IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

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CRIMINAL APPEAL NO. 4 OF 1990
(Criminal Case No. 3 of 1989)

BETWEEN:

EMINONI VAKARUSABOLA KOROI — Appellant

and

S T A T E — Respondent

Date of Hearing: 11th November, 1992
Delivery of Judgment: 18th November 1992

Mr J. Baledrokadroka for the Appellant
Mr I. Mataitoga for the Respondent

JUDGMENT OF THE COURT

On 28th March, 1990 the Appellant was convicted after a trial lasting 17 days of the murder of Saibana Shenaz Ali, a 9-year old girl. He now appeals against that conviction.

Saibana died from drowning on 3 November, 1988 and originally the Appellant and two others were charged with her murder. In the course of the trial objection was taken to the admissibility of the caution interview records of all three accused. Those objections were successful in respect of the

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other two accused but not in respect of the Appellant.

The prosecution case was that Saibana finished school at 3.00 p.m. on 3rd November, 1988 and set off to walk the 4 kms or so to her home. She was with her older brother and two cousins. On reaching the vicinity of the Waiqele temple they separated and Saibana continued alone along a gravel road which runs roughly parallel to the Kulukulu creek. That was the last time she was seen alive by any member of her family. Her body was not found until two days later, when it was located floating face downward in the Kulukulu creek.

The evidence of a pathologist was that Saibana had died from drowning and had vaginal injuries which indicated either forcible intercourse or the use of some blunt object.

The witnesses gave evidence of having seen the Appellant, dressed only in shorts, washing himself in the Kulukulu creek not far from where Saibana had apparently stopped to pick mangoes. The only real evidence of his involvement in the child's death was contained in his caution interview record. If that interview was correctly recorded and admissible then it amounted to a simple confession of murder. In it the Appellant stated that he had seen Saibana picking mangoes, had picked her up from behind and carried her some distance along the stream and had drowned her in a pool. After she was dead he said he had taken her to the river bank and there had intercourse with her. He then placed her body beside an ivi tree.

Following the disappearance of the girl the Appellant was one of those interviewed by the Police and the confession referred to came at the closing stage of a lengthy period of interview.

The prosecution case was further that the Appellant had then agreed to take the Police and show them where the girl's body was. He took them first to the Wailevu bridge where an unsuccessful search was made for the body. Shortly after he took them to the Kulukulu creek where the body was found floating face down in the water.

At the trial objection was taken to the admissibility of the confession statement and to the evidence of the finding of the body. This objection was the subject of a trial within a trial at which the Appellant gave evidence. He said that he had been consistently punched, kicked and threatened and deprived of sleep and refreshment to the point where he was in a weak state and could stand his punishment no longer. It was only for this reason that he changed from his former denials and made the confession attributed to him.

The findings made by the Judge after hearing the evidence on the trial within a trial showed the following sequence of events.

The Appellant was first interviewed informally at about 8.00 p.m. on Saturday 5th November, 1988 in a lean-to kitchen at the back of the Waiqele temple and was then released, but only so as

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to be able to remain in a shed in the temple grounds where he and others were drinking grog. Just before midnight it was decided to record a caution interview with the Appellant. This commenced just before 1.00 a.m. on Sunday morning and finished at 5.15 p.m. that day - a total of some 16 hours. There were, however, a number of breaks during that time so that the interview itself occupied about 12 hours. In particular the total time included the visits to the Wailevu bridge and to the site where the body was found.

The evidence given on the trial within a trial was that of the Police officers involved, the Appellant and two witnesses called on his behalf. The Judge then gave a lengthy and detailed ruling in which he stated the principle to be applied, namely that it was for the prosecution to prove beyond a reasonable doubt that the confession statement had been voluntarily made and not obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. He then reviewed the evidence and concluded that the statement was admissible.

The notice of appeal in this case was apparently prepared by the Appellant in person and contained matters not altogether appropriate to an appeal. Counsel has since been assigned to represent the Appellant and has formulated the grounds of appeal in a more appropriate form. We are grateful to him for the assistance he has given us. In summarised form those grounds are that the Judge erred in law in:

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1. Failing to consider whether the Appellant's confessions were made voluntarily.

2. Failing to consider whether the caution given to the Appellant may have waned by the time he made his confession.

3. Failing to consider other improprieties by the Police.

4. Misdirecting the Assessors in various respects as to the onus and burden of proof and as to the obligations which there were on the Police.

In addition there was an appeal against sentence.

5. That the Judge's recommendation for a minimum term of 20 years' imprisonment was excessive.

We deal with these grounds in turn:

1. The Confessions

In the course of his Ruling on the trial within a trial the Judge reminded himself of the principle which he must apply, and cited the well known passage from the decision of the Privy Council in *Ibrahim v. R.* (1914) A.C. 599 at p.609. He then, as already stated, examined closely the evidence given in the trial within a trial. He has given in considerable detail his reasons for declining to accept the evidence given by the Appellant as

to what occurred. Those reasons are compelling and fully supported by the evidence. Although he did not do so, the Judge might well have referred in addition to the evidence of the doctor who examined the Appellant the day after the interview and could find no signs of the injuries which might have been expected if the Appellant's account of what happened had been correct.

We should add that the trial within a trial concerned objections by all three accused and it is not without significance that the objections of the other two accused were upheld and evidence of their interviews excluded. In the case of the Appellant, however, a distinction was drawn. This can only have resulted from a close consideration of all the evidence.

We can see no reason to interfere with the decision of the Judge to allow the Appellant's confession to be given in evidence.

2. The Caution

This ground was based upon the length of the interview with the Appellant, as previously described, and the fact that the Appellant's change of heart and confession came a long time after the commencement of the interview at which time a formal caution had been given.

In support of this submission Counsel referred to the decision of this Court in *Te Kaobunang Teiwake v. R.* F.C.A. No. 19 of 1964, F.L.R. 1965 p.124. That case, however, was altogether different from the present case and involved a confession made by the Appellant while in custody as a result of questioning without any caution having been given.

In the present case a full caution was given at the start of the interview. While it is true that the confession came some hours later there had in the meantime been several breaks in the interview for refreshments and rest periods. On each occasion of re-commencement of the interview it is recorded that the Appellant was reminded of the caution. The entry in the record for each such occasion reads, *"advised that he is still under caution on Judges' Rule No. 2"*. That Rule is, of course, the Rule which requires the caution to be given.

The result was that, between the initial caution and the stage at which the confession first appears there were four reminders of the caution given to the Appellant. In his evidence the Appellant denied receiving one of those reminders but made no mention of the others.

We are satisfied that the Appellant must be regarded as having been fully informed of his rights.

3. Improprieties by Police

This ground relates to the allegations that the Police had

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subjected the Appellant to "punishment, beatings and threats". This was a matter fully considered by the Judge in the course of the trial within a trial and, for the reasons already given on the first ground, cannot be sustained.

4. Misdirections

The principal matter on this ground concerned the direction given as to the onus of proof being *"beyond reasonable doubt that is to say that you must be satisfied so as to feel sure of the guilt of the accused".*

It was sought to rely upon a dictum of Lord Goddard C.J. in *R. V. Summers* (1952) 36 Cr. App. R. 14 in which his Lordship expressed the view that the use of the expression "reasonable doubt" was unsatisfactory. We do not consider that this comment resulted in any commonly accepted departure from the traditional method of explaining the criminal onus of proof. What has been disapproved of is any attempt to explain in a detailed way what is meant by the expression "reasonable doubt" because to do so only leads to confusion. That, however, did not occur here, and the Judge gave the direction in the form which for a long time has been accepted as correct in countries such as Fiji which follow the English practice.

Accordingly we are unable to uphold any of the grounds of appeal against conviction.

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5. Sentence

A life sentence upon conviction for murder was mandatory. As this is fixed by law there can be no appeal against it. There was, however, power under s.33 of the Penal Code, Cap. 17 for the Judge to recommend a minimum period which he considered the Appellant should serve. In this case there was a recommendation that the Appellant should serve a minimum of twenty years. The appeal against sentence is directed to that recommendation. It was accepted by the Director of Public Prosecutions that such a recommendation, being ancillary to the sentence, was capable of review by this Court under the provisions of Section 23(3) of the Court of Appeal Act.

There is no doubt that this crime had some most disturbing features. It was the deliberate killing of a child in horrifying circumstances. We would not wish it to be thought that we are any less revulsed by those circumstances than was the Judge.

We are, however, bound to observe that there were some matters relevant to the minimum length of time that the Appellant might have to serve which can, at this distance in time and in the calm atmosphere of an appellate Court, be properly taken into account.

The Appellant is 30 years of age and this crime was, for practical purposes, his first offence. The Director of Public Prosecutions very fairly did not feel it necessary to argue in support of the recommendation and acknowledged that there may be

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mitigating circumstances. In particular, we are concerned that the Appellant should not be left with a feeling of complete hopelessness so that, on his ultimate release he would simply have become permanently embittered and therefore a potential danger to the community.

We must not be taken in any sense to be condoning a crime of this nature, but for the reasons indicated we consider the recommendation can properly be varied to one of fourteen years. We are, of course, mindful of the fact that this also is no more than a recommendation and the actual term to be served by the Appellant will in the end depend upon the administrative decision of the appropriate authorities.

By way of summary, the appeal against conviction is dismissed. As to the recommendation concerning the minimum term to be served we vary that recommendation to fourteen years.

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Sir Moti Tikaram
Vice-President

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Sir Peter Quilliam
Judge of Appeal

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Mr Justice Amet
Judge of Appeal