RAM BALI *v.* REGINAM

[FIJI COURT OF APPEAL AT SUVA (Sir Francis Adams, Acting President, Trainor and Knox-Mawer, JJ/A), December 23rd, 1960]

APPEAL NO. 7 OF 1960

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

Assessors—judge rejecting unanimous opinion of—misdirection in summing up—whether substantial miscarriage of justice.

The appellant was tried (with another man who was acquitted) before a Judge sitting with three assessors upon three charges of attempted murder. In his defence the appellant put forward an alibi. In his summing up the Judge asked the assessors, in the first place, whether they accepted the alibi, and secondly whether they considered the appellant guilty or otherwise of the offences charged. The first assessor said he did, the other two said they did not accept the alibi. All three assessors considered the appellant not guilty of the offences charged. In his judgment the trial Judge rejected the alibi, and convicted the appellant, on the first two charges, of attempted murder, and on the third charge, of wounding.

Two principle grounds of appeal were advanced against conviction. Firstly, citing the judgment of the Fiji Court of Appeal in *Ram Lal v. The Queen* (Criminal Appeal No. 3 of 1958), that there were no very good reasons reflected in the evidence to justify the trial Judge in differing from the unanimous opinion of the assessors. Secondly that there were misdirections in the summing up as to the onus of proof in respect of the alibi put forward by the appellant. The Judge had stated:

> " 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 was argued that while it was correct to say that conclusive proof of an alibi necessarily leads to an acquittal, this statement, standing alone, was likely to be interpreted by laymen as meaning that an alibi requires to be proved conclusively by the defence. It was also pointed out by the appellant that when the Judge came to the consideration of the alibi he said " If after considering that evidence as a whole you do accept the alibi ", thereby suggesting that actual acceptance of the alibi was necessary for an acquittal, a contention supported, said the appellant, by the fact that the Judge had intimated to the assessors that, aside from their general opinion upon whether or not the charge had been proved, he wished to know specifically whether or not they accepted the alibi.

Held.—(1) It would be wrong to erect the passages cited from *Ram Lal v. The Queen* into a general proposition applicable in all cases. In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations.

(2) As to the alleged misdirections, had this been a trial by jury, it may well have been necessary to quash the conviction on the ground that the jury might have understood from the direction that the evidence relating to the alibi might properly be disregarded unless the jury were prepared to accept it, whereas a correct direction would have been to the effect that the accused would be entitled to be acquitted if the evidence relating to the alibi raised in the minds of the jury a reasonable doubt as to the guilt of the accused. The position might be different in a trial by a Judge with the aid of assessors whose opinions expressed to the Judge are merely advisory and where the actual decision rests with the Judge who is not bound by the opinions of the assessors.

(3) In the present case, even assuming that, properly directed, the dissentient assessor might have accepted the alibi, the Judge's decision would not thereby have been influenced in any way. In his judgment the Judge specifically accepted the evidence of certain prosecution witnesses and rejected that of the appellant and his witnesses.

(4) Even if the unsatisfactory direction given to the assessors should be regarded as constituting a miscarriage of justice within section 18 (1) Court of Appeal Ordinance (Cap. 3), no substantial miscarriage of justice had occurred in the circumstances of this case.

Quaere, whether the function of the Fiji Court of Appeal in considering an appeal against the judgment of a Judge sitting with assessors is exactly the same as that of the Court of Criminal Appeal in England in reviewing the the verdict of a jury.

Appeal dismissed.

Case cited:

R. v. Bailey 1924 K.B. 300, 1924 All E.R. 466.

S. M. Koya for the Appellant.

A. M. Greenwood, Q.C., Attorney-General, for the Respondent.

Judgment:

The appellant was tried, jointly with one Ishaq Ali, on three charges of attempted murder. The assessors were all of the opinion that Ishaq Ali was not guilty on all three charges and the learned Judge agreed with the assessors and acquitted him.

In regard to the appellant, the assessors were asked, in the first place, whether they " accepted " his alibi; and the first assessor answered that he did not accept it, while the remaining two assessors accepted it. There was thus a majority opinion on the part of the assessors accepting the appellant's alibi. But, notwithstanding the fact that one assessor did not accept the alibi, the assessors were unanimously of opinion that the appellant was not guilty of any of the three charges. In his judgment, the learned Judge rejected the alibi, and held the appellant guilty on the first two charges of attempted murder. On the third charge, he held the appellant not guilty of attempted murder, but guilty of the crime of wounding as defined by section 256 of the Penal Code. This third charge related to the wounding of one Dharma Reddy, while the two other charges arose out of the woundings of Subramaniam Pillay and Muthu Sami Pillay respectively.

All three offences were alleged to have been committed at about 9 p.m. on December 28th, 1959, the case for the Crown being that a number of men came at that time to the compound of Subramaniam Pillay at Vitogo, where

he lives with his sons and other persons in four houses. Some shots were fired, and Subramaniam Pillay and Muthu Sami Pillay were hit by shot gun pellets when they opened the doors of their houses. Dharma Reddy, who was inside Muthu Sami Pillay's house, was wounded slightly by the shot that wounded Muthu Sami Pillay, and the learned Judge's reason for not convicting of attempted murder in respect of Dharma Reddy was that he found no evidence of an intention to kill that person. He was, however, satisfied that such intention had existed in regard to Subramaniam Pillay and Muthu Sami Pillay.

Including certain grounds added by consent at the hearing, no less than 25 grounds of appeal have been put forward, though, not unnaturally, there is a certain amount of overlapping.

In regard to some of the grounds of appeal, there is a preliminary application, under section 17 of the Court of Appeal Ordinance, Cap. 3, for leave to appeal, but decision of the question whether leave should be granted was left over until after Counsel had been heard on the merits.

Each ground of appeal has been elaborately argued, but a good many of the points that have been raised can be disposed of by some general observations.

In regard to the suggestion that the learned trial Judge erred in law in expressing opinions on matters of fact in the course of his summing up to the assessors, thus committing himself to premature decisions on questions of fact and disabling himself from receiving the aid of the assessors thereon, we do not deem it necessary to consider the extent to which it may be proper or permissible for a Judge to express opinions in the course of his summing up, it being sufficient to say that, in our opinion, the learned Judge did not, in the instant case, commit himself in advance to any final decisions, but left himself free to reconsider everything in the light of the opinions that might be expressed by the assessors. He had begun by directing the assessors that they were not bound by his opinions on facts, and repeatedly made it clear, as he went along, that the assessors were free to form their own opinions notwithstanding his tentative suggestions. We consider that, in this connection, the learned Judge did not at any stage go beyond reasonable and proper limits, and that his summing up as a whole represented a perfectly fair endeavour to assist the assessors in evaluating the evidence. In so far as the assessors may have rejected any particular opinion expressed or suggested by the learned Judge on the facts of the case, this did not debar him from repeating or relying on his own view in arriving at his final decision. He was not bound, as was suggested by learned Counsel, to confine himself in his judgment to new reasons that had not been put before the assessors.

As to the contention that the learned Judge did not take into account the oninions expressed by the assessors, we see no reason for holding that he failed in this respect. He stated expressly in his judgment that, in view of the opinions of the assessors, he had reconsidered the evidence in the case, and we see no reason to doubt that he did so in fact, and we find nothing, in the judgment or elsewhere, to support the suggestion that he did not, or that, in differing from the assessors' opinions, he acted without due consideration and deliberation.

In discussing this particular matter, learned Counsel for the appellant cited the unreported decision of this Court in *Ram Lal v. The Queen* (Criminal Appeal No. 3 of 1958), of which copies were furnished to the Court; and he relied in particular on the following passages in that judgment:—

> " In order to justify a Court in differing from the unanimous opinion of the assessors who were in a favourable position to assess the reactions of a man of the class and race they would find the accused to be, there must be very good reasons reflected in the evidence before that Court." . . .
>
> " A trial Judge would require to find very good reasons indeed, reflected in the evidence, before being justified in differing from a unanimous opinion of the assessors on such a question of fact.

It will be observed that, in both of these passages, the Court was careful to limit its propositions to the particular sort of question which arose in that case, namely, the probable reactions to alleged provocation of a man of a particular class and race; and this present Court does not doubt that, on such a question, the Judge ought not to differ from a unanimous opinion of assessors unless he can find—and can find " reflected in the evidence "—very good reasons for so doing. But it would be wrong to erect this into a general proposition applicable in all cases. In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations. It was argued that the learned Judge had erred in failing to consider the evidence relating to each count separately, and learned Counsel cited in support the case of *R. v. Bailey* 1924 2 K.B. 300, 1924 All E.R. R. 466. That case was of an entirely different character, and the position is different where, as learned Counsel agreed is true here, the whole of the evidence is relevant to all of the charges. In such circumstances the necessity for separate consideration of the various charges is limited to matters in respect of which there are differences between the charges. In the present case, after reviewing the evidence in detail, the learned Judge did, towards the close of his judgment, arrive at the point where he considered each charge separately in order to arrive at his decision on each charge, and we are of the opinion that, in following this course, the learned Judge did in fact consider each charge separately to the extent that was necessary in the circumstances of the case.

A considerable number of the grounds of appeal have reference to the learned Judge's acceptance or rejection of the evidence of particular witnesses. Speaking generally, the suggestion was that he ought to have rejected the evidence of one witness after another on various grounds; and it seemed almost as if it were contended that, whenever a witness's testimony is open to some serious criticism on any account at all, a trial Judge is bound to reject his evidence entirely. The learned Judge did not in fact disregard the various grounds on which the evidence of particular witnesses was open to criticism and, without going into details, this Court is satisfied, for the reasons given by the learned Judge, that he was justified in accepting the evidence of those witnesses to the extent to which he did accept and rely on their evidence. Treating the entirety of all such objections as a single ground of appeal, the Court does not find that the learned Judge's reliance on so much of the evidence as he accepted was unreasonable, or that the views he adopted were such as could not be supported having regard to the evidence, or that there was, in this respect, any wrong decision on any question of law or any miscarriage of justice (*vide* section 18 of the Court of Appeal Ordinance, Cap. 3).

Turning now to another matter, exception was taken to the following passage in the summing up, which, in view of the learned Judge's statement in his judgment that he had directed himself in accordance with the terms of his summing up, may be regarded as incorporated in the judgment:—

> "It is difficult however sitting in the security of this Court House, in a township with the Police near at hand, sometimes, to appreciate fully the feelings the people living outside a township may have—where there are no tarsealed roads—where there are no lights on the roads or on the tracks through the canefields and the countryside—and where a number of cases of shooting and violence have been heard of—and where there is little if any electric light in the houses and where dark nights are indeed very dark."

The relevant ground of appeal was to the effect that the learned Judge had erred in law in taking judicial notice of such facts as are mentioned in that passage. In his argument, however, learned Counsel for the appellant limited himself to the contention that the learned Judge had no right to take judicial notice of the way in which the feelings of people might be affected by such circumstances in relation to the matter of giving information to the Police. The Court doubts whether it can fairly be said that the passage in question amounted to a finding of facts by way of judicial notice, but, in any event, does not think that the learned Judge went further than he was entitled to do. In regard to the reactions of people to such circumstances, human nature is certainly a matter of which a Court of law is entitled to take judicial notice.

In regard to such reliance as was placed on previous convictions and the character and reputation of the appellant, those matters were brought out by the defence, and were in no sense raised by the prosecution, and this Court is of the opinion that they were not applied by the learned Judge beyond the extent to which they were properly relevant.

The foregoing remarks sufficiently dispose of all grounds of appeal other than ground No. 6 and certain grounds relating to the way in which the learned Judge dealt with the alibi put forward by the appellant. These two matters are of a more serious nature and have called for careful consideration by this Court.

The complaint in ground No. 6 is that the learned Judge wrongfully disallowed a certain question or questions put by Counsel for the defence in cross-examination of the prosecution witness, Assistant Superintendent of Police Wali Mohammed, on matters relating to the deliberations of a meeting held at the Kisan Sangh Hall in Lautoka on January 2nd, 1960.

At that date only four clear days had elapsed since the commission of the offences alleged herein. It is set out in the ground of appeal that, at this meeting, the alibi of the second accused, Ishaq Ali was discussed, but it would seem that there may also have been some discussion of the appellant's alibi. The meeting in question figured considerably in the cross-examination of several of the prosecution witnesses, and, in regard to them, the matter may have been relevant as going to their credit. It was only in the course of the cross-examination of Wali Mohammed that the Court interfered, and, in his argument before us, learned Counsel for the appellant did not suggest that this particular matter would have any material bearing on his credit; and it was not on any such ground that he endeavoured to justify his questions in the discussion of them at the trial. The meeting had no direct relevance to any issue in the case. When objection was first taken to the line that was

being followed in the cross-examination of this witness, there was some discussion between Counsel and the Court in the course of which certain questions were allowed to be put to, and were answered by the witness. Learned Counsel then put the question, " Was a request made that someone else should investigate this case instead of you ? ". After some further discussion, the question was disallowed, as was also the next question put, namely, " Was there not a meeting between yourself and Mr. Beatt and the people of Vitogo about this ? " An affirmative answer to that last question would in fact have done no more than re-affirm what had already been clearly proved and was never in dispute. Objection was taken to learned Counsel's next ensuing question, but, after discussion, he was allowed to proceed, and no further questions were disallowed. Accordingly, the only question which remained unanswered, as a result of the Judge's ruling, was the one relating to an alleged request that someone else should investigate the case instead of the witness. There is no record of anything said by learned Counsel for the appellant in support of that particular question, but the learned Judge interpreted it as being put forward for the purpose of showing that the principal witnesses for the prosecution had brought unfair and biased pressure on the Police to prosecute the two accused, and his concluding words were to the effect that Counsel had gone quite far enough, had been allowed every latitude, and had already heard the witness's replies.

In his argument before us, Mr. Koya, who appeared for the appellant in both Courts, submitted that further cross-examination might have established that the Vitogo people who were present at the meeting must have told other people what was said there in regard to what the two accused were saying (that is to say, the alibis they were putting forward); and, secondly, there was the possibility that the complainants and their sympathisers might have been led to conclude that it was necessary for them to get witnesses to say that they had seen the two accused that night. He suggested, as was the fact, that certain witnesses had not come forward while Wali Mohammed was known to be investigating the case, but did come forward a few days after the meeting when a detective officer had been brought from Suva to take charge of the investigations. This he supported by the suggestion that some witnesses may have realised that Wali Mohammed knew too much of the situation in Vitogo " to swallow their story," and accordingly wished to have another Police officer from another area who might be more ready to do so; he suggested further that it was because of the meeting that the detective officer was brought in. In an endeavour to crystalize learned Counsel's submission, this Court made the following note, which was read over to Mr. Koya:—

> " My complaint is that I was not allowed to go into the question whether, at the meeting, it was asked that another Police officer should take over the investigation. If that had been allowed, I might have been able to establish that a particular Police officer was in fact appointed to investigate this matter instead of Wali Mohammed. This would have given the opportunity to cross-examine the witnesses Atmaram, Lalla, Munsami Reddy and the taxi man (Subramani) why they preferred to give statements to one Police officer and not the other."

It may not be irrelevant to mention that all four of the witnesses there mentioned had already given their evidence and been cross-examined. Munsami Reddy was in fact recalled later by the Court, and learned Counsel was allowed to examine him on matters arising out of the questions put

by the Court, but no further cross-examination on other topics would have been permissible then without leave of the Court, and no such leave was sought.

It is worthy of note that the grounds put forward before us in respect of the disallowed question or questions differed rather materially from anything said at the time to the learned Judge. This criticism may, perhaps, not be fatal, but seems to us to be pertinent nevertheless.

We do not deem it necessary to arrive at a concluded opinion as to the propriety or otherwise of the Judge's intervention. We think it not unlikely that the learned Judge may have acted quite properly in what he did. But, however that may be, learned Counsel has failed to satisfy us that it involved a miscarriage of justice, or raised any of the other grounds on which this Court is authorized, under section 18 (1) of the Court of Appeal Ordinance, Cap. 3, to allow an appeal. Even if we were to conclude, contrary to the view to which we are inclined, that the learned Judge had erred in this regard we are clearly of opinion that in this connexion "no substantial miscarriage of justice has occurred," and that, accordingly, under the proviso to section 18 (1), the appeal should be dismissed in so far as it rests on this ground. We are quite satisfied that the admission of any rejected question and of any further questions that might naturally have arisen therefrom, would have had no effect whatever on the decision of the case.

The remaining matter that requires to be considered is put in various ways in several of the grounds of appeal, but amounts in substance to an allegation of misdirection as to the onus of proof in respect of the alibi put forward by the appellant. At an early stage in his summing up, the learned Judge spoke as follows:—

> "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."

At no stage did the learned Judge depart from or qualify this unexceptionable general direction as to the onus of proof; and it will be observed that it is so expressed as to be capable of being applied in respect of an alibi or any other matter raised by way of defence. It is, however, usual and proper, in order to avoid possible misunderstanding, for a Judge directing a jury or assessors to make some specific reference to the onus of proof in relation to an alibi. Unfortunately, the learned Judge did not address himself to a full formulation of the rule applicable to an alibi, and such references as he subsequently made to the matter were, to say the least, capable of being misunderstood. At one stage 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 is technically correct to say, as the learned Judge said there, that conclusive proof of an alibi necessarily leads to acquittal. However, such a statement, standing alone, is likely to be interpreted by laymen as meaning

that an alibi requires to be proved conclusively by the defence. We think it probable that the passage just quoted was intended only as a passing comment, and that the learned Judge meant to revert to the topic at a later stage in order to obviate any misunderstanding; but he did not do so, and the risk of misunderstanding was so great that, in our opinion, it is only right to regard this passage as a misdirection. When the learned Judge came to the consideration of the alibi of the second accused, he used the expression "If after considering that evidence as a whole you do *accept* the second accused's alibi"; and there is once again in those words the suggestion that actual acceptance of an alibi is necessary. Finally, the learned Judge intimated to the assessors that he wished to know "whether or not you *believe* and *accept* the alibi of each accused in this case;" and two of the assessors responded by stating that they *accepted* the appellant's alibi, and the other by stating that he did not *accept* it. The same word was used in the answers of the assessors *accepting* the alibi of the second accused.

We are forced to the conclusion that had this been a trial by jury, it may well have been necessary to quash the conviction on the ground that the jury might have understood, from the learned Judge's direction, that the evidence relating to the alibi might properly be disregarded unless the jury were prepared to accept it as establishing the alibi, whereas a correct direction would have been to the effect that the accused would be entitled to be acquitted if the evidence relating to the alibi raised, in the minds of the jury, a reasonable doubt as to the guilt of the accused. The position may, however, be different in the case of a trial such as this, which is conducted by a Judge with the aid of assessors whose opinions expressed to the Judge are merely advisory, the actual decision resting with the Judge, who is not bound by the opinions of the assessors. In this connection, we observe in the first place that, even assuming that the assessors may have misunderstood the learned Judge's direction, the majority of them nevertheless accepted the appellant's alibi and that the assessor who did not accept it nevertheless expressed the opinion that the appellant was not guilty of any of the charges. In other words, the misdirection did not lead any of the assessors to hold the appellant guilty on any charge, and did not prevent the majority of them from actually accepting his alibi. The only conceivable detriment to the appellant arising from the misdirection lies in the fact that one—and one only—of the three assessors may perhaps have been misled into declining to "accept" the alibi. It is possible that, had a different direction been given, the acceptance of the alibi by the assessors might have been unanimous, instead of being by a majority of two to one, and the learned Judge might thus have had to consider a somewhat stronger expression of opinion on the part of the assessors in relation to the alibi. We are satisfied however, that the learned Judge's decision would not have been influenced in any way if the dissentient assessor had accepted, instead of declining to accept, the alibi.

In the judgment itself, the learned Judge, in effect, incorporated his summing up in his judgment by stating, "I have directed myself in accordance with the terms of my summing up to the assessors". Mr. Koya has argued from this that it must be inferred that the learned Judge had also addressed to himself the misdirection complained of in his summing up. In other words that he had misdirected himself. However, we do not require to decide whether this is a necessary inference because the learned Judge, on a careful consideration of the evidence came emphatically to the affirmative

conclusion that the alibi was false. His judgment, 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. He believed the one set of witnesses and disbelieved the other. Questions as to onus of proof arise where there is doubt as to the acceptance or rejection of a particular proposition, and are irrelevant where the evidence carries the mind of the tribunal to a positive conclusion in one direction or the other.

In the present case, so far as the learned Judge's judgment is concerned, it seems to us that, even if he had misdirected himself as to the onus of proof in relation to the alibi, this would not have been a fatal error, the reason being that his conclusions on the facts were such that it never became necessary for him to direct his mind to any question as to the weight to be given to evidence that left it uncertain whether the alibi were true or false. He held that the appellant and his witnesses had all given what he was quite satisfied was false evidence in support of the alibi, and added, "I do not accept their evidence concerning the first accused's alibi at all." He went on to accept the evidence of certain prosecution witnesses, and to reject that of the appellant and his witnesses, and ended his discussion of the facts by saying, "I do not feel the slightest shadow of doubt in my mind about the guilt of the first accused." It is clear that, as the learned Attorney-General submitted, the Judge did not in fact fall into any error arising from any misconception as to the onus of proof.

Our conclusion is that, even if it were right to hold that the unsatisfactory direction given to the assessors should be regarded as constituting a miscarriage of justice within the meaning of section 18 (1) of the Court of Appeal Ordinance, Cap. 3, it is certain, in the circumstances of this case, that in the words of the proviso to that subsection, "no *substantial* miscarriage of justice has occurred."

For these reasons leave to appeal is refused where relevant, and, on matters in respect of which such leave is not required, the appeal is dismissed.

We think we should make reference to the discussion which arose during this hearing as to the function of this Court in considering an appeal against the judgment of a Judge sitting with assessors. Section 246 of the Criminal Procedure Code provides that the decision of the presiding Judge with the aid of assessors on all matters arising upon the trial which in the case of a 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. We think that this provision does not necessarily mean that this Court's function is exactly the same as that of the Court of Criminal Appeal in England in reviewing the verdict of a jury. It is true that this Court acts, like the English Court of Criminal Appeal under the following provision:—

> "The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

However, in regard to unreasonableness, for instance, a Court of Appeal when reviewing a Judge's judgment is in a position to follow his reasoning, and may thus be able to conclude that he has acted unreasonably, even though it might have been impossible to arrive at such a conclusion in the case of a jury's verdict. For the Court of Appeal is entitled to consider the actual findings and the reasoning of the Judge, whereas, in the case of a verdict by jury, the Court of Appeal can only speculate as to particular findings and reasonings, and must therefore uphold the verdict if there was evidence to support it.