BINATAKE TEKAI

v.

REGINAM

[COURT OF APPEAL, 1962 (Marsack P., Know-Mawer J.A.), 10th, 13th April.]

Criminal Jurisdiction

Criminal law—trial—view by court—absence of accused therefrom—view part of trial—serious irregularity—Pacific Order in Council 1893.

Criminal law—trial—assessors having no voice or vote in decision of court—assessors consulted by judge before judgment—fatal flaw in trial—Pacific Order in Council 1893, s.98.

Criminal law—practice and procedure—prosecution witness—not declared hostile—cross examined by prosecutor at stage of re-examination—serious irregularity.

There is no provision in the rules of procedure under the Pacific Order in Council, 1893, rendering it competent for a court to allow the accused to be absent during part of the trial; as the holding of a view is part of the trial the absence of the accused therefrom constitutes a serious irregularity.

By section 98 of the Pacific Order in Council, 1893, it is provided that an assessor shall not have a voice or vote in the decision of the court. It is therefore a fatal flaw in the trial for a judge to call the assessors into consultation before pronouncing judgment, as the only reason for doing so must be to ascertain their views on the guilt or otherwise of the accused.

It is a serious procedural irregularity to permit a material witness for the prosecution, who has not been declared hostile, to be cross-examined by the prosecutor at the stage of re-examination.

Cases referred to: *Karamat v. R.* [1956] A.C. 256; 40 Cr. App.R. 13: *R. v. White* (1922) 17 Cr. App. R. 60: *R. v. Harris* (1927) 20 Cr. App. R. 144.

Appeal from a conviction of murder by the High Commissioner's Court for the Western Pacific at Tarawa.

R. A. Kearsley for the appellant.

K. C. Gajadhar for the respondent.

Judgment of the Court: [13th April 1962]—

This is an appeal against conviction for murder on the 26th September, 1961, before the High Commissioner's Court for the Western Pacific at Tarawa.

On the 15th November, 1960, the appellant was, before the High Commissioner's Court in the Gilbert & Ellice Islands, convicted of the murder of one Tebeibei on the 30th October, 1960. An appeal against that conviction was heard before this Court and on the 5th May, 1961, the judgment of this Court was delivered allowing the appeal and ordering a new trial. This new trial was held on the 22nd, 23rd, 24th and 26th September, 1961, and ended with a verdict of murder and sentence of imprisonment for life. It is against that conviction that this present appeal is brought.

The appellant was not represented at the trial by Counsel but was assisted in his defence by Mr. District Commissioner Roberts acting as prisoner's friend. The grounds of appeal are numerous and lengthy, but it is not considered necessary to set them out in detail in this judgment. Summarised, they amount to a complaint of serious irregularities in the conduct of the trial amounting in all to a substantial miscarriage of justice, and also one of misdirection of himself by the learned trial Judge on the law relating to provocation.

At the outset of the hearing of the appeal before this Court Counsel for the Crown conceded that the conviction could not be supported; that there were serious irregularities in the conduct of the trial, as a result of which the appellant was deprived of a fair trial and of the possibility of securing an acquittal; that there had been a substantial miscarriage of justice; and that in all the circumstances of the case he felt that it would not be proper for him to ask for a new trial.

These concessions are very sweeping and it is necessary for the Court to examine the grounds upon which they are based. The irregularities referred to by Counsel for the Crown are seven in number:

(1) The absence of accused when the Court made a view of the scene of the alleged crime;

(2) Consultation between the learned trial Judge and the assessors before judgment;

(3) Production of a plan not properly proved in evidence;

(4) Lack of proper identification of the body examined by the Medical Officers;

(5) Cross-examination by the prosecution of its own witness as to a previously inconsistent unsworn statement when such witness had not been declared hostile;

(6) Failure to observe the ordinary rules of procedure in criminal trials with regard to the examination, cross-examination and re-examination of witnesses;

(7) A finding by the learned trial Judge that in the final encounter between the accused and the deceased, the deceased had adopted "a defensive attitude" when such a finding was totally unsupported by the evidence.

We propose to deal with these alleged irregularities *seriatim*.

(1) The record indicates that a visit was made by the Court, prosecutor and prisoner's friend on the 22nd September, 1961, to the scene of the alleged offence. It is clear from the judgment that this inspection by the Court was full and detailed. The accused was not present. At the hearing of the appeal it was stated to be very doubtful as to whether either or both assessors attended the view; the Judge's note on the record, however, appears to indicate that they were in attendance. No explanation is given as to why the accused was not present, and it must be assumed that he was not invited to be there. In *Karamat v. The Queen* 40 Cr. App. R. 13 the question of a view of the *locus in quo* was considered by their Lordships of the Privy Council on an appeal from the Supreme Court of British Guiana. At page 18 the Lord Chief Justice says:

> "That a view is part of the evidence is, in their Lordships' opinion, clear".

In that case the accused had declined to attend the view; but it was strenuously argued on his behalf that the absence of the accused from part of the trial, as a view was held to be, was a fatal objection to the proceedings. It was, however, held that under the Criminal Procedure Ordinance in force in British Guiana it was competent for the Court to allow the accused to be absent during part of the trial. The Chief Justice says at page 19:

> "The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent."

There is no such provision in the rules of procedure under the Pacific Order in Council, and consequently the trial Judge had no power to permit any part of the trial to take place in the absence of the accused. As it is clear from Karamat'scase that the holding of a view is part of the trial, then the absence of the accused was a serious irregularity in the conduct of the trial. It is not necessary, in view of our opinions on the other points raised, to determine whether or not the irregularity was such as, in itself, to vitiate the trial and conviction.

(2) After the closing speech for the defence had been heard the record shows that "the court was cleared at 9:50 a.m. for His Honour to consult with assessors and ordered to reconvene at 9:00 a.m." three days later.

In the course of his judgment the learned trial Judge says "after full consideration of the evidence and of the argument for the defence and after consultation with the assessors I find the accused guilty of the crime of murder".

Section 98 of the Pacific Order in Council 1893 which is applicable to the proceedings in the Court below provides:

> "An assessor shall not have voice or vote in the decision of the Court in any case, civil or criminal; but an assessor dissenting in a civil case from any decision of the Court, or in a criminal case from any decision of the Court, or the conviction, or

the amount of punishment awarded may record in the minutes of proceedings his dissent and the grounds thereof; and an assessor dissenting shall be entitled to receive gratis a certified copy of the minutes."

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It is perfectly clear that in the trial of appellant before him the learned trial Judge did give the assessors a voice in the decision of the Court, a proceeding which is directly forbidden by the Order in Council. It is impossible to say that the decision was entirely that of the Judge alone, which under the Order in Council it should be. There can only be one reason for calling the assessors into consultation, and that is to ascertain their views as to the guilt or otherwise of the accused; and it cannot be said with certainty that the expression of those views had no effect on the judgment of the Court. In our opinion the consultation of the trial Judge with the assessors, and the statement in his judgment that his decision was reached after consultation with the assessors, amount to a great deal more than a procedural irregularity. The appellant was in fact tried by a tribunal consisting of a Judge and two assessors; this is a direct contravention of the provisions of the Order in Council which clearly indicate that the decision is to be the decision of the Judge alone. This is in our view a fatal flaw.

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(3) It appears that the original plan prepared shortly after the event was lost by the Court and another was made immediately before the second trial, to some extent from memory and to some extent upon the basis of hearsay. In the result this second plan had, in our opinion, very little evidential value, but it cannot be said materially to have altered the course of the trial.

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(4) No evidence was given to establish the fact that the body examined by the Medical Officers was that of the deceased Tebeibei. This amounted to a faulty presentation of its case by the prosecution. but it is not necessary for this Court to determine whether or not the Court below was justified in holding that the body examined by the doctors was in fact the body of the deceased.

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(5) It is clear from the judgment that some reliance was placed on the evidence of the prosecution witness Katoatoa. After he had been examined in chief and cross-examined, the prosecutor before commencing his re-examination said to the Court "may I show witness original statement he made to the police last November in order to refresh his memory?" The Court "Yes". The witness was then shown the statement and was questioned on it in a manner which can only be described as cross-examination. The matters referred to therein and the questions asked were such as had already been covered by his evidence-in-chief. They did not in any way concern new facts arising out of the cross-examination. There is no record that an application was made at that stage—that is to say at the conclusion of the cross-examination—for leave to treat the witness as hostile, and no declaration of the witness as such. There was nothing in the evidence of the witness indicating that he felt his memory hazy about what had happened at the time of the alleged crime, and no suggestion by the witness that he would like his memory refreshed. The witness was not asked any questions

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from which the Court was entitled to draw the conclusion that it would be proper to refresh the witness's memory by reference to a statement which he had made previously to the police. We consider that the learned trial Judge was not entitled in the circumstances to make the order permitting the examination of the witness, after his cross-examination was concluded, upon a previous statement made to the police.

The evidence given on this so-called re-examination differs in one or two material particulars from that which was given in the course of his examination-in-chief. The result of this should have been that his evidence be regarded as of little value: *White* 17 Cr. App. R. 60: *Harris* 20 Cr. App. R. 144. The Judge, however, as had been pointed out, placed some reliance on the evidence of this witness. In our opinion the procedure adopted constituted a serious irregularity and amounted to a miscarriage of justice.

(6) There are instances where the normal procedure regarding the examination of witnesses has not been followed in the Court below, but it is not necessary for us to give detailed consideration to these procedural defects.

(7) In the course of his judgment the learned trial Judge refers to the "defensive attitude" adopted by the deceased when the appellant came into the house shortly before the final encounter between them. There is, however, no evidence to justify this finding. The matter is one of considerable importance, as the appellant has contended throughout that he was not the aggressor. Of itself this would not be so grave as to vitiate the trial and conviction; but it must be taken into account in conjunction with the other irregularities of which complaint has been made.

In the result this Court is of opinion that the concessions made by Counsel for the Crown were justified and that at the trial in September, 1961, a substantial miscarriage of justice took place.

The question then arises as to the proper course to be followed. In all the circumstances of the case, we are of opinion that it would not be consistent with natural justice to order a third trial. We consider that the conviction should be quashed and a verdict of acquittal entered; and we order accordingly.

With reference to the question of the Court's mis-direction of itself on the law regarding provocation in so far as it applies to the Gilbert and Ellice Islands, this Court finds it unnecessary to examine this question or make any pronouncement thereon in view of its finding that the conviction must be quashed on the grounds already stated.

Appeal allowed; verdict of acquittal entered.