**DAULAT KHAN**

A

*v.*

**REGINAM**

[COURT OF APPEAL, 1976 (Gould V.P., Marsack J.A., Henry J.A.), 4th, 16th March]

B

Criminal Jurisdiction

*Appeal—Supreme Court—functions when hearing an appeal relating to a confession of an accused challenged for want of voluntariness.*

*Criminal law—practice and procedure—whether evidence given by accused during trial within a trial admissable against him as part of prosecution's case.* C

*Criminal law—practice and procedure—respective functions of judge and lay members of the court where confession statement of the accused has been challenged.*

*Criminal law—practice and procedure—whether prosecution evidence given during trial within a trial becomes part of the main trial.* D

In order to decide whether an accused's statement was voluntary after a trial within a trial, the court must have regard to the totality of the issues raised and to all the surrounding circumstances under which the statement was made.

The court made some general observations for the guidance of lower courts as to:— E

*(a)* The functions of the Supreme Court when dealing with an appeal relating to confessions of an accused challenged for want of voluntariness.
*(b)* The respective functions of a judge and lay members of the court where a confession statement of an accused had been challenged.
*(c)* Whether evidence given by an accused during a trial within a trial was admissable against him as part of the prosecution's case. F
*(d)* Whether the prosecution's evidence given during the trial within the trial became part of the prosecution's case in the trial proper.

Cases referred to:

*Director of Public Prosecutions v. Ping Ling* [1975] 3 All E.R. 175; [1975] 3 W.L.R. 419. G
*R. v. Thompson* [1893] 2 Q.B. 12; 57 J.P. 312.
*Ibrahim v. R.* [1914] A.C. 599; 111 L.T. 20.
*Chan Wei-Keung v. R.* [1967] 2 A.C. 160; [1967] 1 All E.R. 948.
*R. v. Burgess* [1968] 2 All E.R. 54; 52 Cr. App. R. 258.
*R. v. Ovenell; R. v. Cartwright* [1968] 1 All E.R. 933; [1969] 1 Q.B. 17. H
*Basto v. R.* (1954) 91 C.L.R. 628.
*R. v. Toner* [1966] Queensland W.N. 44.

*R. v. Convery* [1968] N.Z.L.R. 426.
A *Smith v. The Queen* (1956) 97 C.L.R. 100.
*People v. Cohan*—unreported.
*Maha Narayan v. R.* Criminal Appeal 1 of 1972—unreported.

Appeal against conviction for arson in the Magistrate's Court.

B *M. S. Sahu Khan & S. S. Sahu Khan* for the appellant.
*Trafford Walker* for the respondent.

Judgment of the Court (read by GOULD V.P.): [16th March 1976]—

Appellant was convicted in the Magistrate's Court at Ba and sentenced to 15 months' imprisonment on a charge of arson. An appeal to the Supreme
C Court was dismissed. This appeal is confined to questions of law: section 22 Court of Appeal Ordinance. The charge was that on the 26th April 1975 appellant set fire to the house of Shiri Ram (s/o Yenkanna) at Namada, Ba. Shiri Ram deposed that he had been living at Namada for only six months before the incident, and that prior to the evening when his house, a bure 18 feet by 12 feet, was burnt, he had a disagreement with a appellant who had put his animals in Shiri Ram's plantation. That evening Shiri Ram went to
D the temple three miles away. He said he left his house at 5.35 p.m. After Shiri Ram had been at the temple for about 10 minutes he heard that his house was burning so he returned home via his brother-in-law's house and eventually reported the fire to the police—he says between 9.30 p.m. and 10.00 p.m. Sergeant Salik Ram said that a report was made at 9.28 p.m.

The prosecution evidence was that appellant, after being warned, told Sgt. Salik
E Ram, when interviewed at the Police Station in Ba the next morning, that he set fire to Shiri Ram's house at about 8.00 p.m. the previous evening and that he did so because Shiri Ram swore at his mother. He was then arrested and charged. After being again warned, he repeated his confession. On this occasion the confession was reduced to writing and signed by appellant. The confession is quite short. Appellant said:—

F "Last night I went to his house. I had matches with me. Then I set fire to his bure house. After setting fire I ran away when house started burning. Shiri Ram threatened me saying that he will cut my leg. That is why I set fire to his house."

There was evidence that no fire which might be an accidental cause of the fire had been lit in the house.

G At the trial objection was taken to the admissibility of the evidence relating to both confessional statements. The learned magistrate, therefore, had to determine this question before such evidence could be given. On the first occasion, the prosecutor called two police officers, and counsel for appellant called appellant and his brother. The learned magistrate ruled that the statement was voluntary. Later, the question of the admissibility of the written statement arose. On his occasion, the
H prosecutor led evidence from another police officer who took the statement and one other officer who was present. Appellant gave evidence. The learned magistrate ruled that this statement was also voluntary. On each occasion the prosecution, after the ruling had been made, asked that 'the evidence in the trial within the trial be

admitted in the trial proper'. The learned magistrate granted this request. It will be noticed that the request and ruling are ambiguous because it is not clear whether they refer only to the prosecution evidence or to all the evidence. No objection was taken at the trial. This matter will be discussed later. A

At the conclusion of the case for the prosecution, counsel for the appellant elected to call evidence. Appellant in evidence denied guilt, and set up an alibi. No reference was made in appellant's evidence in his defence to the charge to the matters which were given in evidence on the occasions when the admissibility of the statements were dealt with. Three further witnesses were called to support the alibi. The learned magistrate correctly directed his mind to the onus of proof which lay on the prosecution by reason of the claim of alibi. He rejected the alibi and found guilt proved. The learned magistrate reminded himself that the evidence of the confessional statements must be scrutinised most carefully. He then examined the question of the credibility of the appellant and in doing so, the learned magistrate took into consideration a matter which arose when appellant had given evidence in relation to the question of admissibility. Reference will later be made to this. B C

The grounds of appeal were not argued in the order in which they appear in the notice of appeal—some overlapped and some were abandoned. It is convenient to set out the grounds in such form and sequence as will tend to be a logical approach to the problems involved. We summarise them as follows:— D

(1) That the confessional statements were wrongly admitted;
(2) That appellant was in custody at the time so they ought to have been rejected; and the proviso to section 300 of the Criminal Procedure Code (Amendment) Ordinance, 1969 ought not to be applied;
(3) That the learned magistrate should not have taken into account in his consideration of the credibility of appellant the evidence given by appellant when the admissibility of the confessional statements was determined; E
(4) That the confessions were not formally given in evidence and therefore were not part of the case for the prosecution;
(5) The learned magistrate did not fully or adequately consider the issue of corroboration when dealing with the confessional evidence.

Before dealing with the argument we find it convenient to make some observations of a general nature because matters for the guidance of the lower courts have been discussed at the Bar and in the judgment of the Supreme Court. The functions of the Supreme Court when dealing with an appeal relating to confessions of an accused when challenged for want of voluntariness have been stated by Lord Salmon in *D.P.P. v. Ping Ling* [1975] 3 All E.R. 175, 188, where his Lordship said (the necessary changes have been made to apply his Lordship's remarks to a magistrate's trial): F

> "The (Supreme Court on appeal) should not disturb the (magistrate's) findings of fact, on apparently similar evidence, in other reported cases, but only if it is completely satisfied that the (magistrate) made a wrong assessment of the evidence before him or failed to apply the correct principle—always remembering that usually the (magistrate) has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal." G

Lord Salmon earlier summarised the rule as to admissibility. His Lordship said at p. 187:— H

A "The law relating to the admissibility in evidence of an alleged confession or statement by an accused is plain and simple. It has been clearly stated by many eminent judges and never doubted. 'By (the law of England), to be admissible, a confession must be free and voluntary....If it flows from hope or fear, excited by a person in authority, it is inadmissible': *R. v. Thompson* [1893] 2 Q.B. 12, 15.

It was re-stated in the celebrated judgment of Lord Sumner in *Ibrahim v. R.* [1914] A.C. 599, 609.

B 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."

C The terms 'trial within a trial' and 'voir dire' denote the procedure which has for long been adopted in trials before a judge and jury or a judge and assessors where it is considered that injustice may result if the lay members of the tribunal gain knowledge of incriminating evidence which may be later ruled inadmissible. The question of admissibility, which is always one for the judge, is determined in the absence of the lay members. Only such evidence as is later led before a full tribunal can be considered on the question of guilt. In trials before a magistrate he deals with D all questions of law and fact, including questions of admissibility of evidence. The same tribunal hears all the evidence: What then is the function of such a single tribunal when it hears witnesses and particularly an accused on the issue of admissibility?

The determination of facts as a condition precedent to admission of evidence is not confined to confessional statements. The oath or its equivalent and the com- E petency of a witness are matters which may require viva voce evidence before a witness can proceed and so also is the question of apprehension of immediate death in respect of dying declarations. There are other instances, in which the judge or magistrate in the course of a trial gains knowledge of matter prejudicial to the accused but which is later excluded from the case. We refer to this because the function being discussed is not anomalous but a normal judicial function. The case must be determined purely on the evidence referable to the trial itself. Where the trial is F before a judge and assessors (or a jury) their functions are separate, although in Fiji the judge also gives judgment after the opinion of the assessors has been given. It is convenient to set out those functions before considering the problems which arise when both functions are performed by the same tribunal.

The respective functions of a judge and the lay members have not always been clear. In our judgment, the law which governs Fiji, is that laid down by the Judicial G Committee of the Privy Council in *Chan Wai-Keung v. R.* [1967] A.C. 160, [1967], 1 All E.R. 948, which adopted the principles laid down by the High Court of Australia in *Basto v. R.* (1954) 91 C.L.R. 628, 640. These principles are now followed in England: *R. v. Burgess* [1968] 2 All E.R. 54 and *R. v. Ovenell* [1969] 1 Q.B. 17. In short, the position in Fiji may now be stated as follows:—

H (i) In respect of confessions or admissions (oral or written) made by persons accused of crime, the question whether they have been made voluntarily is for the judge who, for this purpose, must deal independently of, and in the absence of, the lay members and determine all matters of fact and law.

(ii) If the evidence is ruled admissible the trial proper resumes and the evidence held admissible is given.
(iii) The trial continues in the normal manner, and, at the end of the case the probative value of any such evidence is for the tribunal to determine.

In our opinion evidence given by an accused on the voir dire is not admissible against him as part of the prosecution's case. Nor can it be used on cross-examination against him in the trial proper. On general principles and in view of the provisions of section 201 of the Criminal Procedure Code an accused should not be put to the risk of creating evidence confirmatory of his guilt merely because he has exercised his right to challenge prosecution evidence. If an accused does give evidence at the voir dire he should be warned, in respect of any question that might tend to incriminate him, that he is not bound to answer: *R. v. Toner* [1966] Queensland W.N. 44. We see no reason why any other witness in the voir dire should not be cross-examined on, and, if necessary, contradicted by matters he gave in evidence on the voir dire but care should be exercised so that the lay tribunal is not informed of the nature of the earlier enquiry.

We turn now to deal with the specific points raised. Counsel for appellant argued that appellant was illegally detained in breach of his constitutional rights and so the confessions ought to be rejected. Counsel further argued that, in any event, the conduct of the police was such that the learned magistrate ought to have rejected the confessions, or, at least, that he should have considered the question of the exercise of his discretion to reject them, which, of course, must be exercised judicially. It was further argued that the proviso to section 300 of the Criminal Procedure Code (Amendment) Ordinance 1969 should not be applied. We propose first to deal with evidence on the voir dire and the findings of the learned magistrate thereon.

Counsel for appellant at the trial stated his objection to the admission of the oral statement, according to the record, in the following terms:—

> "I object to the interview on grounds—that major part of interview never took place at the station. Accused was assaulted, abused before part of interview was taken. Accused was threatened with further assault if he did not agree to what was written in the interview."

The prosecution's evidence related solely to incidents at the police station which appeared not to be fully in accordance with the objections stated by counsel. When appellant and his brother were called they referred back to the time when appellant was first seen at his home and to the incidents which they alleged occured in getting appellant to the police station. This was, and usually is in such cases, a relevant period which ought to be covered by the prosecution. Appellant said:—

> "Two police came. They were both Indian police officers. They came and asked my name. My brother gave my name to police. Police spoke to me. They asked my age. I said I was 21 years old. I was told to go to Police Station. They said Inspector wanted to see me. I said I did not want to go because father was not home. My brother asked them why they wanted to take me to Police Station. They said there was no law. They held my hand and brought me to Police Station. My brother was not allowed to accompany me.

He denied that he had been cautioned. In cross-examination he said:—

"Two Indian police went to see me. No one was Fijian. Police spoke to my brother first. My mother and sisters were at home. I said to police without telling the reason I will not go. I said my father is not home so I would not go. Police did not tell me the reasons for taking me."

Appellant's brother said:—

"Accused is my brother. One Sunday police came to our house. Policeman spoke to me first. I pointed Accused to them. They spoke to Accused and said to him, Inspector wanted to see him. They did not give any reason for taking. They said there was no law to tell the reason. They forced him to come. I wanted to come. They stopped me from coming. We were repairing the fence. Accused was in his working clothes. He was not given chance to change his clothes. I came later, I did not see accused. Same day I took my solicitor to release Accused. I have a big house. Police could have talked at my house. There were two policemen. They were both Indians. I am sure of this."

From evidence later given in the trial there is considerable divergence from what appellant and his brother said had happened when appellant was taken from his home to the police station. A police party of four arrived in a Land Rover. Police Constable Eroni Antonio who was the only member of the party called in the trial, said:—

"Police Constable Sundar Singh went to get the Accused. There was a creek. Land Rover could not go across the creek. Police Constable Sundar Singh went alone to get the accused. I did not go to Accused's house. I told Sergeant Salik Ram that Accused was brought to Police Station."

However, the only importance of this is that appellant was faced with a police party of four, of whom, he and his brother said two—both Indians—came to his home.

We have summarised the evidence on the first voir dire and turn now to examine the finding of the learned magistrate. He first dealt with the evidence concerning the manner in which appellant got to the police station in these words:—

"I accept the evidence of the accussed and his brother that the accused was brought to the police station for questioning."

The learned magistrate proceeded to deal with the interview at the police station and found—

(1) The appellant was not assaulted;
(2) The interview was properly recorded in Sgt. Salik Ram's notebook in the form of questions to appellant and answers by him;
(3) Appellant was not abused.

For these reasons the oral statements were held to be voluntary. The only finding on the evidence of appellant and his brother is the equivocal term that appellant was 'brought' to the police station. The objection of counsel for appellant quite clearly raised the importance of matters prior to the first interview at the police station. Counsel for appellant also again drew attention to the importance of these matters in his final submissions for he is recorded as saying. 'How was the man brought to the police station?' for which the finding was that he was 'brought' but without the learned magistrate going into and weighing the question of how appellant was brought. The matters deposed to by appellant and his brother hap-

pened shortly before the interview at the police station and were directly relevant to the issue to be determined. Appellant was entitled to have them carefully considered and weighed before a decision was made. Appellant was 20 years of age, a labourer of limited education, living on a cane farm with his parents. He claimed that compulsion was used by two police officers who made some form of mention of 'the law' and who, so it seems from the evidence, conveyed to appellant that he must come to the police station for some reason they would not divulge. Appellant was interviewed by other and more senior police officers shortly after being taken to the police station. According to them they warned appellant of his rights. Appellant denied the warning and his conflict was not resolved by the learned magistrate.

In our judgment appellant was entitled as a matter of law to have his evidence and that of his brother properly weighed and taken into account before a decision was made to admit the disputed evidence. It was clearly relevant to the qestion whether there was, on a consideration of all the events deposed to, improper influence brought to bear on appellant. How free was such a person if the defence evidence is believed? The finding that appellant was 'brought' to the police station for questioning may be no more than a finding of an undisputed fact, and, at best seems ambiguous. To find only that no improper conduct took place at the police station is not sufficient as a matter of law on the evidence presented at the voir dire, particularly in view of the express points taken by counsel. So long as the learned magistrate had regard to the principle involved, his finding on facts could not be disturbed in this court and this court is not purporting to do that. Any such finding of fact might be disturbed in the Supreme Court on appeal but only if the principles laid down by Lord Salmon (supra) are followed.

The law on this topic is conveniently stated in the headnote to *R. v. Convery* [1968] N.Z.L.R. 426 where it was said:

> "The question whether an accused person is in custody and whether statements made by him are made voluntarily is very much a matter of fact in the surrounding circumstances of the particular case. The trial judge, in exercise of his discretion to admit or exclude statements made by the accused in such circumstances, should ask himself whether, having regard to the conduct of the police and all circumstances under which the statement was made, it would be unfair to use his own statement against the accused."

In our view, the learned magistrate did not correctly approach and apply his mind to the totality of the issue raised when making findings of fact in the circumstances of this case. It may well have been open to him to come to the same decision if he had properly considered the total issue clearly raised by the defence but that is beside the point and on that we are not in a position to make any comment.

There remains the second or written confession in respect of which a warning was held to have been given. Nevertheless, in our opinion, this confession depends also largely upon the fate of the first confession. It is so close to and follows the earlier confession that it is no more than a repetition. If any improper influence was exercised earlier it should be weighed on this question. There was a relevant area of inquiry which, as we have stated, was not properly resolved. We think the second confession, as the matter now stands, is in no better position than the earlier one. If there be any force in the evidence of appellant and his brother the events deposed to might well still be operative factors at the time of making this statement. In the circumstances, the prosecution cannot rely upon the written statement to cure the

failure of the learned magistrate to determine the issues raised in respect of the earlier oral statements to the same effect. There cannot, on such vital evidence upon which conviction depended, be any justification for applying the proviso to section 300 of the Criminal Procedure Code (Amendment) Ordinance, 1969. The argument on the first ground will succeed.

Before leaving the first ground we wish to make some comment on the submission that the actions of the police were in breach of section 5, subsection 2 and section 10, subsection 7 of the Fiji Constitution. Counsel relied upon the law as laid down in the case of the *The People v. Cohan* (282 p. 2d 905) which was decided in the Supreme Court of California. The law on the admissibility of evidence unlawfully or illegally obtained has not run parallel courses in the U.S.A. and the Commonwealth nations. The English or Commonwealth authorities were not cited. We find no reasons to deal with this argument in the present case.

We turn now to deal with certain matters of a general nature raised by the remaining grounds of appeal. After the voir dire the prosecution requested that the evidence then already given, should form part of the trial. Probably the learned magistrate treated this as meaning all the evidence including that called by the defence. At this point such evidence cannot form part of the case. The accused may elect not to give evidence. However, in *Smith v. R.* (1956) 97 C.L.R. 100, 132, Webb J. said in a case before a judge alone:—

> "But I must say that I fail to see why his Honour should have separated his functions to the extent of permitting each of the police witnesses to be twice cross-examined on the same subject matter. To say the least that appears to me to have been unnecessary."

Sir John Nimmo, C.J. in a memorandum dated 29th June 1972 gave a similar practice direction to magistrates. If the prosecution and counsel for the defence agree to the prosecution evidence forming part of the prosecution case, then we can see no objection to this course. Any witness whose evidence is so admitted, must be available for further cross-examination. If counsel for accused calls evidence he may, with consent, follow a similar course but this cannot and must not be allowed to arise until after the close of the prosecution. We should mention that the right of an accused to make a statement from the dock should be extended to him in the voir dire if he wishes to exercise it.

As to ground 3 it will be clear that credibility must be assessed on the evidence given in the trial proper. The issue is then wider and probably much more evidence has been heard. The accused is to be judged in the trial proper and is not to be prejudiced because he has exercised a right to challenge the adimissibility of prosecution evidence.

Ground 4 deals with some alleged failure to produce evidence of the confessions, apparently in the voir dire. We see no merit in this ground. The evidence was available (even the oral admissions were reduced to writing) and evidence was later clearly given to prove them.

We see no reason to deal with ground 5 because the appeal succeeds on the first ground. The attention of magistrates is drawn to *Smith v. The Queen,* 97 C.L.R. 100 and *Maha Narayan v. R.* Criminal Appeal No. 1 of 1972 both of which deal with this topic. Each case depends upon its own facts and circumstances and no good purpose is to be served by dealing with the present case which is no longer a live issue.

This is not an appropriate case to order a new trial.

The appeal will be allowed and the conviction will be quashed. A

*Appeal allowed and conviction quashed.*

B