A

GYAN DEO

v.

REGINAM

B

[COURT OF APPEAL, 1967 (Gould V.P., Marsack J.A., Bodilly J.A.), 21st, 23rd February]

Criminal Jurisdiction

Criminal law—trial—witness giving evidence at Preliminary Inquiry—duty of prosecution to have available at trial—discretion as to calling—interests of justice—fairness to accused.

C

Criminal law—evidence and proof—witness giving evidence at Preliminary Inquiry—discretion of prosecution whether to call such witness at trial—mode of exercise—duty to have witness in court at trial.

At the Preliminary Inquiry in relation to a charge of murder against the appellant, one Lila Wati, the wife of the deceased, gave evidence to the effect that the appellant was not present when the crime was committed. This was contrary to an earlier statement she had made to the police, and she subsequently admitted that her evidence had been false. In the Supreme Court the prosecution did not call her as a witness but made the facts abovementioned known to counsel for the defence and invited them to take statements from Lila Wati if they wished.

D

E

Held: 1. While there is a duty on the prosecution to have in court all witnesses whose names are on the back of the indictment, there is a wide discretion, to be exercised so as to further the interests of justice and at the same time be fair to the defence, as to whether the prosecution will call such witnesses or not.

2. There was here no justification at all for saying that the discretion should have been exercised otherwise.

F

Case referred to: *R. v. Oliva* [1965] 3 All E.R.116; 49 Cr.App.R.298.

Appeal against conviction of murder: reported only on the question of the duty and discretion of the prosecution in relation to witnesses.

M. V. Pillai for the appellant.

G

J. R. Reddy for the respondent.

Judgment of the Court (read by Gould V.P.): [23rd February 1967]—

The appellant was convicted by the Supreme Court of Fiji at Lautoka of murdering Ram Singh s/o Paan Singh at Bilolevu, Sigatoka, on the 8th June, 1966. One Atma Ram alias Pilla s/o Shiu Lal was also charged with the offence in the same count of the information and was convicted, but has not appealed.

H

There was ample evidence that Ram Singh was killed in his home on the night of the 8th June, 1966, by being brutally beaten on the head

with sticks. His body was found on the 11th June, 1966, in the Sigatoka River which passes not far from the house of the deceased. There were A indications that his body had been dragged along a small stream which led to the river.

There is no challenge on this appeal to the summing up of the learned trial Judge, or to his judgment on any question of law (save one collateral matter with which we will deal later in this judgment) but it is claimed that the decision was unreasonable and ought not to be supported B having regard to the evidence.

It is true that the evidence implicating the appellant is contained within a fairly small compass, but, having considered the detailed record and Counsel's submissions thereon we are satisfied that there was sufficient, on the view of that evidence that the learned Judge and assessors were entitled to take and obviously did take, to justify the conviction of the C appellant. The main features of the evidence were one recorded and certain oral statements made by the appellant. In the Supreme Court he alleged that they were not voluntarily made, but after a very prolonged trial within a trial in the absence of the assessors, the learned Judge held that they were completely voluntary and admitted them. The same evidence was adduced later in the presence of the assessors and their unanimous opinion that the appellant was guilty indicated that they also D believed the statements to have been voluntarily made. The decision to admit them, vital to the case for the prosecution, has not been challenged on the appeal.

The written statement of the appellant, recorded on the 13th June, 1966, admits his presence at the scene of the crime, with the second accused, and with two others, Dhunki and Ram Chandar. He said that only Dhunki and Ram Chandar entered the house and killed the deceased, and that E his post was initially to keep watch, again to keep watch when the body was disposed of and to help bury mosquito netting in the ground beyond the small stream.

The oral admissions referred to were made in the first instance to S. I. Muniappa to whom he said "You people have got Pilla (i.e. the second accused). Pilla, Dhunki and Shiu have killed Ram Singh and I was pre- F sent". Later he said "Shiu Ram was not there. Ram was there". After the appellant was arrested and cautioned by Supt. Nanka Singh, he said "Babu, I have made a mistake." On the morning after he made the written statement the appellant showed the police where the mosquito netting had been buried and it was recovered. He indicated the track they had followed when it was buried. The appellant, who gave evidence in the Supreme Court denying that he was present at all when the crime G was committed, gave as an explanation of how he came to know the details contained in his statement, that he was told about it, and shown the buried mosquito netting, on the day after the crime, by the second accused. This story was characterised by the learned trial Judge as patently false, and there is not the slightest basis for disagreement with that finding.

Two of the persons mentioned in the appellant's written statement, H Dhunki and Ram Chandra, were called as witnesses for the prosecution to deny any participation and testify to their whereabouts. They were supported by other witnesses and it is the submission of the prosecution that their evidence, if believed, tends to support an inference that the appellant played a greater part in the affair than he admitted.

We have not referred to one or two minor aspects of the evidence relied upon by the prosecution, but on the whole case we are satisfied that the evidence was such as to support the finding of the learned Judge and assessors that it was proved beyond all reasonable doubt that the appellant was a party to the crime of murder.

The collateral matter to which we have referred was raised by the second and third grounds of appeal; the essence of the complaint is that the prosecution failed to call as part of their own case, or to tender for cross-examination one Lila Wati d/o Jai Govind, as a witness. This lady was the wife of the deceased, and there is every reason to believe that she was present when the offence was committed. She was called as a witness by the prosecution at the Preliminary Inquiry. There was evidence which suggested that she had had, or was having, a love affair with the appellant. She made no report of any crime and stated on the day after the murder that her husband had gone to pay a visit to someone. It is abundantly clear that, if called, Lila Wati would have had to be treated as an accomplice.

We were referred to a number of authorities touching the question of whether a duty lies upon the Crown to call all witnesses whose names are on the back of the indictment. The most recent case is *R. v. Oliva* [1965] 3 All E.R. 116 and the gist of that decision is that, while the Crown must have in court all such witnesses, there is a wide discretion as to whether the Crown will call them. The discretion must be exercised so as to further the interests of justice and at the same time be fair to the defence. There is a duty well recognised, to call a witness whose evidence is capable of belief.

We are indebted to the frank statements of Counsel for the appellant and for the Crown before this Court, as to what transpired during the course of the trial and as to the reason for the prosecution's decision not to call the witness. The learned trial Judge at one stage was concerned at the prospect of her not being called and heard Counsel in chambers. At the Preliminary Inquiry Lila Wati gave evidence to the effect that the appellant was not present when the crime was committed. This was contrary to a statement she had earlier made to the police. At a later stage Lila Wati admitted that she had given false evidence on the matter at the Preliminary Inquiry — a confession of perjury.

When the prosecution decided not to call Lila Wati, which was at a stage about half way through the case for the prosecution, all of this information was made available to Defence Counsel, and they were invited to take statements from Lila Wati if they wished. Counsel for the second accused adopted this course though Counsel for the appellant did not.

In these circumstances it is clear that the Crown exercised its discretion against calling Lila Wati on the ground that she was a person totally unworthy of credit and that to call her would not further the interests of justice, an opinion amply based on her background and her conduct throughout. Counsel for the defence were treated with scrupulous fairness. We therefore find no justification at all for saying that the discretion should have been exercised otherwise.

For these reasons the appeal is dismissed.

Appeal dismissed.