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UDAY SINGH AND OTHERS

v.

REGINAM

B

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 6th, 23rd October]

Appellate Jurisdiction

Criminal law—judgment—onus of proof—possible misdirection on—failure to deal with essential issue—application of Criminal Procedure Code (Cap. 14) s.154(1)—Penal C *Code (Cap. 11) s.279(b).*

Criminal law—practice and procedure—evidence—"trial within a trial"—Magistrate's Court—appropriate procedure.

A magisterial conviction against four persons for assaulting a police officer in the due execution of his duty was quashed on the grounds —

(a) that the judgment did not comply with section 154(1) of the D Criminal Procedure Code, in that in it the magistrate failed to consider the necessary question whether the accused were acting together in furtherance of a joint enterprise or were aiding or abetting one another, and

(b) that words used in the judgment made it appear that the magistrate might have misdirected himself on the onus of proof.

E

Observations on the procedure to be followed where a "trial within a trial" is required to determine the admisibility of evidence in the Magistrate's Court.

Appeals against convictions in the Magistrate's Court.

S. M. Koya for the appellants.

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J. R. Reddy for the respondent.

THOMPSON J.: [23rd October 1969]—

This is an appeal against the conviction of the four appellants in the Magistrate's Court of the First Class at Lautoka on the following charge:

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Statement of Offence

ASSAULTING A POLICE OFFICER IN THE DUE EXECUTION OF HIS DUTY: Contrary to Section 279(b) of the Penal Code, Cap. 11.

Particulars of Offence

H

UDAY SINGH s/o Shiu Nath, HIRANNA s/o Yenkenna, APANNA s/o Yenkenna, ABDUL SALIM s/o Abdul Wahab and KRISHNA KANT s/o Hiranna, on the 7th day of February, 1969 at Waiyavi, Lautoka in the Western Division, assaulted Detective Corporal No. 84 Ugrasen in the due execution of his duty.

The prosecution case in the court below was that Detective Corporal Ugrasen received a complaint that a young Indian woman, who had been working as a housegirl, had stolen items of cutlery and clothing from her employer, that he went to the woman's house at about 11 p.m. that night to investigate the complaint, and that on arrival there he was assaulted by the four appellants and Abdul Salim. The learned trial Magistrate found that the case had been proved in respect of the four appellants, convicted them and ordered that they be bound over to come up for sentence if called upon within 12 months; he also ordered the first appellant to pay $10 compensation to Detective Corporal Ugrasen.

The Crown does not support the conviction on the ground that the learned Magistrate failed to evaluate and consider the evidence insofar as it concerned the appellants individually or collectively. The sole portion of his judgment dealing with the evidence implicating the four appellants and with the facts which he found on the basis of that evidence is as follows:—

> "As to the remaining four it is established that the Detective Corporal was injured and I accept that his injuries were the result of blows struck by one or all of the four remaining Accused.
>
> They have unwisely elected to say nothing in their own defence so the Court is left without any explanations of their behaviour. I must note here the Court's concern that it appears that, to me, their silence is the result of their Counsel's instructions and was maintained in spite of my repeated explanations that this would not assist them in any way, and that they were foolhardy if they considered that any suggestion they may have from their Counsel that the decision of this Court could be upset in a subsequent appeal because of differences which arose between their Counsel and the Bench by reason of his behaviour in the Court, is soundly based.
>
> I am therefore compelled to find that it is proved beyond reasonable doubt that each of them is guilty as charged."

Section 154(1) of the Criminal Procedure Code provides that "every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it." In the present case there was evidence that each of the four appellants struck Detective Corporal Ugrasen but the circumstances in which they were alleged to have done so were such that it was necessary for the learned trial Magistrate to consider carefully whether or not they were acting together in furtherance of a joint enterprise or were aiding or abetting one another. Furthermore, the second paragraph of the portion which I have quoted, followed as it is by the statement "I am therefore compelled to find that it is proved beyond reasonable doubt that each of them is guilty as charged", makes it appear that the learned trial Magistrate may have misdirected himself regarding the onus of proof. In my view, therefore, learned Crown Counsel has quite properly conceded that the judgment is fundamentally defective and that the conviction cannot stand.

There were a number of other grounds of appeal. Mr. Koya has asked the Court to deal with them notwithstanding that the appeal is allowed for the reason already stated. Two of these grounds depend

A on the special facts of this case and it would serve no useful purpose to comment on them. One ground concerns a matter of practice and procedure and is of general importance. I shall therefore deal with that ground.

It relates to the failure of the learned trial Magistrate to hold a trial within a trial before admitting evidence of self-incriminating statements allegedly made by the appellants. A trial within a trial was held, but
B only after the evidence of the statements had been given, on the issue of admissibility. The appellants, who had been given an opportunity to cross-examine Defective Corporal Jai Raj in the course of the trial within a trial, were, as far as can be ascertained from the rather brief notes made by the learned Magistrate, not given an opportunity to cross-examine him in the trial proper. The practice to be followed when the prosecution seeks to adduce evidence of a self-incriminating statement
C allegedly made by an accused person is well established. When the point in the evidence of any prosecution witness is reached where it is intended that that witness should give evidence of such a statement, the prosecution should inform the court of this. The magistrate should then ask the accused person or, if he is legally represented, his counsel, whether he has any objection to the admission of the statement; if he puts forward any objection which would, if properly founded, be a ground for the
D court to refuse to allow the evidence to be adduced, a trial within a trial should be commenced immediately to determine the issue of admissibility. In the course of the trial within a trial the evidence given by the prosecution witnesses should be directed only to proving admissibility; the accused person should be given the opportunity to cross-examine each of the prosecution witnesses and also to give evidence or make an unsworn statement himself and to call witnesses on the issue of admissi-
E bility. A ruling should then be given, with reasons, either that the evidence is to be admitted or that it is inadmissible. The trial proper should then be resumed; if the evidence has been held to be admissible, it must then be given again and, after the examination-in-chief of the witness is complete, the accused person should be given an opportunity to cross-examine him.

F For the reason already given the appeal against conviction is allowed, the convictions on all four appellants are quashed and all the orders of the lower court, one of which — that relating to compensation — was ultra vires in any event, are set aside.

Appeal allowed.