IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 13 OF 1989.
(Lautoka Criminal Case No. 1 of 1989)

BETWEEN:

AHMAD ALI (S/O ISMAIL) — Appellant

- and -

S T A T E — Respondent

S M Koya for the Appellant
I F Wikramanayake for the Respondent

Date of Hearing: 23 March 1992

Date of Delivery of Judgement: 26 May 1992

JUDGEMENT OF THE COURT

This is an appeal against conviction on a charge of murder.

The prosecution case was that the Appellant had formed an antipathy towards his daughter-in-law, Hasina Bibi, who lived as part of his family.

It was her practice to get up early in the morning and prepare food. On 23 December 1989 she did this and was in the kitchen of Appellant's house. The Appellant, who had obtained in advance for this purpose a container of petrol, took the

container, poured petrol over Hasina, and then lit a match and threw it at her. Hasina was gravely burned as a result, and, although taken immediately to hospital, died the following morning. This was the way in which the prosecution presented its case.

The prosecution relied upon statements made by Hasina to two different people, which were profferred as dying declarations, and also two written confessions made by the Appellant to the Police. There were also various exhibits put in evidence which were said to support the prosecution case.

So far as the confessions are concerned objection was taken at the trial to their admissibility and this was dealt with by the Judge in the absence of the Assessors on a trial within trial. The confessions were ruled admissible and obviously formed a formidable part of the prosecution case.

For the Appellant reliance is placed mainly upon two grounds. The first concerns the dying declarations. Counsel for the Appellant has gone to most diligent lengths to present a detailed argument in support of this ground of appeal. It is no disrespect to that argument to say that, having regard to the view we have formed on the case, it is unnecessary for us to deal with that ground and accordingly we make no further comment about it. We proceed, however, to consider the other main ground.

The real point in this appeal concerns the evidence of the Appellant's confessions. If these were properly admitted then it cannot be doubted that the verdict must stand.

It is necessary, then, to consider with care the question of the admissibility of the confessions, and first we should set out the course which events took.

Immediately following the fire which fatally injured Hasina she was taken to the hospital by the Appellant and other members of the family. This was at about 5.30 am.

At about 7.20 am the Appellant went voluntarily to the Tavua Police Station and there made a statement, which was recorded and in which he gave an account of what had happened to Hasina. He said that this has been the result of an accident and when he went into the kitchen she was already enveloped in flames. His statements to that effect was completed at 7.47 am and was signed by him. He was told not to leave the Police Station but he was not arrested. He remained there until 11 am, when a Detective Constable commenced to interview him. That interview was recorded in writing and was preceded by a caution in the recognised form.

On its face that recorded interview is a full and detailed confession by the Appellant as to his dislike of Hasina, his reasons for that dislike, his having formed an intention to kill her, and, on the particular occasion, his having thrown petrol over Hasina and set it alight. The statement includes the fact that, in anticipation of doing such a thing, he had purchased a container full of petrol.

At a late stage in the interview the Appellant was asked if he was prepared to go with the Police to his house and there show them where these things had happened. He agreed to do so, and on arrival at his house he was again cautioned. He then pointed out where the incident had happened and retrieved and handed to the Police the petrol container, the box of matches used to light the petrol, and various articles of clothing and the like which had been referred to in his statement.

In the course of his interview the Appellant was asked why he had at first volunteered an account of the matter as having been due to an accident and explained that this was because he was afraid.

Following the completion of the interview, and after it had been read back to him, he had signed it, and he was then charged with murder.

There was then recorded the Appellant's charge statement. In this he briefly repeated his confession. This statement also was signed by him.

At the trial it was argued that both confessions should be regarded as inadmissible as having been procured by improper and unfair methods. At the trial within trial in the absence of the Assessors the Appellant gave evidence and said that he had been assaulted and threatened by a Constable Waqa, and also that much of what was attributed to him in the statement had not been said by him, but had been filled in on the form by the Police.

The trial within trial occupied 5 days and was followed a few days later by a detailed and fully reasoned ruling.

The Judge rejected the Appellant's evidence as being untrue, and allowed the confessions to be given in evidence.

As to the charge statement, it was contended this was held to be admissible by adopting a collective approach, that is, by simply treating it on the same basis as the interview statement. It was argued that the assaults and threats alleged by the Appellant carried over so as to taint the charge statement in the same manner as for the interview statement.

On the appeal it was argued that the Judge ought not to have rejected the Appellant's evidence, and particularly as Constable Waqa was not called to give any contrary evidence.

The charge statement followed immediately after the completion of the interview statement and accordingly it was appropriate to treat them both on the same basis.

In his ruling on the trial within trial, the Judge has set out in full his reasons for rejecting the Appellant's evidence as he was bound to do. It must be said at once that those reasons are compelling.

What the Appellant alleged was that he was first punched on the right side in the ribs and fell down. He was made to stand up and was then punched again twice in the back.

He said that Constable Waqa then slapped him three times on the back of his head and then punched him on his chest.

The Appellant is shown in each of his statements to be 62 years of age, although when he gave evidence on the trial within trial he said he was 67. In either event he was elderly. He was seen by a doctor that evening, namely on the day on which the statements were made and the doctor in evidence said that he saw no injury on the Appellant.

The Appellant made no complaint to the doctor of having been assaulted. It might have been expected that if he had been assaulted so as to have caused him to sign an untrue confession some outward sign of this would have been apparent and that he would have said something to the doctor who was examining him for any injuries.

He also made no complaint when he appeared before the Magistrate the next morning.

For the Appellant it was contended that there was neither a duty nor an obligation on him to complain on either occasion. With this we are in full agreement. This, however, was not the way in which the absence of complaint needed to be considered. It was open to the Judge to consider whether the absence of complaint was consistent with the evidence the Appellant later gave, and to draw a reasonable inference from it. It was simply a question of considering what reaction might have been expected from a person in the Appellant's position had his account of the matter been true, and then observing whether he had reacted in such a way.

The Judge had the advantage of seeing and hearing the Appellant give evidence, and he was able to test that evidence by the absence of injury or complaint, and by his ability to

reconstruct the scene for the Police and to locate for them relevant exhibits such as the petrol container. We conclude that he was entitled to reject the Appellant's evidence as untrue.

We note also that, in the course of the evidence on the trial within trial it was never put expressly to any of the prosecution witnesses that it was Constable Waqa who was alleged to have assaulted and threatened the Appellant. It was not until the Appellant gave evidence that this express allegation was made. With the knowledge of what Appellant intended to say it was the responsibility of counsel to cross-examine the prosecution witnesses on the basis of what that evidence would be. As that was not done it is understandable that Constable Waqa was not called to give evidence.

We should add that, in his ruling, the trial Judge took the right approach when he directed himself in the following terms:

> "In considering the issues raised in this trial within trial I have directed myself that it is for the prosecution to satisfy this Court beyond reasonable doubt i.e. to make the Court feel sure that the aforesaid alleged admissions made by the Accused in the interview and charge statement were given voluntarily i.e. freely without coercion in any form."

This disposes of the principle ground of appeal. There were a number of other grounds advanced. A number of these do not merit consideration but we should refer briefly to some others.

The first was that, in rejecting the Appellant's credibility, the Judge disabled himself in advance from giving any credence to the Appellant's sworn testimony during the trial proper. This argument, if accepted, would mean that upon a trial within trial a Judge could never determine an issue involving credibility notwithstanding that the issue was vital to the further conduct of the trial. This cannot be the position. The Judge was obliged to make a proper finding on the evidence given.

It is to be observed that in his summing up the Judge gave no indication to the assessors of the view he had formed as to the Appellant's credibility. Indeed he referred several times to the need for them to make up their own minds on such matters. If, in doing so, the assessors had made it clear that they believed the Appellant then the Judge would have been obliged to re-consider his view. There is nothing to suggest that he would not have been prepared to do so.

A further ground was that the Judge erred in not considering that for several hours the Appellant was unlawfully and unfairly detained at the Tavua Police Station before he was interviewed.

It is the case that the Appellant was told to remain at the Police Station after completing his first voluntary statement at 7.47 am until his interview commenced at 11 am and there seems to have been no satisfactory explanation as to why this occurred. He was not under arrest but was undoubtedly in custody. It was during this period that he said he had been assaulted. His evidence as to this was not, however, accepted.

We do not condone the fact that the Appellant was held in custody improperly, but that fact alone is not a reason for rejecting his later statements. The admissibility of that statement depended upon whether it was voluntarily made. After hearing evidence the Judge concluded that it was. In view of the express rejection of the allegations of assault as already described we are unable to conclude that the period of detention may have produced an untrue confession. This is particularly so when considered against the background of all the circumstances previously set out.

We think it relevant to add that the Judge left this aspect of the case to the assessors with a very clear direction. What he said was,

"There is no satisfactory explanation for this long wait of almost three hours before the interview starts. If you think this has a bearing on the weight to be attached to the statements you are quite entitled to take that into consideration."

Notwithstanding the very full and able argument addressed to us on behalf of the Appellant we are satisfied that the conviction must stand. The appeal is accordingly dismissed.

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(Sir Moti Tikaram)

PRESIDING JUDGE

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(Sir Peter Quilliam)

JUDGE OF APPEAL

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(Mr Justice Amet)

JUSTICE OF APPEAL