling made the following statement which has given rise to concern:

> "Without one (i.e. a female constable) though, the police are always likely to leave themselves open to complaints, and possibly to having important evidence refused admission by the courts. This case is I think a border line case, but having heard all the evidence I have come to the conclusion that the interview evidence, the production of the cane knife and the charge and caution statement should be admitted."

The judge then noted, quite rightly, that the police were correct to have been suspicious of the appellant: the child had been found dead in her house and she had given what he described as a strange story about an intruder in a red sari with no teeth. The appellant had been taken by the police to a classroom which was fairly open: what transpired could have been observed by anyone in the compound.

The judge then dealt at length with the interview of the appellant conducted by Detective Corporal Bhagat Singh.

He rejected a statement by this officer that the appellant's story emerged without any prompting by or questioning from him. He noted that the appellant acknowledged making the statement almost in its entirety with a

few significant omissions: he then said that the real question was whether her confession was voluntory. He rejected the appellant's story of an assault, despite reservations about the evidence of Bhagat Singh. The judge then stated :

> "I am quite satisfied that what the accused said and was recorded as saying was said entirely voluntorily without any assaults, threats or inducements. I don't doubt that the accused must have been under some stress at the time but she seems to have acted quite calmly, quite unemotionolly. She may be young and not mature as her counsel suggests, but she is also clearly a well educated lady, intelligent, self-possessed and not I think likely to be overawed by being in the presence of policemen, even in the circumstances of this case."

The judge then noted what he considered to have been a lie by D/Cpl. Bhagat Singh over the production of the cane knife. He felt that this officer had not recorded all that had transpired between the appellant and himself. However, he was satisfied, from other evidence, which it is not necessary to detail that the appellant produced the knife to the Police quite voluntarily.

Finally, with regard to the charge and caution statement the judge said :

> "With regard to the charge and caution statement, whatever may or may not have occurred during interview on this issue I am satisfied that in the police station the accused was given every consideration that she was given a meal and allowed to eat it (or not as she wished) with her husband before she was charged. I am

> satisfied that the charge and caution statement was taken quite properly and that it was voluntarily made and does contain what the accused actually said and what she agrees she said."

When the trial proper resumed, the prosecution evidence given earlier was repeated. One further aspect which emerged at the triol proper should be mentioned. Detective Inspector Senitieli had stated in evidence at the trial within a triol ond also at the trial itself that the appellant and her husband confronted one another in his presence and that of DSP Salik Ram. In cross-examination at the trial proper, DSP Salik Ram denied that the appellant had been confronted with her husband. He had not been cross-examined on this topic in the trial within a trial.

The misgivings of the Judge over the evidence of Detective Corporal Bhagat Singh were recalled in his summing up to the assessors in the following passage :

> "Now you have heard the evidence of Bhagat Singh and S.I. Paras Ram, how the interview was conducted. There were - inevitably as I have said before - discrepancies between their evidence on some points, although not on the essential points as to how the accused started the interview and then made that rather long detoiled statement without any prompting. It was suggested that it was most unlikely that the accused would have made a statement like that starting off in 1976. It may be unusual, but is it really so extraordinary? Can you say how a person of the accused's background, education and intelligence would react in a similar situation? Did she for instance hove a need to get it all off her chest? And if a suspect does start talking, and keep on talking, so long as what he or she says is relevant do you think an investigotor is likely to stop him or her? You will note that the accused hos not

said that she didn't say what is recorded, only that she said it because of assault etc."

Against this background, counsel for the appellant submitted that the judge had erred in law in his ruling at the conclusion of the trial within a trial. It was submitted (a) he did not state that the standard of proof for the voluntariness of a confession was proof beyond reasonable doubt and (b) when he said that this was a "border line case", he was not holding that the prosecution had proved the voluntariness of the statement beyond reasonable doubt. Counsel also made submissions on various inconsistencies in the evidence of various police officers, some of which were referred to by the judge both in his ruling and his summing up.

In our view, it is unfortunate that the judge commenced his ruling with the statement that this was a "border line case" - a statement made in the context of a discussion of the circumstances surrounding the making of the statement which might have provided grounds for exclusion on the ground of unfairness.

It is clear trite law that there are two broad grounds on which confessions may be excluded from evidence: (i) failure by the prosecution to prove beyond a reasonable doubt that the conviction was voluntary and (ii) unfairness, a discretionary ground of exclusion for which the Judges Rules provide some general guidance.

The general practice is that a judge should direct himself first to the question of voluntariness: if (and only if) he decides that the voluntariness of the

statement has been proved beyond reasonable doubt, he should then direct his attention to determining whether the voluntary statements, otherwise admissible, should nevertheless be excluded on the ground of unfairness. Under this heading, of course, would fall for consideration factors such as the Judge mentioned here: the age of the appellant, the lack of a policewoman, etc. However, the judge commenced his task from a consideration of the surrounding circumstances. These of course might have had a bearing on voluntariness as well as on fairness.

When the Judge said "this is a border line case", it is not clear whether he was referring to the voluntariness of the statement or to the exercise of his discretion to exclude a voluntary confession.

Counsel for the Crown acknowledged that the standard of proof of the voluntariness of a confession is that of beyond reasonable doubt. Counsel was quite correct to make this concession. The question of the standard of proof in this situation considered by a full bench of five judges in the New Zealand Court of Appeal in R. v. McCuin (1982) 1 NZLR 30.

In the judgments in that case are full reviews of authorities from various parts of the Commonwealth. But New Zealand Court of Appeal preferred to follow the English approach and to opt for the test of proof beyond reasonable doubt.

Of cardinal relevance in any consideration of the admissibility of confessions is the statement of Lord Hailsham, L.C. in the Privy Council case of Wong Kam-Ming v. The Queen (1980) A.C. 247, 261 :

> "... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions of admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

The statement was adopted by the New Zealand Court of Appeal in an important case concerning the exercise of the discretion to exclude a confession on ground of unfoirness: viz. R. v. Wilson (1981) 1 NZLR 316. On this later and seporate topic that Court said at p. 322 :

> "We recognise that there is a school of thought favouring some change - not necessarily by abondoning the requirement of voluntariness but perhaps by revising the Judges' Rules, so as to make confessions obtained by the police more readily admissible than those Rules might permit, at any rate if strictly applied. However, this Court has emphasised over the years that they are not rules of law, nor to be strictly applied. What is important when breach of them is alleged is the overall question of the fairness of the police methods. Foirness can never be a hard-and-fast concept. Changing social conditions ond problems can be relevant in applying it."

In the absence of a clear expression by the judge that he had applied the correct test, we find it impossible to sustain his ruling on admissibility. He

clearly rejected the appellant's claim that she had been assaulted by the Police and that the confession had been extracted from her by violence or feor of violence. Had that finding as to the rejection of appellant's evidence been given before his observotion as to "the border line" case, it might, have been possible to have said that he had adopted the correct opproach. However in a case with some disturbing aspects e.g. one of the police officers having been held by the Judge to hove lied, we do not think it safe to sustoin the admissibility of the confession and therefore to sustain a conviction based entirely on the confession.

This cose moy also have been one of those relatively rore cases when counsel for the oppellant should hove renewed an applicotion to exclude the statement because of the fresh material emerging in the triol proper. There was the conflicting evidence between the two police officers relating to the alleged confrontation between the appellant and her husband ofter she had been interviewed. See R. v. Wotson, (1980) 2 All E.R. 293 and R. v. Wilson (supro).

Counsel for the Crown acknowledged that if the caution stotement were excluded, then the charge statement should also be excluded. This wos a proper ocknowledgment of the fact that the two statements are so inter-related thot if the principol statement be excluded, then rejection of the other stotement must follow.

We consider there was o real possibility thot the learned judge misdirected himself on the law applicable as to the admissibility of confessionol stotements: in these circumstances it would be unsafe to allow the conviction founded on such statements to stond. There was no other

evidence as to the guilt of the accused.

The proper course is to order a new trial. On that trial, the trial judge will have to consider whether the voluntariness of the statement is proved beyond reasonable doubt; if it is so proved then he will have to consider whether the statement should be excluded on the grounds of unfairness. He will be guided by the direction of Lord Morris of Borth-y-gest in the House of Lords case of Director of Public Prosecutions v. Ping Lin (1976) A.C. 574, 593-4 where His Lordship provides a neat summary of the duties of a trial Judge in this situation.

Counsel for the appellant raised two other grounds of appeal: neither of which commends itself. First, he submitted that the judge erred in placing an affirmative burden on the appellant when he said in his summing up that the appellant in her unsworn statement had not told how and when her husband killed the deceased. It was further submitted that the Judge erred in directing the assessors that the failure of the appellant to give evidence on oath minimized the value of her unsworn evidence. In his summing up the learned judge said :

> "She gave an unsworn statement from the dock, so you have not had the benefit of hearing her cross-examined under oath on her evidence, as all the other witnesses have been cross-examined. That may affect the weight you wish to attach to her evidence, but it does not in anyway mean that you may treat what she said lightly, or not consider it carefully and fully in the light of all the evidence. Nor does it mean that you may draw any inference of guilt from her failure to give evidence on oath. She was exercising her right to give evidence as she wished. She might

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> equally well have chosen to remain silent, and again no inference could be drawn from that. She had given evidence, she has presented her defence and subject to what I have said about the weight you may or may not attach to her evidence, you must consider it with all the other evidence and if at the end you are left in any reasonable doubt then she is entitled to the benefit of the doubt."

Mr. Shankar acknowledged that the above statement was a perfectly acceptable direction where the accused person makes an unsworn statement rather than give sworn testimony. However he submitted that in a number of other parts of the summing up the Judge implied that the onus of proof was on the appellant. The summing up, of course, should be read as a whole. The judge gave the usual direction that questions of fact were for the assessors and that they were entitled to disagree with anything concerning the facts that the judge might say. The Judge also gave a perfectly proper direction as to the onus of proof which he reinforced at the conclusion of the summing up.

We consider that there is no substance in the various objections. The judge was perfectly entitled to express his own views on the facts, provided he made it clear to the assessors that he was merely expressing his own views which they were at liberty to reject. Reading the summing up as a whole, we see no misdirection on the onus of proof. Indeed, he was right to comment as he did when the appellant chose to give, from the dock, an entirely different version of the death of Geeta from that supplied to the non-police witnesses i.e. blaming the toothless woman in the red sari: she also acknowledged in her unsworn statement that she had confessed to the police but that the confession was untrue.

The general topic of unsworn statements from the dock is considered in Fallon, Crown Court Practice 652 and in the authorities there cited. The Judge's direction in this area was within the limits of comment allowed by authority.

Secondly counsel submitted that there was insufficient proof of the identity of the deceased. This submission was based on the fact that formal identification of the deceased was made by the appellant's husband who was not called as a witness. On this point, there was ample evidence of the identity of the deceased. The police photographer took pictures at the scene of the crime and at the mortuary. One of the photographs he took was identified by a witness who knew the deceased. Mrs. Vibose saw her lying dead on her bed. This point is completely without merit.

The appeal must be allowed on the substantive point raised and a new trial is ordered.

As there is to be a new trial there will also be an order forbidding the publication in any news media of any report or account of the whole or any part of the evidence of the appellant's alleged confessions. This order is to enure until the new trial has commenced.

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Vice President

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Judge of Appeal

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Judge of Appeal