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JAGENDRA SHARMA

v.

REGINAM

B [COURT OF APPEAL,* 1970 (Marsack V. P., Bodilly J. A., Spring J. A.), 7th, 16th January].

Criminal Jurisdiction

Criminal law—evidence and proof—confession—persistent questioning by police—held voluntary on ample grounds. Criminal law—evidence and proof—Judges'
C *Rules rules of conduct for police—breach of principle in preamble to rules—discretion of court—Judges' Rules* (*Legal Notice No.* 14 *of* 1967) *Rules* 2, 3.

Where there were ample grounds to support the trial Judge's finding that confessions made by an accused person were made voluntarily, the fact that there was some repetition and persistence in questioning by the police pursuant to their desire to ascertain the truth did not give rise to a valid ground of appeal.

D The appellant, having been duly cautioned under Rule 2 of the Judges' Rules, made a statement containing incriminating material. Twenty-five minutes later he made a specific request to be permitted to make a further statement. Before doing so he was again cautioned under Rule 2.

Held: 1. That the Judges' Rules are rules of conduct directed to the police, and no more.

E 2. A the time the second statement was made the police had sufficient evidence to prefer a charge, but while there may therefore have been a technical breach of paragraph (*d*) of the preliminary statement of principles contained in the Judges' Rules, the trial Judge had a discretion, which he exercised correctly, to admit the second statement.

Cases referred to:

F *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326.
Powell v. Streatham Manor Nursing Home [1935] A.C. 243; 152 L.T. 563.

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*Special leave to appeal against this judgment was refused by the Privy Council.

Judges' Rules. Para. (*d*). That when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;.

Judges' Rules. Rule 2. As soon as a police officer has evidence which would afford reasonable grounds
G for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:—

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

H Rule 3. (*a*) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:—

"Do you wish to say anything ? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence".

Baksh v. The Queen [1958] A.C. 167; [1958] 2 W.L.R. 536.
Watt (or Thomas) v. Thomas [1947] A.C. 484; [1947] 1 All E.R. 582. A
R. v. Voisin [1918] 1 K.B. 531; 13 Cr. App. R. 89.
Ibrahim v. R. [1914] A.C. 599; 111 L.T. 20.
R. v. Lee (1950) 82 C.L.R. 133.
R. v. Phillips [1949] N.Z.L.R. 316.
R. v. Smith [1961] 3 All E.R. 972; 46 Cr. App. R. 551.
R. v. Stenning; *R. v. Collier* [1965] 3 All E.R. 136; 49 Cr. App. R. 344. B
Cornelius v. The King (1936) 55 C.L.R. 235.
R. v. Ovenell [1969] 1 Q.B. 17; [1968] 1 All E.R. 933.
Ramzan Ali v. Reginam (1969) 15 F.L.R. 174
Nirmal v. Reginam (1969) 15 F.L.R. 194

Appeal from a conviction of murder in the Supreme Court.

F. M. K. Sherani for the appellant. C

J. R. Reddy for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by SPRING J. A.): [16th January 1970]—

The appellant and one Nirmal (s/o Chandar Bali) were convicted by the Supreme Court of Fiji at Lautoka of the murder of Davendra Sharma (s/o Ram Singh Maharaj) on the 4th September, 1968 at Koronubu, Ba. The trial began on the 3rd February, 1969 and concluded on the 13th March, 1969 and took place before a Judge and five assessors. The trial Judge accepted the unanimous opinion of the assessors that the appellant was guilty and entered a conviction for murder and imposed the mandatory sentence of imprisonment for life. A third accused, Mahesh alias Ramesh (s/o Ram Samujh), was acquitted by the trial Judge. The appellant now appeals to this Court against his conviction for murder. D

The facts in so far as they are relevant to the case against the appellant may be stated briefly as follows. The body of Davendra Sharma was found at about 3 a.m. on the morning of the 5th September, 1968 lying face downwards near the tramline at Koronubu, Ba. The police arrived at the scene at 4.15 a.m. They found found a vaivai stick lying near the head of the deceased. Doctor Mangal Singh was called and after viewing the body expressed the opinion that death had occurred between 9.30 p.m. and 11.30 p.m. on the evening of the 4th September, 1968. Dr. Holmes carried out a post-mortem examination and concluded that death was due to multiple wounds of the head, face and neck; at least three of the wounds being inflicted by a sharp instrument. There was also a wound on the front of the deceased's left leg which was consistent with the deceased being struck by a blunt instrument. Jagat Singh, who was the last prosecution witness to see the deceased alive on the night of the 4th September, 1968 gave evidence that he had walked along the Koronubu tramline with the deceased until they reached the junction of the Nabatolu Road at about 11 p.m. when they separated. The deceased then walked alone along the tramline towards his house. E F G

Evidence was given that on the night of the murder after 10.30 p.m. at night a man was heard to yell out in a " scared " manner and 5 to 10 minutes later the appellant and another man were seen approaching the appellant's house from the direction where the deceased's body was later found—a distance of 27 to 31 chains from the house. H

The evidence against the appellant was founded almost entirely upon two written statements made by the appellant to the police on 11th September, 1968 at Koronubu.

The original notice of appeal against conviction and sentence was abandoned at the hearing of the appeal and by leave of this Court eight fresh grounds of appeal were argued. The grounds overlapped to a considerable extent and counsel for the appellant agreed in answer to a question from the learned Vice-President that the principal ground of appeal was that the alleged confessions made by the appellant and contained in the two written statements had not been affirmatively proved by the prosecution to have been freely and voluntarily made. This epitome of the main grounds of appeal adequately covers numbers 1, 2, 4, 5 and 7 of the grounds of appeal, and a consideration thereof necessitates an examination of the evidence leading up to the taking of the statements from the appellant.

The appellant was first seen and questioned by the police on the 6th September, 1968 and on subsequent days thereafter, and he gave oral explanations to the police on various matters but at no time did he admit complicity in the murder of the deceased. The police had interviewed several other people as well; and it was decided to hold a mass interview of accused persons, including the appellant, who were likely to assist them in their investigations. This interview was held on the 11th September, 1968 at the compound of the house of the deceased. In our view, having regard to all the circumstances, we are of the opinion that this method of mass inquiry and investigation offered what appeared to be the most effective way of ascertaining the truth.

The evidence for the prosecution is to the effect that at about 6 a.m. on the morning of the 11th September, 1968 Corporal Sataya Narain called for the appellant at his house and conveyed him, his brother and his brother's wife to the police base at the deceased's compound.

The interview with the appellant commenced at 9.05 a.m. in the bedroom of the deceased's house, and was conducted by Corporal Mohammed Ishak who first cautioned the appellant in accordance with Rule II of the Judges' Rules in force in Fiji. Other policemen were from time to time present in the room. On the 9th September, 1968 the appellant had been confronted with the third accused, one Ramesh, who had in the presence of the appellant stated that the appellant had been involved in the murder of Davendra Sharma. This the appellant denied. The appellant was questioned as to why the third accused should implicate the appellant in the murder. He replied that Ramesh had enmity against him on account of his being in love with Ramesh's sister. The appellant was confronted with Sharma Wati—the sister of Ramesh—who denied in the appellant's presence writing letters to the appellant and being his lover.

Just before 12 noon the appellant stated that he wished to give his true statement. From a reading of the evidence given on the *voir dire* we are left with the impression that eventually the appellant, after giving many statements which when checked by the police were found to be contradictory or inconsistent with other testimony, was anxious to tell his story. He was duly cautioned as before, and a Statement Exhibit R.1 was recorded and completed at 2 p.m. At 2.25 p.m. after he had had his lunch, the appellant stated to Inspector Jone Sawau that he wished " to give a little further statement ". Corporal Ishak who was absent from the room was recalled, and after he had cautioned the appellant again in accordance with Rule II of the Judges' Rules a further statement Exhibit S.1 was recorded and completed at 3 p.m. Shortly after this some police officers and the appellant proceeded to the latter's house to take photographs; it was here that the appellant spoke to his elder brother Narendra and, according to the prosecution evidence, admitted that he was involved in the murder. The party returned to the deceased's compound where the appellant was arrested at 4.10 p.m.

and charged with the murder of Davendra Sharma. He was taken to the Ba Police Station at about 5.30 p.m. A charge statement was completed by the Police at 7.20 p.m. The appellant was seen by a Justice of the Peace, Billy Obed, at 9 p.m. and was examined by Dr. Mangal Singh at 9.30 p.m.

At the trial the admissibility of the two statements was challenged, and the question was considered in detail on the *voir dire* in the absence of the assessors.

Counsel for appellant argued that the statements were not voluntary in the sense that they had been obtained (i) by means of threats, physical assaults and violence, or (ii) by means of unfair practices or improper procedures on the part of the police.

We turn firstly to consider the allegation that the statements were obtained as a result of threats, physical assaults or violence. A considerable amount of evidence was led by the prosecution and the appellant also gave evidence. He admitted that he signed the statements, but asserted that they were extracted from him by reason of acts of physical violence. It is pertinent to note that when he was cross-examined in " the trial within a trial " he stated he did not call out because he was not being assaulted so forcefully that he should be crying out. In the trial proper it is to be observed that when asked the same question he gave a totally different answer. This was to the effect that it was pointless to cry out as there were 20 to 25 constables about and he did not think they would help him. Further it is to be noted that while the appellant admits speaking to his elder brother Narendra Sharma, shortly after both statements were taken, he made no complaint as to the alleged assaults by the police. In the trial within a trial the appellant also admitted in evidence that he made no complaint to Inspector Tevita Nadolo as to being physically assaulted by the police although when giving evidence in the trial proper he claimed that he did. The first allegation of police assaults made by the appellant was at the time the charge statement was taken at the Police Station at about 7 p.m.; and it appears from the record that this was after the appellant had spoken to a solicitor. Later he complained to the Justice of the Peace at 9 p.m. that he had been assaulted. Dr. Mangal Singh at the request of the police examined the appellant at 9.30 p.m. the same evening and found no sign of injury upon him.

We have given careful consideration to the evidence contained in the record and to the argument of Counsel that the statements made by the appellant were obtained by violence and physical assaults. The learned trial Judge in his ruling in the fourth trial within a trial rejects as thoroughly unreliable the evidence of the appellant with regard to the allegations of threats assaults and ill treatment and in coming to that conclusion he says:

> " I have borne in mind throughout that the Crown has the onus of proving beyond any reasonable doubt that the disputed statements or answers of the accused sought to be given in evidence were voluntary in the sense that they had not been obtained from him by fear of prejudice or hope of advantage exercised or held out by any person in authority or by oppression..... The prosecution has satisfactorily discharged the burden which lay upon it."

On full consideration we can find no valid reason to differ from the ruling of the learned trial Judge on his findings of fact. We are of course mindful of the principles governing the position of an appellate court in relation to findings of fact, which are fully stated in *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370 and in the earlier decisions of *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243 and *Watt (or Thomas) v. Thomas* [1947] A.C. 484: they need not be repeated.

We now consider the other matters urged upon us by counsel for the appellant independently of the alleged assaults and violence, viz whether the appellant was coached by Corporal Sataya Narain to tell the narrative contained in the statements; whether the appellant was severely cross-examined; whether a confession was extracted from him involuntarily; whether the learned trial Judge assessed the credibility of the appellant and his witness by demeanour and that alone; and generally whether the statements were obtained by means of unfair practices or improper procedures on the part of the police. It is perfectly clear that the allegations as to the coaching of the appellant by Corporal Sataya Narain and Inspector Jone Sawau; of the cross-examination of the appellant; and of the extraction of a confession from the appellant were rejected by the learned trial Judge. We are satisfied that the learned trial Judge did not reject the testimony of the appellant and his witness by their demeanour and that alone. There was considerable evidence and cross-examination on all the points concerned, and we are satisfied that the learned trial Judge carefully weighed and evaluated the evidence; accepting such evidence as he found reliable and rejecting that he found unreliable. We can find no evidence of unfair practices or of the use of improper police procedures. There were ample grounds in our view for the trial Judge's finding that the confessions were voluntary, in accordance with the principles enunciated in the judgment of Lord Sumner in *Ibrahim v. R.* [1914] A.C. 599 at 609:

> " It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

The police were essentially concerned in ascertaining the truth and on this point we have considered the statement in *R. v. Lee* (1950) 82 C.L.R. 133 at p. 155 quoting an earlier judgment of Street, C. J.:

> " But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence."

And as Finlay J. said in *R. v. Phillips* [1949] N.Z.L.R. 316 at p. 357:

> " It is to be hoped that the now re-emphasized demand of the law that statements made out of Court should be voluntary will not result in too onerous a restriction being imposed on those who are engaged in a task so vital to the public interest as the detection of crime."

We agree that although there was some repetition and some persistence in questioning, all this was in our view entirely appropriate to the inquiry on which the police were engaged. In the result we can find no merits in the main ground of appeal advanced by counsel for appellant and contained in numbers 1, 2, 4, 5, and 7.

Turning now to Ground 3 of the notice of appeal which reads:

> " It was incumbent on the Police, in order to comply with Principle (*d*) of the Preamble to the Judges' Rules to have, either charged or warned the Appellant, that he might be prosecuted for the offence of murder before recording Exhibit R: and, in any event, before recording Exhibit S. The learned trial Judge erred in holding to the contrary."

It is not disputed that the appellant was duly cautioned in accordance with Rule II of the Judges' Rules by the interviewing corporal not only before the interview commenced but also again when the first Statement Exhibit R was recorded. The appellant when seen at 9.05 a.m. on the 11th September, 1968 was merely a suspect, and we agree with the submissions of learned counsel for the Crown that there was insufficient evidence at that stage to charge him with the crime of murder.

We are firmly of the opinion therefore that it was not necessary for the interviewing constable to charge the appellant in accordance with Rule III of the Judges' Rules before recording the first statement taken from the appellant. With respect to the second statement Exhibit S, there was in our view ample ground for the finding that the appellant freely and of his own volition expressed the desire to Inspector Jone Sawau " to give a little further statement " which was merely to supplement or add to the statement which the appellant had given some 25 minutes earlier. Before the second statement was recorded the appellant was again cautioned in accordance with Rule II of the Judges' Rules, the interviewing corporal stating in evidence that he had not at that stage made up his mind to charge the appellant.

It was conceded by learned counsel for the Crown that there was sufficient evidence against the appellant (before the second statement was recorded) to prefer a charge against him; but he argued that any breach of the preamble (D) to the Judges' Rules was purely technical, and that the learned Judge still had a discretion to admit the statement: *R. v. Smith* [1961] 3 All E.R. 972. We have considered the decision of *R. v. Collier* and *R. v. Stenning* [1965] 3 All E.R. 136 at p. 138 where Lord Parker C. J. says:

> " Where however r. 3 (*a*) does not apply because there has been no actual charge but there has been a breach of the principle set out in paragraph (*d*) of Appendix A of the introduction that breach will be a factor to be considered in determining whether any statement obtained or made thereafter is a voluntary statement."

The learned trial Judge duly considered all the circumstances surrounding the taking of the second statement and found as a fact that it was made at the specific request of the appellant and ruled that the statement was admissible.

Having considered the evidence and remembering what was said in *Cornelius v. The King* (1936) 55 C.L.R. 235 at p. 252 that "a statement need not be spontaneous or volunteered to be voluntary " we are satisfied that the learned trial Judge exercised his discretion correctly in admitting the second statement. We are further satisfied that his action in so doing did not in our view lead to any miscarriage of justice. It is to be noted that he did, in the interests of complete fairness to the appellant, exclude any evidence relating to a demonstration given at the scene of the murder by the appellant to the police about an hour after the second statement was recorded, on the ground that after the second statement had been taken the appellant should have been charged or informed that he might be prosecuted for the crime of murder.

In considering the Judges' Rules which were adopted in Fiji as from 1st March, 1967, it is pertinent to note the comments of the Court of Criminal Appeal in *R. v. Ovenell* [1968] 1 All E.R. 933 at p. 938 where Mr. Justice Blain in delivering the judgment of the Court said:

> " Now three things require to be said about the Judges' Rules. First of all, they are not mandatory or not even directed to the court at all. They are rules of conduct directed to the police and no more; indeed, they are directed to no

A one but the police, though it is understandable that investigating officers of other services might be thought to be comparably placed with police officers. Secondly, where a statement has been made without caution in circumstances where compliance with the rules would have necessitated a caution, it is a matter for the trial Judge to exercise his own discretion as to whether the statement should be admitted or not. No doubt in exercising that discretion so long as the statement is not inadmissible he will apply his mind, *inter alia*, to such factors and principles as the balance between probative value B and potential prejudice. Thirdly, in this particular case the deputy chairman did exercise his discretion judicially and, in the view of this court, more than fairly to the applicants."

We conclude therefore that there is no merit in this ground of appeal.

We turn now to the sixth ground of appeal which reads:

C " In giving his Ruling in the " trial within trial " at page 111 to 113 of the 3rd Volume of the Record the learned trial Judge failed to consider that substantial and weighty evidence pointed to the fact that no food was provided to Appellant until 12.45 o'clock on 11th September, 1969. This fact further lent aid to the Appellant's contentions that Exhibits R and S were not voluntarily made by him. There has been thus a substantial miscarriage of justice."

There was in our view sufficient evidence from which the learned trial Judge D could conclude, as he did in fact so conclude in his final judgment that refreshments were given to the appellant.

Evidence was given by prosecution witnesses that the appellant was supplied with breakfast between 8 a.m. and 8.30 a.m. and with bread and tea at sometime after 12 noon and lunch at 2 p.m. Again in our view this was a question of fact for the learned trial Judge and, although it was not specifically mentioned in the ruling in the fourth trial within a trial, it is obvious that he had directed his mind E to the matter and evaluated the evidence, as is apparent from his statement in the final judgment where he says:

" Reasonable arrangements were made for seating and for refreshments and meals ".

After a careful study of the record we are satisfied that there is no merit in this ground of appeal.

F We turn now to ground 8 which reads:

" The learned trial Judge erred in making available to the gentlemen assessors Volume I of the Laws of Fiji and therefore there was a miscarriage of Justice."

We can find no substance in this ground and adopt the reasoning given by this Court in *Ramzan Ali* (s/o Ali Buksh) *v. Reginam* (1969) 15 F.L.R. 174 that the prac- G tice of handing to the assessors a volume of Ordinances is to be deprecated but is not a ground for setting aside a conviction. This ground of appeal also fails.

Finally counsel for appellant referred to the decision of this Court in *Nirmal* (s/o Chandar Bali) *v. Reginam* (1969) 15 F.L.R. 194 where this Court allowed the appeal, quashed the conviction and ordered a re-trial.

It is true that Nirmal and this appellant were jointly convicted of the murder H of Davendra Sharma. It was urged upon us by counsel for the appellant that this Court should at the least allow the appeal and order a re-trial. In support of his submission he referred us to *Baksh v. The Queen* [1958] A.C. 167. We are unable to agree that the judgment in Baksh's case supports his contention. Counsel relies on the passage from the judgment at p. 172:

> " Their credibility " (i.e. of the witnesses) " cannot be treated as divisible and accepted against one and rejected against the other."

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But there is no question of accepting certain evidence as against one of these appellants and rejecting it as against the other. Consequently there is no basis for the submission that judgment on this appeal must necessarily follow that given in the case of Nirmal and we refer to the decision of *R. v. Voisin* [1918] 1 K.B. 531 at p. 537 where Mr. Justice Lawrence in delivering the judgment of the Court of Criminal Appeal said:

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> " It is clear and has long been frequently held that the duty of the judge to exclude statements is one that must depend on the particular circumstances of each case."

In our view therefore the appellant was rightly convicted after a fair trial upon ample evidence accepted by both the learned trial Judge and the assessors and there is nothing in any of the grounds of appeal which warrants interference by this Court.

C

The appeal is accordingly dismissed.

Appeal dismissed.