Privy Council Appeal No. 18 *of* 1961

Ram Bali – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JUNE, 1962

Present at the Hearing:
LORD EVERSHED
LORD MORRIS OF BORTH-Y-GEST.
LORD DEVLIN
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal, by special leave, from a judgment of the Fiji Court of Appeal dated the 23rd December, 1960, dismissing the appeal of the appellant from the judgment of the Supreme Court of Fiji dated the 6th July, 1960, whereby the appellant was convicted of attempting to murder one Subramani Pillay and one Muthu Sami Pillay and of wounding one Dharma Reddy. On the two convictions of attempted murder the appellant was sentenced to nine years' imprisonment on each count and on the conviction for wounding to one year's imprisonment, all the sentences to run concurrently. The information charged the appellant jointly with one Ishaq Ali with three offences of attempted murder. Both accused, who were tried together, pleaded not guilty to all three counts of the information. The charge in the first count was that the two accused attempted to murder Subramani Pillay at Vitogo on the 28th December, 1959. The second and third counts charged the attempted murders of Muthu Sami Pillay (one of the sons of Subramani Pillay) and Dharma Reddy respectively at the place and on the date mentioned in the first count. The trial in the Supreme Court of Fiji took place before Hammett, J. who sat with three assessors. In the result the appellant was convicted on the first and second counts and on the third he was found not guilty of attempted murder but guilty of wounding. Ishaq Ali was acquitted at the trial on all three counts.

At the conclusion of the hearing of the appeal their Lordships announced that they would humbly advise Her Majesty that the appeal should be dismissed. Their Lordships now give their reasons.

On the 28th December, 1959, at about 9.0 p.m. a number of men went to the compound at Vitogo in which, in various houses (four in number), Subramani Pillay, his four sons and their families resided. Some shots were fired. Subramani Pillay and Muthu Sami Pillay opened the doors of their houses and they were hit by shot-gun pellets. Dharma Reddy was at the house of Muthu Sami Pillay and was wounded, though not seriously, at the same time as the latter was hit. The case for the prosecution was that the appellant and also Ishaq Ali were amongst those who had gone to the compound.

The appellant denied that he was amongst those who had gone to the compound. So did Ishaq Ali. The appellant gave evidence that he had spent the entire evening at the house of one Bechu. Ishaq Ali gave evidence that he was elsewhere.

The effective issue at the trial was whether it was established that the accused were included in the party of assailants who had gone to the compound. In the hearing before their Lordships it was not in contest that if it could properly have been held that the appellant had gone to the compound no doubt could be entertained as to the validity of the conclusion that he was a participant in the shooting and that he had the intent necessary to sustain the first two counts. The learned Judge was satisfied that there had been an intention to kill Subramani Pillay and Muthu Sami Pillay but had found no evidence of an intention to kill Dharma Reddy. For that reason the conviction on the third count was of the crime of wounding contrary to section 256 of the Penal Code.

It is unnecessary for present purposes to recite in detail the evidence relating to the identification of the appellant as being one of those present when the shooting took place. Suffice it to say that if accepted there was definite evidence which identified the appellant. The vital issue as to whether the appellant was present depended for its determination upon decision as to which witnesses were to be believed. Subramani Pillay testified that he flashed his torch and saw the appellant (whom he knew) with a gun in his hand ready to fire and that the appellant then fired at him. Two witnesses (Atmaram and Lalla) gave evidence of the circumstances under which, having gone out after having heard shooting, they saw four men, one of whom was the appellant who had a gun. They gave fear of the appellant as their reason for their delay (until the 7th January) in reporting to the police. There was other evidence the value of which could best be determined by those who heard it.

The evidence of the appellant was that throughout the evening of the 28th December he had been, with others, at Bechu's house at Tuvu. A journey between Tuvu and Vitogo (partly by car and partly by foot) would take about half an hour. That the appellant was present at Bechu's house throughout the evening of the 28th December was testified by various witnesses who said that they had also been at the house. They included Bechu himself and his son Hari Krishna. Bechu owned a car which Hari Krishna drove. They said that the car had not been out that evening. If however the testimony of a witness who had been called for the prosecution was accepted then the evidence supporting the appellant's alibi was considerably discredited. That witness was a taxi driver (by name Subramani). He said that at about 9.20 p.m. on the 28th December, which was at a time shortly after the shooting, while driving his taxi on the King's Road when he was returning to Lautoka, he was nearly involved in a collision with another car which suddenly swung out in front of him from the Drasa Farm Road near Vitogo and which crossed the main road in front of him. He said that that car was driven by Bechu's son, Hari Krishna, and that in it were two or three passengers whom he did not recognise. The car was being driven away from the area in which the compound was situated and towards the direction in which Bechu's house lay.

When the learned Judge summed up the case to the assessors he asked for their opinions in regard to the alibis respectively and separately advanced by each accused. He asked whether they believed and accepted the alibis: he further asked for their opinions in regard to the guilt of each accused. In regard to Ishaq Ali all the assessors accepted his alibi and they were all of opinion that he was not guilty. The learned Judge found him not guilty and he was acquitted. In regard to the appellant, two of the assessors accepted his alibi: one did not. They were all of opinion that he was not guilty. The learned Judge found that he was guilty on the first two counts and, as stated above, that on the third count he was guilty of wounding.

Two main contentions were advanced before their Lordships. Their Lordships proceed to examine these contentions but with the reminder that the well recognised principles which guide their Lordships' Board in criminal appeals do not equate such appeals with those that are taken to Courts of Criminal Appeal. A third contention to the effect that there was wrongful exclusion of a line of cross-examination of a police witness (Wali Mohammed) was not pursued and need not be further referred to. One of the main contentions was that in the summing-up there was an erroneous approach and

misdirection in regard to the alibi of the appellant. It was said that though the learned Judge had in the first place in his summing-up clearly and accurately stated the rule that the onus of proof was on the prosecution he had later dealt with the matter so as to suggest or possibly to suggest that the rule does not apply with full force and effect if the defence of an alibi is advanced. It was also submitted that the form of the first question put to the assessors was such that there was danger that the assessors might conclude that if the defence of an alibi is advanced a burden of proving innocence is assumed by the defence. It was said that there was a failure to point out that, short of the acceptance of the truth of an alibi, there may be a state of doubt which must point to the failure of the prosecution to prove their case in the manner that the law requires. Further it was said that had there been a summing-up which was free from these criticisms there might have been unanimous acceptance of the appellant's alibi by the assessors and that as a consequence the learned Judge might have acquitted the appellant. Also it was urged that if there was misdirection in the summing-up to the assessors this showed that there was a faulty approach on the part of the learned Judge in the process of arriving at his own judgment particularly as he stated that he had directed himself in accordance with the terms of his summing-up to the assessors.

In the course of his summing-up to the assessors the learned Judge said:

> " Now as to the onus of proof. In this as in every criminal trial the onus of proof rests on the Crown to prove the guilt of the accused beyond reasonable doubt. If after considering the evidence as a whole you are left in reasonable doubt as to the guilt of the accused it is your duty to express the opinion that he is not guilty. It is only if you are satisfied of the guilt of an accused beyond reasonable doubt that you are entitled to express the opinion that he is guilty."

Later he said:

> " As I have already told you, the onus of proof rests on the prosecution, but if the Defence set up proves conclusively to your satisfaction that the accused were elsewhere at the actual time the offence was committed, the accused are entitled to be acquitted and there would be no need for you to consider further the evidence of the actual shooting. It might therefore be convenient first to consider the evidence of the accused's abilis in greater detail."

Towards the end of his summing-up the learned Judge told the assessors not to overlook his direction on the onus of proof and at the conclusion he said:

> " When you retire will you please consider the evidence carefully and formulate your opinions.
>
> When you return I would like to know your individual opinion on the following matters.
>
> Firstly: I wish to know whether or not you believe and accept the alibi of each accused in this case.
>
> Secondly: I wish to know your opinion as to the guilt or otherwise of each of the accused on each of counts 1, 2 and 3."

Their Lordships conclude that the learned Judge was desirous of ascertaining whether the assessors positively accepted the alibi of the appellant: if they did it would of course follow that in their opinion the appellant was not guilty. Their Lordships cannot think however that there are any indications that there was any misconception in the mind of the learned Judge as to the onus of proof. Nor indeed would it seem that there was any misconception in the minds of the assessors. The assessor who did not accept the alibi of the appellant gave it nevertheless as his opinion that the appellant's guilt was not established.

In a criminal trial with a jury the decision lies between a verdict of guilty and one of not guilty. If in a summing-up it is clearly explained that the onus of proving guilt lies throughout upon the prosecution and if the jury are then also told that though the defence have no sort of onus of proving innocence yet if they have nevertheless proved innocence a verdict of not guilty must follow, they are only being told an obvious truth. But if some particular

defence (such for example as an alibi) is advanced there is an element of peril in asking a jury whether such defence is believed or accepted. However clear the general directions may have been, the jury may be caused to think, either that some burden of proving innocence is assumed by the defence, or that the particular defence can be disregarded unless it is positively believed or accepted: the jury might not remember that if the evidence relating to the particular defence, though not positively believed or accepted, nevertheless produced a reasonable doubt in their minds, the accused would then be entitled to be acquitted.

In the present case however their Lordships do not consider that the assessors were under any misapprehension and they do not consider that there was anything which the learned judge said which shows that he in any way disabled himself from a correct approach when he came to consider his judgment.

The Criminal Procedure Code (Laws of Fiji 1955 Cap. IX) contains the following provisions:

> " Section 246. Every trial before the Supreme Court in which the accused or one of them or the person against whom the crime or offence has been committed or one of them is a native or of native descent, or of Asiatic origin or descent, shall be with the aid of assessors in lieu of a jury, unless the presiding judge for special reasons to be recorded in the minutes of the Court thinks fit otherwise to order, and upon every such trial the decision of the presiding judge with the aid of such assessors on all matters arising thereupon which in the case of trial by jury would be left to the decision of the jurors shall have the same force and effect as the finding or verdict of a jury thereon.
>
> Section 306 (1). When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.
>
> (2) The judge shall then give judgment, but in so doing shall not be bound to conform to the opinions of the assessors."

Though two of the three assessors positively accepted the alibi of the appellant and though all three considered that the appellant was not guilty the learned Judge found him guilty. This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or of their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing-up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence. He was " not at all favourably impressed " by the demeanour of the witnesses who were called in support of the appellant's alibi. He was impressed by the evidence of Subramani the taxi-driver and he had no hesitation in accepting it. He was satisfied that the appellant and his witnesses had given " false evidence " concerning the movements of Hari Krishna and of Bechu's car. He considered on the other hand that Subramani Pillay had told the truth in regard to the identification of the appellant. He accepted the evidence of Subramani Pillay and also the evidence of Atmaram and Lalla. Accordingly the learned Judge expressed himself as follows:—

> " In view of the opinion of the three Assessors that the first accused is not guilty on any of these three counts, I have reconsidered the evidence in this case. Since I do not accept the first accused's alibi and I do believe the evidence of Subramaniam Pillay when he said he saw and identified the first accused when the gun was fired at him and I believe the evidence of Atmaram and Lalla that after the shots were fired they saw the first accused and others coming away from the direction of Subramaniam Pillay's compound, I do not feel able to accept the opinion of the Assessors on this matter. I do not feel the slightest shadow of doubt in my mind about the guilt of the first accused."

Their Lordships can discern no error in the approach of the learned Judge in arriving at his positive and affirmative conclusions: it is manifest that his acceptance of certain witnesses and his rejection of others made him satisfied beyond even " the slightest shadow of doubt " of the guilt of the appellant. Their Lordships agree with the High Court of Appeal that the judgment of the learned Judge in so far as it related to the alibi did not depend in any degree whatsoever upon any question as to the burden of proof but was governed by his unhesitating acceptance of the evidence for the prosecution in regard to the relevant facts and by his equally unhesitating rejection of the evidence tendered in support of the alibi.

The further contention advanced on behalf of the appellant was that in the summing-up and in the judgment of the learned Judge there was an undue and erroneous dependence and reliance upon the evidence of Subramani the taxi-driver. It was said that the witness had no positive recollection that the date on which he was nearly involved in an accident with the car driven by Hari Krishna was the 28th December and that he only fixed that date because it was the date recorded on a record sheet which was shown to him: it was said that the date on the sheet might have been wrong. The system followed by those for whom the witness was working was that a clerk recorded, on information given by the taxi-driver, a journey that had been made, the record sheet being later verified on the day of the journey by the taxi-driver. The record sheet (or job card) which recorded the journey in the course of which there was nearly a collision with the car driven by Hari Krishna was dated the 28th December. The witness said that he fixed the date because the card showed that on the 28th December he made a trip to Matawala and he said that if the card had shown that the trip was made not on the 28th December but on another day he would have said that the incident relating to Hari Krishna had happened on that other day: he said however that he had no doubt that the card that was shown to him was the correct card in reference to the trip in the course of which he saw the car driven by Hari Krishna.

In his summing-up the learned Judge dealt fairly with the evidence and their Lordships cannot accept that there was error in his handling of it. It is further to be noted that Hari Krishna stated in his evidence that he had not on any occasion driven at night out of the Drasa Farm Road. If therefore the evidence of Subramani the taxi-driver is accepted that he saw Hari Krishna driving at night out of Drasa Farm Road—it is clear that Hari Krishna was not making the suggestion that Subramani was mistaken as to the date. It is further to be noted, in reference to the contention that the date of the 28th December on the record card might have been incorrect, that certain cards for other dates had been made available to Counsel for the defence who had ample opportunity to consider them and to decide as to their significance and who did not consider that they were of assistance. Suffice it to say that in their Lordships' view there was no wrong approach by the learned Judge. No error is shown in the process or in the reasoning which lead him to place dependence upon the evidence of Subramani the taxi-driver and to accept the evidence as to the date of the particular journey of which he spoke.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

(85955) Wt. 8004/82 100 7/62 Hw.

In the Privy Council

RAM BALI

v.

THE QUEEN

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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