GYAN SINGH

v.

REGINAM

[COURT OF APPEAL, 1963* (Finlay V.P.; Marsack J. A.; Knox-Mawer J.A.)
15th July, 17th August]

Criminal Jurisdiction

Criminal Law—witness—earlier conflicting statements—principles upon which judge and assessors must act.

It is the duty of the trial judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the assessors, and of the judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in court at the trial is worthy of credence and, if so, what weight should be attached to it. The assessors and the trial judge, in determining the credibility of the evidence, must decide the preliminary question as to whether or not the explanation given by the witness as to the reason for such conflict is feasible and acceptable.

Held.—(1) That the learned judge had directed the assessors fully and correctly in accordance with the above principles.

(2) That though in his judgment he did not refer again specifically to such principles, he stated that he had directed himself in accordance with his summing up to the assessors and there was no doubt that he did so.

Cases referred to:

R. v. Leonard Harris (1927–28) 20 Cr. App. R. 144; *R. v. Golder* (1960) 45 Cr. App. R. 5; (1960) 3 All E.R. 457.

Appeal against conviction.

Ramrakha for the appellant.

Palmer for the Crown.

The facts sufficiently appear from the judgment.

Judgment of the Court [17th August, 1963]—

This is an appeal against conviction for murder on the 14th December, 1962. Appellant was the second of four accused who were jointly charged with the murder of one Mohammed Roshan on the 4th May, 1962. The first accused was found not guilty and the other three were found guilty. The trial was held before a Judge and five assessors. In the case of appellant, all five assessors expressed the opinion that appellant was guilty of the crime charged. The trial Judge gave judgment in accordance with the unanimous recommendation of the assessors, convicted appellant of murder and sentenced him to death.

The evidence against appellant may be shortly summarised as follows. On 28th January, 1962, he was concerned, together with the fourth accused, Shiu Narayan, in obtaining possession of a shot-gun, by means of a subterfuge,

* Leave to appeal to the Privy Council was refused.

appellant passing himself off to the owner of the gun, one Ganga Prasad, as a C.I.D. man. Some two weeks before the 4th May Shiu Narayan pointed out to appellant the house occupied by Mohammed Roshan and said: " That is where you will have a feast ". Mohammed Roshan was shot with a shot-gun at the door of his house about 9 o'clock on the evening of the 4th May, 1962. Immediately after the shooting appellant was seen riding a horse away from the vicinity of Roshan's house in the direction of Tavua where appellant lived. On the 14th June, 1962, a floral sports shirt was found hidden under leaves on the bank of the river near the house occupied by appellant; this shirt was recognised as one which closely resembled the shirt appellant had been wearing in the early hours of the morning of the 5th May. The following day a shot-gun and some ammunition were found hidden under some rocks near appellant's house; this was held by the trial judge to be the same gun as that obtained from Ganga Prasad. The remainder of the evidence against appellant consists of statements or admissions made by him; to one Madhavan, shortly before the shot-gun was found, that appellant had a gun hidden in that area; to one Autar Singh, about 3 a.m. on the 5th May, that he had done some shooting near Ba that night, that the man had fallen down and he did not know whether the man was alive or dead; and to one Pooran Singh, a day or two after the 4th May, that he had done the shooting and Hassan was with him.

Three grounds of appeal were set out in the Notice of Appeal. These are:

" (1) The learned trial Judge erred in not specifically directing himself and the assessors that the effect of previous inconsistent statements made by Munsami and Baburam rendered their testimony on oath negligible and thereby erred in accepting their testimony at all.

(2) The learned trial Judge erred in directing himself and the assessors that the prosecution's case against the appellant rested upon circumstantial evidence.

(3) The verdict is unreasonable and cannot be supported having regard to the evidence."

The main argument of counsel for appellant was directed to ground one which must be considered under two separate headings, in the light of the evidence of Munsamy and of Baburam, respectively. At the trial Munsamy deposed that on the night Mohammed Roshan was shot he saw two horses going along the King's Road towards Tavua from the direction of Ba. On the second horse there were two riders, one of whom was appellant. He further deposed that the shirt produced in Court was similar to that which appellant had been wearing when riding the horse on the night of Roshan's death. In a statement made to the police on 25th June, 1962, Munsamy had positively identified the shirt produced as that which had been worn by appellant on the night in question. Counsel argued that in view of his previous inconsistent statement, Munsamy's evidence on oath was worthless and should not have been accepted. In our view this argument is not well founded. Such a modification of assurance on the part of the witness was not of such a character as to invite disbelief. It was a perhaps understandable variation in the degree of certainty for which the witness was prepared to accept responsibility when giving evidence on oath in the solemn atmosphere of a trial for murder.

We turn now to the evidence of Baburam, the taxi-driver, which was to the effect that one night in January, 1962, he picked up one Jodha and appellant in Ba Township and drove them to Yalalevu to a place near the house of Shiu Shankar Singh, which house Jodha pointed out to appellant.

Shiu Shankar Singh was the son of Ganga Prasad and was privy to the arrangement for the acquisition of the shot-gun from his father. Appellant left the taxi while Baburam and Jodha drove back to Ba. They returned to Yalalevu some 15 minutes later; they met appellant and picked him up. He was carrying something about 3 feet long wrapped up in a sack. Baburam drove appellant and Jodha back to Ba where they left the taxi.

Baburam made his first statement to the police on the 19th June, 1962, some five months after the incidents to which he deposed. In that first statement he made no mention of Jodha's presence with him and appellant on the trip to Yalalevu. He also referred to the package carried by appellant as being a gun wrapped in a sack. A few days later he returned to the police and stated that Jodha had been with him and appellant; in cross-examination at the trial he gave the explanation that Jodha's presence had slipped his memory but as soon as he recalled the fact that Jodha had been there he returned of his own volition to the police to make the appropriate correction in his statement. Counsel for appellant, however, pointed to the coincidence that on the 19th June, 1962, Jodha had also made a statement to the police in which he had failed to mention that he had been with appellant in the taxi on the trip to Yalalevu. Counsel invited us to draw the inference that Baburam and Jodha, who were friends, deliberately refrained from disclosing to the police Jodha's participation in the acquisition of the shot-gun by appellant from Shiu Shankar Singh or his father.

Counsel strongly contended that the evidence of Baburam played a leading role in the conviction of appellant; in counsel's own words: " This evidence was the hub of the prosecution case and everything else revolved around it ". If, therefore, the evidence of Baburam is rejected or treated with the deepest suspicion owing to his previous inconsistent statements, then, in counsel's submission, the case against appellant is weakened to the extent that the assessors might well have made a different recommendation to the trial Judge, and the trial Judge had come to a different decision. We were referred to several authorities, such as *Leonard Harris* (1927–28) 20 Cr. App. R. 144 and *Golder & Ors.* (1961) 45 Cr. App. R. 5. The principles upon which the Courts acted in the cases quoted do not, however, vary or extend that set out in Archbold's Criminal Pleading Evidence and Practice 35th Ed. at p. 562:

> " The character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury; and if he has formerly sworn the contrary, the fact (although no objection to his competency) is almost conclusive against his credibility."

It is the duty of the trial Judge to warn the assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the assessors, and of the Judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in Court at the trial is worthy of credence and, if so, what weight should be attached to it. The assessors and the trial Judge, in determining the credibility of the evidence, must decide the preliminary question as to whether or not the explanation given

by the witness as to the reason for such conflict is feasible and acceptable. It is for the assessors to take all these factors into consideration before they give their advice to the trial Judge.

In the course of his summing-up the learned trial Judge referred to the matter of conflict between sworn evidence and previously inconsistent statements in the following words:—

> " In the absence of any acceptable, logical or compelling explanation, where a witness has on a previous occasion made a statement contradictory to his evidence, the only safe rule to apply, normally, is to disregard his testimony entirely as being too unreliable to place any weight upon it at all. If, however, such a witness gives an explanation or you are of the opinion that there is satisfactory or understandable reason for the previous contradictory statement, such as for example, it was made whilst the witness was in a state of fear and was too frightened then to say what he has later said in evidence, or that his earlier statement was made out of a sense of family loyalty before realising that such a serious charge as murder was involved, then whilst you must obviously treat such evidence with considerable reserve and give it the most careful consideration, you are entitled to accept it and act upon it if you really feel convinced it is the truth. In considering this you should of course also look to see if there is any independent corroboration of that evidence and whether it is consistent with the other evidence you believe. One thing you must not do, however, is to substitute for the evidence of a witness, the contents or substance of a statement made by him previously. You must either accept or reject his testimony before us but not substitute for that anything else he may have said on another occasion."

He also made available to the assessors copies of the statement which the witness Baburam had made to the police. The assessors were thus placed in possession of full information as to the previously inconsistent statement and, in our opinion, the direction of the learned trial Judge on the subject was full and correct.

It is true that the trial Judge, in the course of his judgment, did not specifically refer to the principles which he had so carefully explained to the assessors; but he must be taken to have kept those principles in mind when assessing the value of the evidence of Baburam. The trial Judge specifically states early in his judgment that he had directed himself in accordance with his summing-up to the assessors. We have no doubt that he did so in respect of the closest scrutiny that must be given to any evience by a witness who had made a previously inconsistent statement. Notwithstanding the direction he had given, we are satisfied, to himself as well as to the assessors, he expressed himself as accepting the evidence of Baburam as the whole truth. The trial Judge and the assessors all had the advantage of observing Baburam as he gave his evidence and it is clear that the Judge's opinion, as to the credibility and value of that evidence, coincided with the unanimous opinion of the assessors. Compelling reasons must be shown before an appellate tribunal will upset the finding of the Court below on the subject of the credibility of a witness; we can find no such reasons here. We are satisfied that the trial Judge properly directed the assessors on this subject and that he took these directions into account in making his own decision. There was no misdirection by the trial Judge on the point and we can find no substance in this ground of appeal.

We are in some difficulty in ascertaining exactly what is the basis of the second ground of appeal. The statement of the learned trial Judge, in the course of his summing-up, to which exception is taken by counsel for appellant, is as follows:—

> " The case for the Crown against the 2nd accused, Gyan Singh, rests upon circumstantial evidence. Circumstantial evidence is often better and more reliable than the direct evidence of witnesses who say that they actually saw a crime committed."

This was, if anything, an understatement of the case against appellant which rested on direct as well as circumstantial evidence. The merit of this ground of appeal can, perhaps, be gauged by the fact that the only argument advanced by counsel in its support was that the assessors might have been induced by the statement to place too much weight on the circumstantial evidence against appellant. We can find no ground for this contention. In his summing-up the learned trial Judge was careful to refer to the whole of the evidence against appellant, direct as well as circumstantial, and he fairly placed all that evidence before the assessors. Accordingly we can find no merit in this ground of appeal.

As to the last ground of appeal, counsel for appellant conceded that this was based very largely on his first and second grounds. The only additional argument put forward in respect of it concerned the evidence of Autar Singh and Pooran Singh. The evidence of these witnesses was accepted by the assessors and also by the trial Judge and nothing was put to us at the hearing of the appeal to convince us that the assessors and the trial Judge were not justified in so doing.

Upon a proper consideration of the whole of the evidence accepted by the learned trial Judge and the assessors, we are satisfied that the guilt of appellant was proved beyond reasonable doubt and that nothing has been put before us on this appeal establishing any good reason for setting aside the verdict appealed from.

For these reasons the appeal will be dismissed.

Appeal dismissed.

Solicitor for the appellant: *K. C. Ramrakha*

Solicitor-General for the Crown.