NARAYAN NAIR *v.* THE QUEEN

[FIJI COURT OF APPEAL AT SUVA (Sir George Finlay, Acting President, C. C. Marsack and R. Knox-Mawer, JJ/A), November 12, 1959]

Criminal Appeal No. 11 of 1959

(Appeal from H.M. Supreme Court of Fiji—Lowe, C.J.)

Murder—provocation—direction to assessors—aid of assessors—whether disabled from giving aid they should give in the absence of a specific direction on reasonable doubt as to provocation—consideration of summing up as a whole—test to be applied—cumulative effects of different acts of provocative nature—meaning of " ordinary man ".

Held.—(1) It is better to give specific direction to assessors on the question of reasonable doubt as to provocation, but the effect of the summing up as a whole must be considered ;

(2) Full consideration was given to the question of provocation and proper principles as to the onus of proof were applied ;

(3) The direction to the assessors as to what test was to be applied in deciding what was an " ordinary man " was correct.

Appeal dismissed.

Cases referred to:

McPherson (1957) 41 C.A.R., 213 at 216 ; *Prince* 28 C.A.R. 60 ; *Woolmington v. D.P.P.* (1935) A.C. 462 ; *Bullard v. The Queen,* (1957) A.C. 635, at p. 645 ; *Bharat v. The Queen,* (1959) 3 W.L.R. 406 ; *Kwaku Mensah v. R.* (1946) A.C. 83.

F. M. K. Sherani for the appellant.

J. F. W. Judge, ag. Solicitor-General, for the respondent.

This is an appeal against conviction for murder on the 1st day of August, 1959, before the Supreme Court of Fiji at Suva. The trial took place before the Chief Justice and five Assessors. Three of the Assessors gave their opinions in favour of a verdict of murder and two of manslaughter. The Chief Justice, in a written judgment, expressed agreement with the majority, entered a conviction for murder and sentenced the appellant to death.

The deceased Seruwaia Wati was a young Fijian woman who for some years had lived with the appellant as his wife. This association continued during the term of her employment as house-girl by a Mr. Gray, an employment which continued up to the date of her death. On the 12th March, appellant went by taxi to Mr. Gray's house at Lami and had an interview with the girl. Something in the nature of a quarrel took place. The dispute terminated in the stabbing of the deceased by the appellant with a narrow-bladed knife. Deceased sustained ten deep penetrating wounds in the back and chest and on the neck. She died shortly after receiving these injuries, the cause of death being haemorrhage resulting from multiple stab wounds. The striking of the blows by the appellant was not seriously contested at the hearing of the appeal.

The original Notice of Appeal specified six grounds. Nine additional grounds were put forward later and were argued at the hearing of the appeal. The additional grounds for the most part are worded somewhat obscurely and several appear to overlap others which were submitted. The grounds put forward may conveniently be grouped under four headings:—

1. Non-direction or misdirection by the learned trial Judge in the course of his summing-up in respect of the onus of proof of provocation, in that he did not direct the Assessors that the onus of proving absence of provocation lay on the prosecution.

2. Misdirection by trial Judge in:
   (i) failing to direct the Assessors that the appellant was entitled in setting up a defence of provocation to rely on the cumulative effect of several provocative acts ;
   (ii) failing correctly to define the phrase " ordinary man " when explaining the law as to the effect on the ordinary man of the provocation alleged.

3. Wrongful rejection of evidence tendered by the defence.

4. A summing-up unduly prejudicial to the appellant in that the trial Judge failed adequately to bring the essential features of the defence to the notice of the Assessors and failed to give due weight to some of the evidence in the appellant's favour.

The greater part of the argument submitted on behalf of the appellant concerned the first of these grounds, that is non-direction or misdirection as to the onus of proof of provocation when that defence is raised.

The learned trial Judge makes several references in the course of his summing-up to the question of provocation:—

Page 38 of the Record—

> " If you accept that the defence case shows that the provocation caused him a sudden loss of control, and he acted under that provocation, then that takes away the element in murder and reduces the crime to manslaughter."

Page 47 of the Record—

> " There still is the question of provocation. If you believe the accused's story, and if you believe that when he struck those blows he was out of control and his mind went blank, then you will say he is not guilty of murder."

Page 48 of the Record—

> " The defence case evidence is in a clear, careful, dovetailed manner. If the evidence is all true, it would show provocation. Again, let me say that you would have to be satisfied without reasonable doubt that it is untrue before you will be justified in rejecting it completely. You do not, and again I repeat, you do not have to be satisfied without reasonable doubt that it is true before you accept it. The difference is vast."

Counsel for the appellant contends that nowhere in the course of the summing-up is there any direction to the Assessors such as that recommended in *McPherson* (1957) 41 *C.A.R.* 213 at p. 216:—

> " If you are left in doubt as to whether really a prisoner was acting under provocation or not you should find a verdict in his favour on that issue."

Counsel for the appellant relies on the authority of McPherson's case, in which a verdict of capital murder was set aside and a verdict of manslaughter substituted because no express direction had been given to the jury as to the onus of proof of provocation, though the onus of proof generally had been carefully and accurately explained. Counsel also relied on *Prince* 28 *C.A.R.* 60 which follows *Woolmington v. D.P.P.* (1935) A.C. 462 where the law is stated thus:

> " On a trial for murder the jury should be directed that, if upon a review of all the evidence they are left in reasonable doubt as to whether, even if the prisoner's explanation is not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted." (i.e. of murder).

For the Crown it is contended that even if there were misdirections—and it is conceded that if the extracts quoted from pages 38 and 47 stood alone they would be misdirections—they were corrected by passages elsewhere in the summing-up. In other words, the overall effect of the summing-up was to convey to the Assessors a correct explanation of the law regarding onus of proof when the defence of provocation is raised. The passage quoted from page 38 is followed very shortly afterwards by a direction to the following effect:—

> " But the onus of proof never moves from the prosecution. The accused never needs to prove one jot of evidence. If his evidence casts a doubt—a reasonable doubt—on the prosecution case, and he does not even need to do that, but if it does, so much the better for the accused. It is a reasonable doubt that you must resolve in his favour . . ."
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> " This is what you have to do. You consider the defence case but the accused does not have to satisfy you, and I repeat, does not have to satisfy you beyond reasonable doubt, that any part of his story is true. In fact it is the other way around. Before you will be justified in rejecting the accused's story or any part of it you will have to be in no reasonable doubt that it is false. That is how severely the law puts the onus on the prosecution. It is one of the basic principles of British Justice. The prosecution must get their facts and prove them to your satisfaction and mine before a man can be found guilty of a crime with which he is charged or any other crime."

and at page 49:

> " You must remember also that the prosecution must prove its case beyond reasonable doubt and that the onus never moves from the prosecution. You must remember that the accused is not required to prove anything whatsoever but if any reasonable doubt is cast on the prosecution case, so far as your opinions and mine are concerned, we must give the benefit of that doubt to the accused."

In several other passages in his summing-up the trial Judge emphasizes that the accused is not bound to prove anything.

It is clear that with regard to the general onus of proof the learned trial Judge directed the Assessors quite accurately that the onus of proof is always on the prosecution and that any reasonable doubt must be resolved in favour of the accused. He has been meticulously careful throughout the summing-up to emphasize that there is no onus of proof cast on the accused, and that any reasonable doubt left in the mind of the Assessors on any material point must be resolved in favour of the accused. It is true that nowhere does he give an express direction to the effect of the passage quoted from *McPherson,*

that if the Assessors are in doubt as to whether accused was acting under provocation or not, the verdict should be manslaughter and not murder. It would no doubt have been better if he had done so. But in view of the fact that there was no real contest as to the striking of the blows by the appellant the only material issue put before the Assessors was as to whether the appellant had been provoked into doing what he did. This is made perfectly clear by the trial Judge at the very beginning of his summing-up where he states, " It is not a difficult case. The only difficulty you might have is on the question of provocation ". The passage from page 38 of the Record which the appellant contends to be misdirection is immediately preceded by the caution " If, on the prosecution evidence you feel sure and certain that the accused killed this woman with malice aforethought and without any sufficient provocation then he is guilty of murder." It is immediately followed by the warning that the onus of proof never moves from the prosecution.

What has to be considered is the effect on the Assessors of the summing-up as a whole. It must have been clearly in the minds of the Assessors, from the directions given in the course of the summing-up, that the matter of provocation was the main issue which they had to decide. The trial Judge repeated over and over again that the onus never shifted from the prosecution and that any doubt must be resolved in favour of the accused. As Lord Tucker states in *Bullard v. The Queen* (1957) A.C. 635 at p. 645:

> " But there is no magic formula, and provided that on a reading of the summing-up as a whole the Jury are left in no doubt where the onus lies no complaint can properly be made ".

It is of course true that the trial Judge in the Supreme Court of Fiji is not bound by the opinion of the Assessors on matters of fact as is a Judge by the finding of a Jury in England. None the less he must observe the same rules in directing the Assessors as are observed in a jury trial. In *Bharat v. The Queen* (1959) 3 W.L.R. 406 an appeal to the Privy Council from the Supreme Court of Fiji, their Lordships point out that while the Judge is not bound by the opinion of the Assessors he must at least take them into account, and that the effect of the misdirection in that case was to disable the Assessors from giving the Judge the aid which they should have given. There is the further point that in that case the trial Judge did not refer in his judgment to the question of provocation, which was thus not taken into account at all in determining the verdict of the Court. In the present case, however, it is clear from the judgment itself that the trial Judge gave detailed consideration to the question of provocation. He rejected the defence based on it on the ground, *inter alia,* that the acts of violence committed by the accused bore no relation to the provocation alleged to have been received ; that the provocation alleged would not have caused the ordinarily reasonable man to do what appellant did.

We find therefore that the summing-up left the assessors in no doubt as to where the onus of proof lay with regard to the issue of provocation, which had been clearly stated by the Judge at the outset to be really the only question that might cause them any difficulty. We also find that in his judgment the trial Judge had given full consideration to the question of provocation and had applied the proper principles with regard to the onus of proof. The ground of appeal based on non-direction or misdirection as to the onus of proof regarding provocation accordingly fails.

We can find no substance in appellant's objection to the summing-up on the ground that it did not specifically refer to the cumulative effect of a series of provocative acts. The learned trial Judge in effect refers to the defence evidence as a whole, and expressly mentions all the acts of provocation alleged by the appellant. The provocative acts were dealt with cumulatively and would no doubt be considered cumulatively.

We find also that there is no substance in the objection based on the meaning of the phrase " ordinary man ", when the question was being considered as to what would be the effect on an " ordinary man " of the provocation received and whether that provocation would have caused an " ordinary man " to perform the acts which led to the death of the deceased. The trial Judge, after emphasizing the difficulty of defining an ordinary man in any community, proceeds to tell the Assessors that in the present case " an ordinary man " can be taken to be an ordinarily reasonable man of the Indian community in this Colony. Later, at page 48 of the Record, the trial Judge takes this a little further in favour of the appellant:

> " You take the standard of an ordinary man in the community of the accused and, in fairness, in his walk of life ".

The test so applied is similar to that adopted by Lord Goddard in *Kwaku Mensah v. R.* (1946) *A.C.* 83 where it is held that the phrase " ordinary man " in the case of a crime committed in a village on the Gold Coast is to be interpreted as the ordinary West African villager. In our opinion the direction on this point given by the learned trial Judge was correct.

We find no substance in the ground based upon the wrongful rejection of evidence tendered by the defence. It was explained at the hearing of the appeal that the effect of this evidence would have been to show that on a previous occasion appellant's father had refused to give him money on the ground that he disapproved of appellant's association with the deceased woman. We are unable to accept the contention of counsel for the appellant that the admission of this evidence, even if it had been relevant, would have materially strengthened the defence of provocation.

We are also compelled to reject the argument on behalf of appellant that the trial Judge had shown bias against the appellant, had expressed opinions on the facts prejudicial to the appellant and had failed to explain to the Assessors in detail the salient features of the case for the defence. The trial Judge was careful throughout his summing-up to remind the Assessors that they must form their own conclusions as to the facts, and that they were entitled to disregard any personal views as to the facts which the Judge might put forward. It has never been the law that the Judge can draw no inferences from the evidence other than inferences favourable to the accused ; and it has never been the law that the Judge may not express his own views as to the evidence if he sees fit to do so. The Judge's summing-up on questions of fact seems to have been careful and fair to the accused throughout. This, added to his frequent warning to the Assessors that they must make up their own minds on the facts and could ignore the Judge's views, makes the summing-up in our view unexceptionable in this respect.

In the result the appellant has established no sufficient grounds for setting aside the judgment and the appeal is dismissed.