A

RAMZAN ALI

v.

REGINAM

B

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.), 20th October, 7th November]

Criminal Jurisdiction

Criminal law—direction to assessors—self defence—belief by accused of imminent danger—based on reasonable grounds—assessors directed only on one aspect—Court of Appeal Ordinance (Cap. 8) s.22.

C

Criminal law—practice and procedure—practice of handing a volume of Ordinances to assessors to be deprecated.

At the trial of the appellant for murder the judge, in directing the assessors upon the question of self defence, told them that there must be good cause for the person attacked to believe his life to be in danger before he can kill in self defence with impunity.

D

Held: The omission to add a direction that it must also be established that the appellant actually believed that he was in imminent danger, was favourable to the appellant; the assessors having plainly rejected that there were any reasonable grounds for such a belief the omission could not avail the appellant as a ground of appeal.

E

Semble: Where it is desired that the assessors have available a copy of relevant sections of the Penal Code the practice of providing typed copies thereof is to be commended and that of handing to the assessors a volume of the Ordinances is to be deprecated.

Cases referred to: *R. v. Chisam* (1963) 47 Cr.App.R.130: *Owens v. H. M. Advocate* [1946] S.C. (J.) 119.

F

Appeal against a conviction of murder by the Supreme Court.

M. S. Sahu Khan for the appellant.

G. Mishra and D. I. Jones for the respondent.

G

Judgment of the Court (read by MARSACK J.A.): [7th November 1969]—

This is an appeal against conviction for murder entered in the Supreme Court sitting at Lautoka on the 13th April, 1969. The trial Judge sat with three Assessors who expressed the unanimous opinion that appellant was guilty of murder. The trial Judge concurred with this opinion, entered a conviction accordingly, and passed sentence of imprisonment for life.

H

The facts may be shortly stated. On the 20th December, 1968, at at Marinitawa, Moto, Ba, appellant and one Bhairo Prasad were involved in verbal altercation on the subject of the boundaries of lands in which

they were interested. This took place between 10 a.m. and 10.30 a.m. Appellant was carrying a knife. In the course of the events which happened after the altercation began Bhairo Prasad received seven knife wounds and he died before 11 o'clock that same morning, the cause of death being irreversible shock from excessive haemorrhage resulting from those wounds. Appellant did not deny that the wounds were inflicted with his knife, but in evidence he stated that he had merely been swinging it to frighten deceased who was advancing towards him in a threatening manner, and that he had not intended to wound deceased with the knife. He further contended that a serious wound on the leg had been caused by a blow from another person whom he did not see. This blow was, according to medical evidence, the most serious of all and made death almost inevitable. Dr. Rao expressed the opinion that death may possibly not have resulted from the other wounds if they had been treated within a short time after they were inflicted. Appellant also stated that deceased had used some offensively insulting language towards him.

A total of some 30 grounds of appeal, in headings and sub-headings, were put forward on behalf of appellant. The grounds were diffuse and overlapped to a great degree. We do not find it necessary to set these grounds out in detail. At the conclusion of the argument for appellant the Court ruled that there was no case to answer on a great many of the grounds, which were found to have no substance. The grounds to which counsel for the Crown was called upon to reply may be briefly set out as follows :—

(1) that the direction of the learned trial Judge to the Assessors was unduly favourable to the prosecution when he directed the Assessors to scrutinize carefully the evidence of Segram, the 12-year-old son of the deceased, because of his age, his relationship with the deceased, his distance from the scene and the emotional state of his mind;

(2) that the learned trial Judge misdirected the Assessors on the subject of self-defence when he directed them that it was for the Assessors to say whether appellant had good cause for believing that his life was in danger from the deceased;

(3) that the learned trial Judge misdirected the Assessors when he directed them that the appellant might be found guilty of manslaughter on the basis of excessive self-defence if the Assessors found that the force used by appellant was excessive and beyond that which he was justified in using in self-defence;

(4) that the learned trial Judge misdirected the Assessors in that he did not explain to them what in law constitutes "aiding and abetting" and "acting in concert in pursuance of a common criminal design";

(5) that the learned trial Judge erred in law and in fact in allowing the Assessors to take with them Volume I of the Laws of Fiji at the time of their deliberations.

We propose to deal with these grounds seriatim.

Ground 1 : The boy Segram, who had given evidence at the preliminary inquiry, was not called as a witness for the prosecution but was submitted for cross-examination. In the course of that cross-examination

he stated that he had seen Shaukat Ali, appellant's brother, inflict the serious wound on his father's leg. Counsel for appellant contended that the attention of the Assessors should have been directed to the fact that on this point he corroborated the evidence given by appellant, to the effect that he had not inflicted the wound on the leg which, in counsel's submission, was the probable cause of death.

In our opinion there is no merit in this ground of appeal. Although it is true that Segram deposed that the wound on the leg had been inflicted by Shaukat Ali, yet his evidence definitely served to incriminate the appellant in that he said he saw appellant strike the deceased twice with the knife when deceased was unarmed. It is perhaps of interest to note that in his cautioned statement to the police appellant admitted that he became angry with deceased and started hitting him with the knife; and also that it was he alone who had struck deceased with the knife. To Senior Detective Inspector Muniappa Swamy he admitted striking deceased a blow on the leg. It appears quite clear that the evidence of Segram on certain important points was unreliable and conflicted with the evidence of other witnesses accepted on good grounds by the Court. In the circumstances we are of opinion that the learned trial Judge dealt with the matter correctly when he said in his judgment that although a considerable portion of Segram's evidence was otherwise consistent with the prosecution case he concluded, for the reasons already stated, that his evidence should not be accepted as reliable. There was no obligation on the part of the trial Judge to point out to the Assessors that one part of Segram's evidence was consistent with that of appellant. He quite properly left the credibility of Segram to the Assessors when he directed them, after referring to the cross-examination of Segram —

> "how a certain event took place, who is telling the truth, who is reliable and who is not, are matters essentially within your province".

It was perfectly proper to direct the attention of the Assessors to Segram's age, his relationship to the deceased, the distance from the scene of the incident and the emotional state of his mind. His direction to the Assessors with regard to Segram's evidence was, in our view, scrupulously fair. This ground of appeal accodingly fails.

Ground 2 : Counsel for appellant submits that the direction of the learned trial Judge to the Assessors on the subejct of self-defence was inadequate. What the trial Judge said on this point was :—

> "there must be good cause for the person attacked to believe his life to be in danger before he can kill in self-defence with impunity. This is a question of fact. This is a matter for you to consider as a question of fact, and decide whether in your opinion there was good cause for believing the accused's life was in danger".

Counsel's contention was that this direction was insufficient in that the learned trial Judge did not explain to the Assessors that there are two questions to be considered in relation to a plea of killing in self-defence: the first being whether the accused was acting in a belief that his life was in danger, and the second whether that belief was based on reasonable grounds.

In support of his argumentt counsel cited the judgment of the Court of Criminal Appeal in *Colin Chisam* (1963) 47 Cr.App.R. 130. There the principles applicable are set out in these terms, quoted from *Owens v. H. M. Advocate,* 1946 S.C. (J) 119 at p.125 :—

> "In our opinion self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are founded on a genuine mistake of fact."

In that case, as appears from the judgment of the Court at page 135, the trial Judge left to the jury the question whether the appellant in fact was acting through fear of such danger, but omitted to leave to them the second question whether that belief was based on reasonable grounds. Here, counsel's complaint is that, as appears from the Judge's direction to the Assessors, he left it to them to consider whether the appellant's belief that his life was in danger was a reasonable one but did not leave to them the question whether in fact he believed his life was in danger.

Chisam's case is, therefore, a converse of the present one. But it is clear that to omit leaving either one of these questions to the Assessors cannot but be of advantage to the accused. In Chisam's case it was held that the omission of the second question, whether the belief that his life was in danger was on reasonable grounds, was highly favourable to the prisoner. This must also, in our view, be so in the converse case when the Assessors are directed merely to consider whether appellant's belief that his life was in danger was a reasonable one. They must have held that it was not. That renders the plea of self-defence unavailing however strongly the appellant may himself have held the belief that his life was in danger.

There is, therefore, no merit in this ground.

Ground 3 : It is clear that in his direction to the Assessors on the point of excessive self-defence the learned trial Judge has correctly stated the law. Counsel for appellant contends that the trial Judge should have gone further and explained to the Assessors exactly what is meant by self-defence and exactly what degree of force would be regarded as reasonable and what excessive. We can find no merit in this ground. The learned trial Judge's finding on the matter was that appellant's suggestion that he was acting in self-defence, and that the injuries on deceased were inflicted accidentally and not deliberately, had no foundation in fact. The trial Judge was scrupulously fair to appellant when he put the issue of excessive self-defence to the Assessors and he directed them accurately as to the law on the subject. The Assessors could have been in on doubt as to what was meant when the trial Judge explained that excessive self-defence meant that the degree and extent of force used by the accused was excessive and beyond that which he was justified in using in self-defence. He went on to remind the Assessors again that the onus was on the prosecution to disprove affirmatively that the accused had acted in self-defence or excessive self-defence. It is true that in his final summary to the Assessors the learned Judge referred to self-defence only in general terms; but we consider that in all the circumstances this was sufficient. This ground of appeal also fails.

Ground 4: This ground of appeal was argued on the basis that the severe wound on deceased's leg had been inflicted by some person other than appellant and that it was this wound which was the real cause of death. Counsel contended that in these circumstances appellant could not be held responsible for the death of deceased unless it was proved by the prosecution that he and the person who had struck the blow had been acting in concert in the course of a common enterprise; and that the learned trial Judge had given what amounted to a misdirection when he said:—

> "You are also to bear in mind that the Accused person cannot be held to be responsible for the act of another person unless the prosecution can satisfy you beyond any reasonable doubt that the Accused and the other person were aiding and abetting each other or were acting in concert in pursuance of a common criminal design."

It was counsel's contention that the Assessors would be unable to understand the effect of this direction unless it were explained to the Assessors exactly what was meant by the phrase "aiding and abetting" and "acting in concert in pursuance of a common criminal design".

We are unable to accept this argument. In the first place it cannot be held to be established that the wound on the leg was the cause of death. The medical evidence was to the effect that even if the leg injury had not existed the other injuries could have caused death by bleeding; though if he had been treated within half an hour his life might possibly have been saved. These other injuries were unquestionably severe enough to establish with certainty an intent to cause at least grievous bodily harm. The case for the prosecution was that all the injuries were inflicted by appellant; and if no direction had been given on the subject of joint enterprise at all, it could not, in our view, reasonably have been contended that the summing-up had been inadequate by reason of the omission. Moreover, we are not satisfied that the lack of a more elaborate explanation as to the meaning of the phrases quoted would have misled the Assessors. From the summing-up they must necessarily have concluded that if they found it was not proved beyond reasonable doubt that appellant had inflicted the wound on the leg and that wound have been the sole cause of death, then appellant could not be held responsible unless it was proved that he and the other person had been working together in pursuance of some common plan. This was, in any event, no part of the Crown case.

Accordingly this ground of appeal also fails.

Ground 5: We can find no substance in this ground. We were informed at the hearing that a common practice is to have the relevant section of the Penal Code typed out and copies of that given to the Assessors. This system, we think, is to be commended, which the system of handing out a volume of the Ordinances is not. At the same time we can find no basis for counsel's contention that in these circumstances the Assessors, being laymen, would be inclined to interpret the Ordinance in their own fashion instead of relying on the interpretation of the law given to them by the learned trial Judge. The Assessors were reminded at the very beginning of the summing-up that the Judge would direct them on matters of law and they were bound to accept those directions. We think that the practice of handing to the Assessors

a volume of Ordinances is to be deprecated; but we can find no justi-
A fication for the argument that such an action on the part of the trial Judge should lead to a quashing of the conviction. It is perfectly clear that no substantial miscarriage of justice has in fact occurred; and if it were necessary to apply the proviso to section 22 of the Court of Appeal Ordinance — and in our opinion it is not necessary — we should dismiss the appeal on that ground.

B For these reasons the appeal is dismissed.

Appeal dismissed.