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PHILLIP VIJAY ANAND

v.

REGINAM

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[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Perry J.A.), 28th March, 6th April]

Criminal Jurisdiction

Criminal law—principles of criminal liability—mens rea—manslaughter—unlawful act causing death—must be recognisable as subjecting the other to risk of harm, though not serious harm—Penal Code (Cap. 11) s.227. C

The appellant's conviction of manslaughter was based on evidence that the deceased died as a result of strangulation at his hands. On the appeal it was argued that the trial judge had erred in law by not directing himself and the assessors that *mens rea* was an essential ingredient of the offence of manslaughter and that the prosecution had failed to prove it at the trial. D

Held: 1. The law as stated in *R. v. Church* (post) is that to justify a conviction of manslaughter the unlawful act relied upon must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least the risk of some harm resulting therefrom, albeit not serious harm.

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2. The trial judge had directed the assessors and himself in those terms and it was not necessary for him to introduce the technical term *mens rea.*

3. The trial judge's finding that the appellant knew that his unlawful act would subject the deceased to at least the risk of some harm resulting therefrom, was amply supported by the evidence.

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4. It was a case in which the court was bound to presume, because there was nothing to suggest the contrary, that the appellant intended the consequences that would naturally folow from the exercise of the degree of force used.

The Queen v. Sharmpal Singh [1962] A.C.188; [1962] 2 W.L.R.238, applied. G

Quaere: Whether the law as stated in *R. v. Church* (post) applies in Fiji in view of section 227 of the Penal Code.

Other cases referred to:

R. v. Church [1966] 1 Q.B.59; [1965] 2 All E.R.72. H

Bharat v. The Queen [1959] A.C.533; [1959] 3 All E.R.292.

Lee Chun Chuen v. Reginam [1963] A.C.220; [1963] 1 All E.R.73.

Appeal against conviction and sentence in the Supreme Court for the offence of manslaughter: reported only on the question of *mens rea.*

S. M. Koya and Ram Krishna for the appellant.

G. Mishra for the respondent.

The facts sufficiently appear from the judgment of the court.

6th April 1972

Judgment of the Court (read by Gould V.P.) :

The appellant was convicted by the Supreme Court of Fiji at Lautoka on the 8th November, 1971, of the offence of manslaughter. He had been charged with the murder of a woman named Mohmoodan Nisha on the 15th April, 1971, before a judge and three assessors: after a retirement of eighteen minutes the assessors returned and expressed three different individual opinions. One considered the accused to be not guilty of either murder or manslaughter, one was of the opinion that he was not guilty of murder but guilty of manslaughter, and the third considered him guilty of murder. This rather unusual diversity of opinion cannot have been of great assistance to the learned trial Judge, who, as we have indicated, gave judgment convicting the accused of manslaughter.

It will be necessary to outline the main facts. The deceased was about 25 years of age, married, but separated from her husband since 1969. The appellant in his unsworn statement in court said that she was his girl friend and that he had been intimate with her. She was about three months pregnant at the time of her death. On the date mentioned in the charge, Subramani, a taxi driver drove the appellant and the deceased from Lautoka along King's Road in direction of Ba. At a certain point on the road the appellant requested Subramani to stop. The two passengers alighted and crossed the road in the direction of the sea — a canefield lies along on that side of the road. Before leaving, the appellant requested Subramani to return after an hour, the time being then approximately 4.45 p.m.

A little over an hour later Subramani returned to the same spot and sounded the horn. He was joined by one Ward Raju, a fisherman but also the owner of the canefield. The appellant emerged from the canefield shortly afterwards and alone. There was a conversation between the three men to which we will refer in greater detail later. At this stage it is sufficient to say that the trial Judge accepted Subramani's version of it, and that the important aspect of the matter is that the appellant, in reply to questions, said that the girl was scared and was not coming out, that she had told the appellant to go, and that she herself would go to Ba. Subramani then drove the appellant back to Lautoka.

Ward Raju joined his brother Mahadeo and the two entered the canefield and found the deceased lying in the cane. Ward Raju at first thought she was "pretending" but Mahadeo felt for a pulse at her wrist and breast and then thought she was dead. Neither noticed any injuries. The two brothers left the deceased as she lay and Ward Raju made his way to Ba and reported to the police. He returned with the police van and showed the police where the body lay.

Meanwhile Mahadeo had taken five people from another car to see the "body" — he said that no one inteferred with it. After that he waited on

the road until the police arrived. The time at which the body was discovered cannot be fixed with certainty, but, in addition to Subramani's evidence, there was an estimate of 6 p.m. by Ward Raju's daughter Parwati, who based her evidence upon the arrival of a bus. One Chandar Singh, whose car was stopped at the scene, put it at 5.45 p.m. Police Corporal Salik Ram said that Chandar Singh reported the matter to him at Ba at 7.38 p.m. — that he picked up Ward Raju and was at the scene by 7.55 p.m. He stayed there until a party of Lautoka police arrived. The relevance of the question of time will appear later in this judgment.

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With the Lautoka police party was Dr. Eseroma Daulako, who found that the deceased was dead, saw superficial bruising in part of the neck and evidence of free blood in the mouth. The trial Judge found the time of his examination to have been 8.18 p.m.

Later that night the appellant was interviewed by the police. The admissibility of the evidence of what he then said to A.S.P. Muniappa Swami was the subject of a trial within a trial in the Supreme Court but the evidence was admitted and that question has not been raised again on the appeal. The material part of the appellant's statement is as follows :—

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> "A. I will tell the truth. I took Mohmoodan to Tavarau in Subramani's car. Myself and Mohmoodan got down off at Tavarau and told Subramani to pick after an hour. The car left and I took Mohmoodan into the cane field. In the cane field, we had some quarrel because Mohmoodan wanted to come and live at my home like my wife. I told her that my relatives were not willing but Mohmoodan did not agree to that. Then I gave her 3 or 4 slaps. Mohmoodan began to get hold of me. I punched her once on the face and she fell beside a stone and became unconscious. Mohmoodan was lying on the ground and I was sitting. In the meanwhile, I heard the tooting of the car. I left Mohmoodan there and came by the car. Subramani asked me where is the girl. I told lies to Subramani that girl would go away to Ba."

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Finally, in relating the case against the appellant, there is the evidence of Dr. Michael Sorokin, Medical Superintendent of Lautoka Hospital who performed the post-mortem. We will set out the relevant portion of his evidence verbatim :—

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> "On external examination, number of marks, $\frac{1}{4}$" abrasion and bruise, angle of right jaw.
>
> Bruise $\frac{3}{4}$" x $\frac{1}{4}$" on right chin. Small bruise in mid-line of throat about $\frac{1}{4}$".
>
> Superficial bruise $\frac{1}{2}$" under right breast. In the region of lower vulva, a few small cracks in the skin. They were fresh bruises in the region of the neck. These were injuries apparently.
>
> I then opened up the body.
>
> Thoracic cavity — bruising of the larynx immediately inferior to the vocal cord. There was slight curling of the epiglottis and no other

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evidence of other injuries. Larynx is part of the throat surrounds vocal cords. Bruising were fresh bruising. Police photographer photographed the opened neck. Ex. A6 shown. There is bruising but does not appear clearly.

Slight curling of epiglottis is pressure of cartridge right on top of larynx. The bruising of larynx and curling of epiglottis is consistent with asphyxia.

I opened scalp. I found no abnormality. I examined cranial cavity. No abnormality. Blood vessels were normal.

Abdominal cavity — stomach contained small amount of digested food.

Uterus contained a foetus which I estimated 3 months. She was pregnant. Abdominal cavity otherwise normal.

In my opinion, I thought cause of death was asphyxia due to strangulation."

There was no cross-examination of Dr. Sorokin.

The appellant called no witnesses but made a long unsworn statement. After describing in greater detail the quarrel in the canefield about whether he should take the deceased to live with him, he continued :—

"I said I would not be able to keep her in that way and then she started holding me, even tried to kiss me, sir, as usually she did in all the other occasions. I tried to move away from her and she came up again holding me then I slapped her. That slapping is not anything new, sir, as on many other occasions I have slapped her and also received slaps from her. But on that occasion, when I slapped her she had an umbrella in her hand and I don't know what came in her mind she tried to use that on me. I grabbed hold of the umbrella and while snatching it away from her she fell down. She fell down and quickly sat up, then I asked her to stand up and she did not. Then at that time I heard voices on the road and when I asked her, she did not get up. I caught hold of her both hands and wanted to make her stand up but she started yelling and became sort of stubborn. Then I left her and I asked her again to get up and to go with me to Lautoka. I said that "I would drop you in town and you can go to your auntie's place." But she said she was not going back to Lautoka. Then I told her as I have said that I heard noises outside, that noise was made by some man and one particular word was something like he was trying to swear and relating to that I told her that some people outside seem to be angry. I said if we could go out as quickly as possible and to that she was scared and when I insisted that she come back to Lautoka with me she said it was waste of time asking her to go to Lautoka and she would go to Ba and I should go to Lautoka. Then I came out on to the road and called the taxi driver."

The first ground of appeal is that the trial Judge erred in law in not directing the assessors on the question of provocation. Counsel did not rely upon provocation in his closing address at the trial and we venture to think this ground is only now put forward by reason of the following passage in the judgment of the trial Judge :— A

> "Bearing this in mind, I feel now that there is a possibility of some provocation on the part of the deceased as a result the accused strangled her. In my summing up to the Assessors, I did not direct them on the question of provocation because there is strictly no sufficient material before the Court to call for a direction on that question but after reconsidering the matter, I feel that there might have been some provocation. Apart from this, after reviewing the whole of the evidence and the circumstances of this case, I am left in doubt whether at the material time the accused intended to kill her or even cause her grievous harm. I am also in doubt whether he knew that what he was doing will probably cause the death of or do grievous harm to the deceased; although I am satisfied that when he was pursuing the unlawful act which caused the deceased's death, he knew that it would subject the deceased to at least the risk of some harm resulting therefrom." B C

It will be noticed that the real basis of the reduction of the offence to manslaughter was that the trial Judge was in doubt as to the intention of the appellant, but counsel argues that as he also appears to have accepted provocation as a possibility, he should have left that possibility to the assessors. The argument continues along the well known line based on *R. v. Bharat* [1959] 3 All. E.R.292, that the trial Judge disabled himself from receiving the opinions of the assessors based upon a proper direction. In the present case, of course, the argument (if valid) could have weight in relation to only one of the three assessors — one was already in favour of manslaughter and one of complete acquittal. We are, however, unable to appreciate how a direction on the subject of provocation could (properly appreciated by the assessors) have resulted in a more favourable verdict than the one actually arrived at. Legal provocation can only reduce murder to manslaughter. Finally, with all respect to the trial Judge we consider that his belated doubts on the subject of provocation were entirely unnecessary. Nowhere in the evidence, or of the two unsworn statements of the appellant, do we find material fit to be left to assessors as a basis for provocation in law. Even the alleged assault with an umbrella was the result of slaps administered by the appellant and could never, in the circumstances, be regarded even as a provocative incident. In no way could it, or any other aspect of the evidence, form a substratum upon which could be based findings of an act of provocation, loss of self control and proportionate retaliation, all of which are recognised in *Lee Chun Chuen v. Reginam* [1963] 1 All E.R.73 as integral components of provocation in law. D E F G

The second ground of appeal reads as follows :— H

> "*THAT* the Learned Trial Judge erred in law and in fact in not directing the Assessors and himself, *firstly* that Doctor Sorokin had given inconclusive opinion as to the cause of the deceased's death, *secondly* that Doctor Sorokin had not furnished to the Court with the necessary scientific criteria for testing the accuracy of his conclusions,

A *thirdly* that Prosecution Witnesses Ward Raju and Mahadeo had given inclusive opinion on the Prosecution assertion that the deceased was dead when they saw her body in the cane field on the afternoon of the 15th April, 1971 and *fourthly* that in the particular circumstances the only available evidence on the question of pronoucement of death was that of Doctor Daulako."

As we understand the argument under this head it is that :—

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(a) Dr. Sorokin's evidence was insufficient to establish death by manual or any other form of strangulation;

(b) That the trial Judge went too far in finding on the basis of the evidence of Ward Raju and Mahadeo that when they saw the deceased in the canefield she was dead;

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(c) That the first time at which the evidence establishes that death had occurred is at 8.15 p.m. when Dr. Daulako saw the deceased; and

(d) As a result the possibility that her death had been caused by some third party had not been excluded. In this latter connection counsel pointed out that a track leading to the sea was near at hand.

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As to point (a) we have set out Dr. Sorokin's evidence above. Counsel made a point of the words used by the doctor "In my opinion, I thought cause of death was etc." as implying some doubt — not a firm opinion. We see no reason to put such a construction upon the words. The injuries had been detailed and the doctor gave his opinion. He was not challenged upon it in cross-examination. In relation to this, counsel for E the appellant said in his closing address that he was "not fool enough" to cross-examine the two doctors. It can be assumed that he meant he was not going to fill in gaps in the Crown case, but the result is that the doctor's opinion stood unchallenged. The court was therefore entitled to accept the evidence of strangulation, rely upon the evidence of the surrounding circumstances in deciding whether it was manual, or one of the other types of strangulation to which counsel referred e.g. by F ligature, self-inflicted or accidentally caused. We agree that the medical evidence was not very full but in the context of the whole case it was sufficient, if the court accepted it.

As to point (b) we have no hesitation in rejecting this contention. Ward Raju and Mahadeo were not permitted to testify as to what they had said to each other at the relevant time but the narrative leaves no G doubt that having examined the deceased they thought she was dead. They left the body untouched and reported to the Police. Mahadeo said that, after feeling her pulse he thought she was dead. Earlier impressions by Ward Raju that she was pretending, that she look normal, and Mahadeo's statement that "her eyes were open but they were not open as of living person" do nothing to detract from the total effect of the evidence. The witnesses' failure to notice bruises seen later by medical experts H does not appear surprising. The opinion of Ward Raju and Mahadeo was, of course, not an expert one but when the trial judge pronounced himself as fully satisfied that the deceased was dead when found, he would not be excluding from his mind the subsequent evidence that the body was left untouched and that at 8.15 she was found to be dead by a medical

witness. The trial Judge referred to that, and added that there was nothing in evidence to show or even suggest that death occurred after Ward Raju and Mahadeo saw the body. We have no criticism of the trial Judge's handling of this question of fact. There is therefore no need to refer to point (c) above.

We turn to point (d) and would observe that in relation to it the argument under point (a) does not appear of very great moment. If the deceased died at the hands of some unknown, it could presumably have been by strangulation. We have noted some of the times above. The deceased was found after a search of some 6 or 7 minutes. If that was about 6 p.m. it was less than two hours afterwards that police were on the scene — in the meantime Mahadeo had shown the deceased to a party of five, and had waited on the road for the remainder of the time. Even if Ward Raju and Mahadeo were wrong in supposing the deceased to be dead when found, the possibility of her having been strangled by a passer-by in the intervening periods can in our view be safely and completely discarded.

The third ground in the Notice of Appeal is as follows :—

> "(c) *THAT* the Learned Trial Judge erred in law and in fact in not directing the Assessors and himself when considering the circumstantial evidence adduced by the Prosecution the full significance of my conversation on the 15th April, 1971 after my return from the cane field with the Prosecution Witnesses Subramani and Ward Raju and whether my conduct as a whole at that time was consistent with the conduct of an innocent man."

The argument on this ground was prefaced by criticism of the trial Judge for having accepted Subramani's version of the conversation between Subramani and Ward Raju on the one hand and the appellant on the other, when the latter emerged from the cane field. More particularly the submission was, that in accepting the whole of Ward Raju's evidence except his version of that conversation, the trial Judge was being inconsistent.

What Subramani said was :—

> "Accused got into the front of the car and said, "Let's go." I said "Where is the girl?"
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> Accused said that the girl was scared and that is why she was not coming out and that she had told him to go and she would go to Ba.
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> Ward Raju said that it was not a good thing to bring girls and leave them alone and go away. When he said this the accused said "What can I do. I called her and she doesn't want to come. She told me to go and she would go to Ba."
>
> I told him to go and fetch the girl and that the fisherman will not do anything to him.
>
> He said that what could he do, she was not coming. I told the fisherman that if the girl came out, not to say anything to her. After that I left and drove off."

The material point of Ward Raju's evidence was :—

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> "I told him to fetch the girl and take her away. He said that the girl wanted to come but he did not want to take her away. I asked "Why don't you want to take her?" He said that his parents would get annoyed and that is why he did not want to take her. I said that if that was so why did he bring the girl. Then I said where would she go then. Then he said she would go to Ba when the bus arrives."

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As counsel for the Crown pointed out, Ward Raju's version presents the appellant in a slightly less favourable light than that of Subramani; therefore we consider there is no materiality in this point and do not feel called upon to discuss the right of a judge, in the infinite variety of circumstances in which he finds himself, to accept the evidence of a witness in part while rejecting another part.

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The basic argument under this ground of appeal was that the conduct of the appellant at this stage was that of an innocent man. He did not try to conceal that the deceased was in the cane field or say she had disappeared. As part of the circumstantial evidence this factor should have been given weight. For ourselves we would not be inclined to say that the conduct of the appellant at that point was more consistent with
D innocence than guilt. If guilty he would know that the discovery of the body would be inevitable. But the point is that the assessors were reminded of the conversation and the trial judge obviously kept it in mind. The question of weight was for them: we find no materiality in this ground.

The fourth ground of appeal alleges failure by the trial Judge to direct
E the assessors upon the possibility of death having been caused by accident. Counsel used the word "accident" here in the sense of accidental death caused, after a push a blow by the appellant, by a fall, perhaps against a stone. Such a direction by a judge must, of course, be based on evidence or upon a reasonable inference from evidence. In the present case there is only the appellant's statement to A.S.P. Muniappa Swami that "I punched her once on the face and she fell beside a stone and became
F unconscious." There is evidence of a stone nearby. But counsel for the appellant conceded that such a defence depended for its validity upon the cause of death having been other than strangulation. The medical evidence showed that there were no injuries to the body other than those which pointed to asphyxia. That being the case, there can be no criticism of the trial Judge for not having directed the assessors on that point.

G The fifth ground is expressed as follows :—

> "(e) *THAT* the Learned Trial Judge erred in law in not directing the Assessors and himself that mens rea was an essential ingredient of the offence of Manslaughter and that the Prosecution had failed to prove this element of proof at the trial."

H Counsel based his argument upon the case of *R. v. Church* [1965] 2 All. E.R.72 in which the Court of Appeal, after saying that the passage of years had achieved a transformation in the old law under which any unlawful act to a human being resulting in death justified a conviction for manslaughter, stated the present law to be as follows :—

"For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other persons to, at least the risk of some harm resulting therefrom albeit not serious harm." A

We are rather at a loss to understand why this ground of appeal has been put forward, for the trial Judge adapted the relevant words from the passage just cited, both in his direction to the assessors and in his own judgment. It would not have helped the assessors if he had introduced the technical term *mens rea*. In his judgment he said that he was satisfied that when the appellant was pursuing the unlawful act which caused the deceased's death, he knew that it would subject the deceased to at least the risk of some harm resulting therefrom. B

In this finding the trial judge was amply supported by the evidence. It was not a case like that of *The Queen v. Sharmpal Singh* [1962] A.C. 188 in which there were circumstances rendering the use of some degree of force permissible, and in which the verdict of manslaughter was based on evidence that more than the permissible degree had been used. In the present case the appellant had at no time given any explanation of how the deceased came to die of asphyxia. Therefore once the evidence established that it was the appellant who inflicted the injuries found on her body (here we paraphrase words used by the Privy Council in *Sharmpal Singh's* case) the court was bound to presume, because there was nothing to suggest the contrary, that the appellant intended the consequences that would naturally follow from the exercise of the degree of force used. The degree of force was indicated by the medical evidence and in our opinion, the trial Judge's finding was fully justified. C D

We would add that whether the law as stated in *Church's* case is applicable in Fiji, where section 227 of Penal Code provides specifically that any person who by an unlawful act causes the death of another person is guilty of manslaughter, is not a question which it is necessary for us to consider. The Privy Council in *Sharmpal Singh's* case had to give effect to a similar section of the Penal Code of Kenya, and at one point of their judgment used the words "the only question under the Code is whether that act is unlawful." Whether that statement would have been qualified in a different set of circumstances is not a question upon which we need express any opinion. It is enough that the trial Judge placed upon the law the construction more favourable to the appellant. E F

The final ground of appeal is that the verdict is unreasonable and cannot be supported having regard to all the evidence. We have set out above in outline the established facts, and discussed the various matters raised on the appeal. It is implicit in what we have already said that in our opinion this ground of appeal cannot succeed. G

In the final result we do not find merit in any of the grounds of appeal and the appeal against conviction is accordingly dismissed. There is an appeal also against the sentence of seven years' imprisonment passed by the trial Judge. We do not find that to be wrong in principle or manifestly excessive, and that appeal also is dismissed. H

Appeals dismissed.