A

SHIU RATTAN

v.

B

REGINAM

[COURT OF APPEAL, 1970 (Gould V.P., Marsack J.A., Tompkins J.A.), 3rd, 13th November]

Criminal Jurisdiction

C *Criminal law—summing up—onus on prosecution—method of conveying requisite standard of proof to assessors—use of expression " beyond reasonable doubt " approved.*
Criminal law—trial—witness—accused giving evidence—no impropriety in counsel for prosecution putting to him for comment other evidence given earlier.
Criminal law—passing sentence—court entitled to fullest relevant information—duty of Crown Counsel.

D The rule is well established that the assessors should be directed that they must be satisfied beyond reasonable doubt: it is not a rule that the assessors must be directed that they are to be sure, or certain, of the guilt of an accused person, before giving the opinion that he is guilty. The use of the phrase, " the prosecution is not required to establish the guilt of the accused with certainty ", deprecated.

E There is nothing improper in counsel for the prosecution putting questions to an accused person in cross-examination asking him to comment in any way he wished on other evidence already given in the course of the trial.

Per curiam: A court embarking upon the difficult task of passing sentence is entitled to the fullest possible relevant information, including particulars of any previous convictions; it is the duty of Crown Counsel to ensure that all such information is placed before the trial Judge.

F Cases referred to:

R. v. Hepworth [1955] 2 Q.B. 600; 39 Cr. App. R. 152.

R. v. Summers [1952] 1 All E.R. 1059: 36 Cr. App. R. 14.

Thomas v. R. (1960) 102 C.L.R. 584.

Ravi Nand v. R. (1964) 10 F.L.R. 37.

G *Riano v. R.* [1960] E.A. 960.

Northern Australian Co. v. Goldsborough Mort [1893] 2 Ch. 381; (1893) 62 L.J. Ch. 603.

Stirland v. Director of Public Prosecutions [1944] A.C. 315; [1944] 2 All E.R. 13.

R. v. Kritz [1949] 2 All E.R. 406; 33 Cr. App. R. 169.

H *R. v. Onufrejczyk* [1955] 1 Q.B. 388; [1955] 1 All E.R. 247.

Mancini v. Director of Public Prosecutions [1942] A.C. 1; [1941] 3 All E.R. 272.

Appeals against conviction and sentence in the Supreme Court.

K. C. Ramrakha for the 1st appellant.
M. S. Sahu Khan for the 2nd and 3rd appellants. A
D. I. Jones for the respondent.
The facts sufficiently appear from the judgment.
Judgment of the Court (read by MARSACK J.A.): [13th November, 1970]—

These are appeals against conviction before the Supreme Court sitting at Suva of the offences of attempt to commit arson and damaging property, and also against the sentence of three years' imprisonment imposed upon conviction. B Appellants had been jointly charged in the Supreme Court. All three appeals were, by consent, heard together.

The facts found in the Court below may be set out briefly as follows. On the night of 20th June, 1969, one Ram Kishor was awakened from sleep to find a fire burning in his car which had been parked in a garage adjoining his house at Malamala, Nadi. At the same time, stones were being thrown at his house. C Ram Kishor looked through the window and identified all three appellants, each of whom was then throwing stones at the house. Evidence confirming that of Ram Kishor was given by his wife, Ram Dulari, his defacto wife, Kanya Wati and his son, Jawahir Lal. A container which had not been in the car the previous night, was found in it after the fire had been extinguished, and the trial Judge drew the inference that this had contained the inflammatory liquid with which the car had been set ablaze. D

The defence set up was an *alibi* on the part of all three appellants, who testified that they had been elsewhere at material times and had taken no part in the acts forming the basis of the charges against them.

All three assessors expressed the opinion that each of the appellants was guilty on both charges. The learned trial Judge agreed with the assessors, entered E convictions accordingly and passed sentence in each case of three years' imprisonment on the first charge and one month's imprisonment—to be served concurrently —on the second. It is from these convictions and sentences that the present appeals are brought.

Although at the hearing of the appeal second and third appellants were represented separately from the first appellant, the grounds of appeal were identical F in each case. Two of the grounds set out in the notice of appeal overlapped to some extent, and an additional ground was, by leave, adduced at the hearing. The grounds of appeal argued may be conveniently summarized as follows:—

(1) That the learned trial Judge erred in law and in fact in not dealing with the evidence against each accused separately, and assessing the evidence against each separately;

(2) That the learned trial Judge did not sufficiently and adequately direct G the gentlemen Assessors on the question of burden and quantum of proof and alibi;

(3) That the verdict and findings of the learned trial Judge and the Assessors are unreasonable and cannot be supported having regard to the evidence as a whole;

(4) That Crown Counsel was allowed by the learned trial Judge to put to H first appellant in cross-examination questions which were unfair and not permissible.

In their argument on the first ground, Counsel for appellants conceded that the learned trial Judge had directed the assessors that although the three accused persons were charged jointly, the case against each must be considered quite independently and separately. He further directed them that any extra-judicial admission made by one accused must be wholly disregarded against the others. None the less, Counsel contended that the learned trial Judge made no effort to detail the evidence against each appellant separately, but referred always to the evidence as a whole.

We can find no merit in this ground of appeal. Not only did the learned trial Judge direct the assessors correctly in the terms already quoted; but from time to time he referred to the evidence in terms such as these:—

" (the witness) was able to identify the three accused, and each of whom was then engaged in the stoning of the house. "

" He saw each of their faces. "

" She said she peeped through the window and identified accused 1, 2 and 3. She saw all three of them throwing stones. "

" You remember he said he first recognised accused 2 and 3 and then accused 1. "

Reading the summing up as a whole, with particular reference to the warnings given to the assessors that the case against each accused must be considered quite independently and separately, we are satisfied that the learned trial Judge directed the assessors, and himself, fully and accurately on this point. Accordingly, the first ground of appeal fails.

The second ground of appeal was based on the express direction given to the assessors by the learned trial Judge in these terms:—

" As you have already been told, the onus of proof in a criminal case rests on the prosecution throughout. You should only express the opinion that the guilt of an accused person has been proved if you are satisfied that that has been shown beyond reasonable doubt. It is never a question of the prosecution adducing evidence which merely raises a cloud of suspicion against the accused. It is not for the accused to establish his innocence. The duty always rests upon the prosecution of proving the offence charged, beyond all reasonable doubt. The doubt must be a reasonable one, not a mere fanciful one. The prosecution is not required to establish the guilt of the accused with certainty. Proof beyond reasonable doubt is what is required. "

It was the contention of Counsel that the use of the phrase " the prosecution is not required to establish the guilt of the accused with certainty ", vitiates the whole of the summing-up and makes that summing-up fatally defective. In Counsel's submission a direction so worded might well have led the assessors to base their opinions upon a balance of probabilities, instead of adopting the strict standard of proof required in criminal trials. Counsel cited the dictum of Lord Goddard L.C.J. in *R. v. Hepworth* [1955] 2 All E.R. 918 at p. 920:—

" One would be on safe ground if one said in a criminal case to a jury: ' You must be satisfied beyond reasonable doubt '. One could also say— ' You, the jury, must be completely satisfied '—or, better still—' You must feel sure of the prisoner's guilt '. I desire to repeat what I said in *R. v. Kritz* [1949] 2 All E.R. at p. 410:—

' It is not the particular formula of words that matter. It is the effect of the summing up. If the jury are made to understand whether in one set of words or in another, that they must not return a verdict against a defendant unless they feel sure of his guilt and that the onus all the time is on the prosecution and not on the defence. . . . '. "

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In Counsel's submission Lord Goddard expresses the view that, in a proper direction, the jury should be told that they must be sure of an accused person's guilt before bringing in a verdict of guilt; and that the direction given in the present case would have precisely the opposite effect on the assessors when they were told that the prosecution was not required to establish the guilt of the accused with certainty.

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Reference was also made to *R. v. Summers* [1952] 1 All E.R. 1059 in which Lord Goddard says at p. 1060:—

" I have never yet heard any court give a real definition of what is a ' reasonable doubt ', and it would be very much better if that expression was not used. "

C

The High Court of Australia considered this matter in some detail in *Thomas v. R.* (1960) 102 C.L.R. 584. At p. 605, it is said by Windeyer J. :—

" For generations jurymen have been directed in terms of ' reasonable doubt ', ' moral certainty ' and ' the benefit of the doubt '. Now it has been suggested in England, mainly by Lord Goddard, that these phrases should be abandoned. The third edition of *Halsbury's Laws of England* vol. 10, p. 424 par. 780 goes so far as to say that the phrase 'reasonable doubt' should be avoided (see among other cases *Reg. v. Summers*; *Reg. v. Onufrejczyk.*) With great respect for those whose great experience has led them to this view I think that it would be unfortunate if it were adopted in Australia. The House of Lords said in *Mancini v. Director of Public Prosecutions* that a direction ' as to reasonable doubt ' must be ' plainly given '. The best and plainest way to give it is, I venture to think, to tell the jury that they must be satisfied beyond all reasonable doubt. In the same case it was said that there is ' no prescribed formula '—in *Bullard v. The Queen* it becomes ' no magic formula '. But that no particular form of words is prescribed does not mean that an old and well-known expression is to be prescribed. And in *Mancini's* case the House of Lords referred to what Finlay J. said in the first trial in *Woolmington's* case as ' a good example of the proper direction '."

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Although Lord Goddard in *Hepworth* expresses his views on the preferable form of words to be used in summing-up to a jury as to the quantum of proof yet there is in our opinion no authority binding on this Court laying down the rule that the jury—or in Fiji, the assessors—must be directed that the jury are to be sure, or certainr of an accused person's guilt before bringing in a verdict acordingly. In our view, the well-established rule is that the jury should be directed that they must be satisfied beyond reasonable doubt. In the present case, that was made perfectly clear on several occasions to the assessors.

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But never has it been laid down that absolute certainty is essential; in fact that was conceded by Counsel for the appellants at the hearing of this appeal. Counsel distinguished between " certainty " and " absolute certainty "; and submitted that though absolute certainty could not be required, certainty could. With respect, we do not think that there can be degrees of certainty. If one is only almost certain, then one has no certainty in the strict sense of that word.

H

We agree that the use of the phrase " the prosecution is not required to establish the guilt of the accused with certainty " is to be deprecated. The summing-up in question would have been better without it. But, applying the principles set out in the recognised authorities we are satisfied that, taking the summing-up as a whole, the assessors were left in no doubt as to the standard of proof required.

In the result, the second ground of appeal also fails.

The arguments in support of the third ground of appeal were based mainly on the facts that the essential evidence of identification was given by members of the family only; that no steps were taken by Ram Kishor to advise the Police until some 6 or 7 hours after the fire had been put out; and that when a neighbour, Sish Ram, called early to inquire as to the trouble, Ram Kishor made no mention at all of the identity of the persons responsible for causing the fire.

Counsel's submission with regard to the evidence by members of the family was that this dovetailed to such an extent that it must have been a made-up story. In this respect, it is perhaps apposite to quote from the judgment of this Court in *Ravi Nand v. R.* (1964) 10 F.L.R. 37 at 41:—

> " Counsel's argument may be put shortly in this form: the evidence of each of these witnesses is similar on certain material points to that given by the others; therefore they must have concocted the story amongst themselves. There are in our opinion no grounds for any such submission."

As Crown Counsel pointed out in his address some of the points of similarity in the evidence—such as for example those concerning the clothes worn by the appellants—arose only on the cross-examination of the witnesses concerned. We think it is fair comment that if the story had been fabricated then everything would have been mentioned in examination-in-chief. The evidence of the witnesses is certainly consistent; but that in itself is no ground for holding that it is a made-up story.

With regard to the failure of Ram Kishor, in all the circumstances, to go immediately for the Police, or to inform Sish Ram of the names of the persons blamed for what took place, we can find no justification for holding, on these grounds, that the learned trial Judge and the assessors should have rejected his evidence. Ram Kishor gave an explanation on these points in the course of his evidence; and that explanation must be regarded in the light of the whole of the surrounding circumstances, including the mentality of Ram Kishor and his relations with his neighbours. The learned trial Judge and the assessors had before them all the evidence on these points, and heard such submissions as Counsel wished to make with reference to them. The evidence was accepted in the Court below, and we can see no reason for interfering with their findings.

There was in our view ample evidence, if accepted by the learned trial Judge and the assessors, to justify a conviction in each case. The evidence was so accepted, for what appear to us to be sound reasons. Accordingly, this ground of appeal also fails.

In his argument on the additional ground, Counsel submitted that the learned Judge—although no objection to the questions was taken at the trial—should have intervened to stop the cross-examination of the first appellant by Counsel for the Crown when certain questions were asked. Two of the questions to which strong objection was taken by Counsel at the hearing of the appeal were in these terms:—

" Both you and Shiu Ram went to Mani Ram's shop to buy mutton—didn't you? "

" You did not see him? But he told the Police Officer that he went to Mani Ram's shop about the same time as you did, about seven o'clock—Is that correct?"

Counsel submitted that by wording the first question in that precise form the prosecutor put the whole weight of the Crown behind the statement that Shiu Rattan and Shiu Ram went to the shop. Counsel cited the case of *Riano v. R.* [1960] E.A. 960, in which the Court of Appeal strongly disapproved the asking of a question in the nature of a trap by the trial Judge, concerning a meeting between the accused and a fictitious person invented by the Judge. But the facts in the present case are entirely different . There had been evidence given at the trial, in the hearing of first appellant, that the two appellants had been to Mani Ram's shop. The first appellant had been given the opportunity of confirming, denying or explaining this evidence. Counsel contended, on the authority of *Northern Australia v. Goldsborough Mort* (1893) 62 L.J. Ch. D. 603, that an accused person may not be told what third persons have said or sworn, and asked if he contradicts them: *Phipson on Evidence* (9th Ed.) 503. That principle however, does not apply to questions based on evidence given by witnesses at the trial of the accused person. All that the first appellant was asked at the trial was to comment in any way he wished on other evidence which had been given in the course of that trial. Such questions are in no sense improper, and in our opinion there was no onus on the Judge to prevent their being put.

As to the fact that Counsel made no objection to the putting of these questions in cross-examination, Counsel referred us to the decision of the House of Lords in *Stirland v. Director of Public Prosecutions* [1944] A.C. 315, which in his submission is authority for the principle that no conclusions prejudicial to an accused person are to be drawn from the fact that Counsel does not object to the questions when they are being put. What was said by the Lord Chancellor in that case is found at p. 328:—

" No doubt, as was said in the same case, the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. "

In the present case, for the reasons already stated we are of the opinion that questions put were proper; and if an objection had been raised by Counsel for the defence that objection should have been disallowed by the learned trial Judge.

In the upshot, appellant handled the questions very well, and the case against him, as far as can be judged from the Record, was in no way strengthened by this part of the cross-examination.

In the result we can find no merit in any of the grounds put forward, and the appeals against conviction are in each case dismissed.

With regard to the appeals against the sentence of three years' imprisonment, we agree with the learned trial Judge that the offences proved were very serious and called for substantial prison sentences. Accordingly, we can see no reason to interfere in the sentences passed on the first and third appellants.

With regard to the second appellant, however, we feel that the learned trial Judge did not fully take into account his comparative youth and possible instability. A For this reason we quash the sentence of three years' imprisonment and substitute a sentence of two years' imprisonment.

One further matter on the subject of sentence calls for comment. It appears that in the Court below Crown Counsel, at the request of Counsel for the defence, refrained from giving the trial Judge any details of the offence of which first appellant had been convicted and in respect of which he was at present serving B a sentence of imprisonment. At the hearing before this Court Counsel for the defence made it clear that he was not willing for that information to be made available to the Court.

The comment we wish to make is this. When a trial Judge is facing the difficult task of deciding upon a proper sentence to be imposed on a convicted person, he is entitled to the fullest possible relevant information, including full particulars C of any offence of which the accused has already been convicted; and Crown Counsel is under a definite obligation to ensure that all such relevant information is placed before the trial Judge before sentence is passed.

Appeals against conviction dismissed: appeals of first and third appellants against sentence dismissed; appeal of second appellant against sentence allowed and sentence reduced.