SHEIKH HASSAN

v.

REGINAM

[COURT OF APPEAL, 1963 (Finlay V.P.; Marsack J.A.; Knox-Mawer J.A.), 15th July, 17th August]

Criminal Jurisdiction

Criminal law—confession—whether voluntary—cumulative effect of improprieties.

Evidence—trial within a trial—reference to in summing up to assessors—improper.

Practice—Silence by accused when charged—adverse reference to—misdirection.

The appellant was convicted of murder on evidence consisting solely of his own extra-judicial statement which indicated that he aided and abetted another accused in the crime of murder by shooting. At the time when the statement was made the appellant was for seven hours from 11.20 a.m. in the police station under interrogation (except for one hour when he had lunch) and, though a suspect, was given no warning until 4.55 p.m. At 11.30 a.m. a police officer said to him, " You are a fool to trust a man like Gijan Singh (the other accused referred to) as he has boasted to others about this murder ". At 3.30 p.m., when the appellant said he looked upon deceased as his brother, the same officer said, " The first recorded murder, as you as a Moslem would know quite well, was by Cain on his brother Abel." Two solicitors who asked to see the appellant were not permitted to do so until his statement had been completed. The trial judge held that no inducement had been offered to make the statement.

Held.—While no single matter of objection would perhaps in itself be sufficient to make the statement inadmissible the cumulative effect of the improprieties rendered it doubtful whether the statement could be regarded as free and voluntary and it ought not to have been received in evidence.

In his summing up the trial judge made pointed comment on matters which had transpired at a trial within a trial in the absence of the assessors and also commented adversely on the silence of the appellant when formally charged.

Held.—(1) Any disclosure to the assessors of the fact of holding a trial within a trial and its subject matter, of the evidence or the arguments then put forward and any comment on that evidence or those arguments either by counsel or by the trial judge is improper.

(2) Where a comment in a summing up on the prisoner's silence when arrested and cautioned by the police amounts to an invitation to the jury to form an adverse view of the prisoner from the fact of his silence, such comment amounts to a misdirection.

R. v. Davis (1959) 43 Cr. App. R. 215; 103 S.J. 922, followed.

Cases referred to:

Cornelius v. The King (1936) 55 C.L.R. 235: *The King v. Phillips* [1949] N.Z.L.R. 316: *Reg. v. Johnston* [1864] Ir. C.L.R. 60: *R. v. McDermott* [1947] N.S.W.S.R. 407: *R. v. Whitehead* [1929] 1 K.B. 99; 21 Cr. App. R. 23: *R. v. Naylor* [1933] 1 K.B. 685; 23 Cr. App. R. 177: *R. v. Leckey* (1943) 29 Cr. App. R. 128; [1943] 2 All E.R. 665: *Bullard v. The Queen* [1957] A.C. 635; 42 Cr. App. R. 1: *R. v. McPherson* (1957) 41 Cr. App. R. 213.

Appeal against conviction.

Falvey and Koya for the appellant.

Palmer for the Crown.

The facts sufficiently appear from the judgment.

Judgment of the Court [17th August, 1963]—

This is an appeal against conviction for murder on the 14th December, 1962. Appellant was the third of four accused, of whom the first was found not guilty and the second, third and fourth were found guilty. The trial took place before a Judge and five assessors. In the case of appellant, three of the assessors gave their opinions in favour of a verdict of guilty and two of a verdict of not guilty. The trial Judge, in a written judgment, expressed agreement with the opinion of the majority of the assessors, entered a conviction for murder, and sentenced appellant to death.

The case against appellant is that on the night of the murder he went with the second accused, one Gyan Singh, to the house of the deceased; he remained at some distance from the house while the second accused went over and shot the deceased with a shot-gun as the latter came to the door. The second accused and appellant then rode off together on a horse. There is no evidence that appellant took part in the actual shooting. He had, however, been present at the murder, had assisted the second accused to go to the house and to escape after the shooting of the deceased. Thus, in the judgment of the learned trial Judge, either he was a principal, or he aided and abetted Gyan Singh in the commission of the crime, and accordingly was also guilty of murder.

The evidence against appellant was founded almost entirely upon a statement made to the police on the 18th June, 1962. There was some evidence that he had made a self-incriminatory statement also to one Vishnu Deo; but the trial Judge, on grounds which appear to us thoroughly adequate, rejected the evidence of Vishnu Deo *in toto*. In the result there is no evidence directly associating appellant with the crime except his statement of the 18th June, 1962.

Five grounds of appeal were set out in the original notice and two more were added, by consent, at the hearing of the appeal. The grounds overlapped to a certain extent, but those mainly relied upon by counsel for appellant and argued before us may be briefly summarised as follows:—

(1) That the learned trial Judge erred in holding that the statement of 18th June, 1962, was freely and voluntarily given.

(2) That the trial Judge deprived himself of the effective aid of the assessors by informing them of his ruling at the " trial within a trial " on the admissibility of appellant's statement, and informing the assessors of his reasons for holding the statement admissible.

(3) That there was misdirection by the trial Judge in commenting to the assessors on the failure of appellant to make any protest when he was formally charged with murder.

(4) That there was non-direction amounting to misdirection with regard to the onus of proof as to the voluntary nature of the statement made to the police.

Consideration of the first ground of appeal requires an examination of the evidence as to what took place at the police station on the 18th June, 1962, with regard to appellant. The evidence for the prosecution is to the effect that at about 11 a.m. Corporal Anare told appellant that the Officer-in-Charge of the Ba Police Station would like to see him. The corporal then asked appellant to accompany him to the police station and appellant agreed to do so. On arrival at the police station at 11.20 a.m. appellant was taken to the office of Deputy Superintendent Caldwell. The Deputy Superintendent thereupon questioned him in the presence of Police Constable Ram Sumer. At 11.55 Deputy Superintendent Caldwell went away and left Constable Ram Sumer to continue interrogating appellant who, according to Mr. Caldwell, was then a suspect. As he was leaving, the Deputy Superintendent said to appellant:

" You are a fool to trust a man like Gyan Singh as he has boasted to others about this murder."

The Deputy Superintendent returned about 12.30 p.m. with the second accused, Gyan Singh, and brought him to the presence of appellant, to whom he put the question: " Is this the man?". Appellant replied: " Yes ". Constable Ram Sumer questioned appellant—who, it will be remembered, was then a suspect—about his movements in connection with the murder of the deceased. That is as Ram Sumer himself describes the interrogation. The constable went home for lunch shortly after 1 o'clock and appellant was given lunch at the police station. The interview by Constable Ram Sumer was resumed at about 2 p.m. The purpose of this interview was, in the Deputy Superintendent's words, " to elicit information from the suspect". The examination proceeded until 4.40 p.m. During the whole of this time appellant had denied all knowledge of the crime and had not stated anything which would incriminate him in the slightest degree. At 4.43 p.m. Detective Inspector Koya came into the office. Inspector Koya states that appellant then said to him: "Bhaiya I want to tell you everything". A second statement was commenced at 4.55 p.m. and completed at 6.15 p.m. Before taking this statement the police, for the first time, cautioned appellant. In the course of this statement appellant admits that he had gone with Gyan Singh to the scene of the killing; that Gyan Singh had taken the shot-gun which he had brought with him, and shot the deceased while appellant remained at some distance away; and that Gyan Singh and appellant had thereupon made off on the one horse. The police furnished no explanation of appellant's action in thus suddenly changing his protestations of innocence into an acknowledgment of guilt. Appellant himself said that he was induced to make this statement by a promise from Inspector Koya that appellant would be called as a Crown witness. He further stated that the story was a complete fabrication concocted by Inspector Koya. Inspector Koya, however, denies that he made any such promise and swears that the story was appellant's own version.

The police deny that appellant was in custody at any time during the seven hours that he spent at the police station. It is appellant's contention that he was in fact in custody.

During the afternoon, at about 3.30 p.m., Deputy Superintendent Caldwell came back to the office in which appellant was being interviewed. In his presence appellant said that he had an alibi, being at home on the night of the

murder; that Mohammed Roshan, the deceased, was like his brother, and that he had been to the funeral. The Deputy Superintendent then said to appellant:

> " The first recorded murder, as you a Moslem would know quite well, was by Cain on his brother Abel."

At about 12.15 p.m. Mr. A. M. Koya, a solicitor, asked permission to see appellant but this permission was refused by the Deputy Superintendent on the ground that appellant was being interviewed. Later Mr. Mishra, a solicitor engaged by appellant's father, came to the station and asked to see appellant. Permission was, however, refused until the second statement had been completed and signed. The Deputy Superintendent stated that his rule on the subject was to this effect: he would not allow any solicitor to see a person being interviewed unless that person specifically asked to see a solicitor or unless the person interviewed was a young person.

Mr. Caldwell arranged for a Justice of the Peace, Munswamy Mistry, to call at the police station. He was to speak to appellant as soon as the statement had been finished in order to satisfy himself that no pressure had been put upon appellant to make the statement concerned. When Mistry saw appellant he invited the latter to make any comments he might wish to make to Mistry as a Justice of the Peace. Appellant said: " The police officer who was writing down my statement told me that Gyan Singh had told everything and I would be hanged ". Mr. Mishra, the solicitor, had come into the room. Mistry then read the appellant's statement over to him and appellant replied that that was true and correct. Mr. Mishra said to appellant: " Is it not that the police told you if you gave a statement you will be a witness and you will be saved?", to which appellant replied that that was so.

In his judgment the trial Judge rejects, as thoroughly unreliable, the evidence of appellant with regard to the inducement held out to him to make the statement, and accepts the evidence of the police officer concerned that no such promise was made. In view of this finding of fact by the learned trial Judge it is not open to this Court to find that the statement was induced by a promise to appellant that if he made the statement he would be called as a Crown witness and would be allowed to go free.

The question then arises as to whether, in the circumstances detailed above, the statement made by appellant between 4.55 p.m. and 6.15 p.m. on the 18th June, 1962, can be regarded as a free and voluntary statement and, therefore, admissible in evidence. In determining this question consideration must be given to the principles of common law as to the grounds rendering a statement inadmissible as not being free and voluntary. These principles were exhaustively examined by the High Court of Australia in *Cornelius v. The King* (1936) 55 C.L.R. 235, which lays down at p. 246 that a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion. Such compulsion may have taken—

> " The form of prolonged and substantial pressure by police officers upon a prisoner in their hands until through mental and physical exhaustion, to which want of sleep and food sometimes contributes, he consents in order to obtain relief to make a confession of the crime. If it is alleged that the confession is the outcome of pressure, the question whether by persistent interrogation, or by other means, a prisoner has been constrained to confess so that his statement cannot be regarded as voluntary must sometimes be decided as a matter of degree."

With this statement of the law this Court respectfully agrees.

Although appellant could, in view of the police evidence on the subject, not be regarded as a prisoner from the time of his arrival at the police station on 18th June, the fact remains that he was at the station for nearly seven hours and during the latter part of that period he would not, according to Deputy Superintendent Caldwell, have been allowed to leave the station. It is the mental effect on the person being interrogated that is relevant. In the course of his judgment in the New Zealand case of *The King v. Phillips* (1949) N.Z.L.R. 316 at p. 344 O'Leary, C.J., cites, with approval, a passage from the Irish case of *Reg. v. Johnston* [1864] Ir. C.L.R. 60:

> " It is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself to his hopes or fears."

Further in the same case, at p. 346, O'Leary, C.J., quotes from *R. v. McDermott* (1947) 47 N.S.W.S.R. 407:

> " I think it follows, from what was said in *R. v. Jeffries*, that the trial Judge should exclude damaging statements obtained from a prisoner by a person in authority (such as a police officer) by interrogating him whilst he is being held in custody, whether legal or illegal, if in his opinion the statements are ' affected by impropriety in the conduct ' of the examiner whilst interrogating him."

Phillips's case is not binding on this Court, but it presents an admirable survey of the principles of the common law on the subject of confessions, and of the relevant authorities. The case is very helpful in that the same principles of the common law apply to trials before the Courts of most Commonwealth countries.

The improprieties which, it is submitted on behalf of appellant, took place with regard to his statement made on the 18th June are these:

(*a*) That he was kept at the police station, whether in strict custody or not, for nearly seven hours and was under interrogation during the whole of that period except for an interval of approximately one hour when he had his lunch.

(*b*) That although he was a suspect from about mid-day he was not given the normal warning until 4.55 p.m.

(*c*) That Deputy Superintendent Caldwell said to him at 11.30: " You are a fool to trust a man like Gyan Singh as he has boasted to others about this murder ".

(*d*) That when at 3.30 p.m. appellant said that he had looked upon deceased as his brother Deputy Superintendent Caldwell said to him: " The first recorded murder, as you a Moslem would know quite well, was by Cain on his brother Abel ".

(*e*) That Mr. Koya, solicitor, was not allowed to see him at 12.30 p.m. and Mr. Mishra, the solicitor engaged by appellant's father, was not permitted to see him in the late afternoon until the statement had been completed.

It is, we think, significant that until the return of Inspector Koya at 4.43 p.m. appellant had persistently maintained his innocence; but at that moment, without any reason that appears from the evidence for the prosecution, he changed his mind completely and made the statement incriminating Gyan Singh and himself. In the absence of any other explanation it is possible, as is said in the judgment of Dixon, Evatt and McTiernan, J.J., in *Cornelius v. The King* (*supra*) at p. 252:

> " that interrogation may be made the means or occasion of imposing upon a suspected person such a mental and physical strain for so long a time that any satement he is thus caused to make should be attributed not to his own will, but to his inability further to endure the ordeal and his readiness to do anything to terminate it."

In the present case there is not only the length of the interrogation to consider, there are also the two unjustifiable remarks of the Deputy Superintendent with regard to the foolishness of trusting Gyan Singh who had boasted about the murder, and the reference to the murder of Abel by his brother Cain. The very use of the word " murder " by a senior police officer on two separate occasions might well be expected to induce a feeling of apprehension and even fear in the mind of a person such as appellant.

There can be no doubt that the circumstances surrounding the taking of the self-incriminatory statement from appellant were unsatisfactory. It is perhaps true that no single matter of objection set out above would in itself be sufficient to make the statement inadmissible. The cumulative effect of what we have referred to as the improprieties surrounding the making of the statement is such, however, as to render it, in our opinion, doubtful whether the statement could be regarded as free and voluntary in accordance with the requirements of the common law. It must not be forgotten that appellant's conviction of murder was based upon this statement and upon this statement only. The Court must then scrutinise most carefully the evidence as to how the statement came to be given, and to apply strictly the tests by which the voluntary nature of that statement must be judged. Applying these tests strictly, we are not satisfied that the statement was the free and voluntary act of appellant and it should not, therefore, have been received in evidence.

This really disposes of the appeal. There are, however, other grounds upon which we conclude that the conviction cannot stand.

We now turn to the second ground of appeal. In accordance with universal practice in Fiji the question of the admissibility of the statement made by appellant was determined by the Judge alone, in the absence of the assessors, in what is known as a " trial within a trial " in the course of which the Judge heard evidence on behalf of the prosecution and of the defence as well as argument from counsel on both sides.

The passages in the summing-up to which appellant objects are these:

> " As you will remember Gentlemen, the admissibility of this statement was challenged during the trial, and I then heard evidence on this issue in your absence. The ground upon which it was challenged was that the 3rd accused had not made this statement voluntarily but only as a result of inducement held out to him and was also induced by fear, unfair means and contrary to the Judges' Rules.
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> I must confess I was somewhat taken aback when the 3rd accused went even further than this as he gave his evidence and maintained that in fact he never made this statement at all. He asserted that it was an entirely untrue and a completely false statement of facts which was an entire fabrication, concocted by Inspector Koya to which he had merely agreed and to which he had placed his signature on the strength of a promise that he would be called as a Crown witness.
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> Unless a statement is proved to have been made voluntarily it is not in law admissible against an accused person. From the fact that I have ruled it admissible in evidence, it is clear that I did not believe the accused's version of how the statement came to be made and that I did

accept the evidence of the police officer concerned that it was a statement made voluntarily. It would be a subterfuge were I not to make this clear. That is not the end of the matter however.

This statement is now in evidence and you have heard all the evidence about it that I originally heard in your absence and it is now for you to decide what weight you feel should be attached to this statement. If you do not agree with my view of the facts you should attach no weight to the statement at all. If however you believe it was made voluntarily then you may accept it as the truth of the matter as far as the 3rd accused is concerned and act upon it accordingly."

The evidence in a trial within a trial is taken in the absence of the assessors doubtless for the primary purpose of ensuring that if the statement is excluded the assessors will have no knowledge of it and so will not be influenced by it. The basic conception, therefore, is that the trial within a trial is a proceeding of which all knowledge is denied to the assessors. Furthermore, the evidence given there is not evidence in the trial proper. If the statement is admitted the evidence in favour of admission is led again by the Crown and the evidence against its admission is led again, if he so wishes, by the accused. The assessors can then determine for themselves the question as to whether the statement was voluntary or not. The function of the assessors differs from that of the Judge alone on the trial within a trial, in that the Judge is concerned only with the admissibility of the statement but the assessors have to decide, first, whether they accept the statement as voluntary and then, if they do so, to determine what evidential weight is to be given to it.

When, therefore, the trial Judge, in his summing-up, referred to the proceedings in the trial within a trial and specified the grounds upon which the voluntary character of the statement had been challenged before him, he was conveying to them information which they were not entitled to have, in that the whole trial within a trial took place in their enforced absence. It would, therefore, appear that by his initial reference to those proceedings the trial Judge had introduced, for the consideration of the assessors, matters of which they should have been left uninformed. The action of the trial Judge in making the very pointed comment which is quoted above was, in our opinion, a grave irregularity in the conduct of the trial. It is impossible to avoid the conclusion that the judgment of the assessors as to the voluntary nature of the statement made by the appellant may well have been affected by the statement of the Judge that he did not believe the evidence of the appellant given in a proceeding from which the assessors were excluded. It is quite possible that the assessors would be swayed in determining the credibility of the appellant's evidence given before them by the strongly expressed opinion of the trial Judge that he had found the appellant unworthy of credence when giving evidence before the Judge alone. The possibility that the opinions of the assessors might be so influenced was in fact recognised by the trial Judge when on the return of the assessors to the Court the trial Judge said to them:

" If I now recorded and gave in full the reasons for my ruling I might well, quite unintentionally, unduly influence your views in this case before you yourself have heard that evidence and the rest of the evidence in this case."

On this ground of appeal, therefore, we are of opinion that there was irregularity in that the trial Judge both disclosed to the assessors what had taken place at the trial within a trial, and furthermore commented,

adversely to appellant, on the evidence given by appellant at that time. We are also of opinion that the view of the assessors as to the credibility of appellant may have been influenced by the Judge's comment on the evidence given in their absence. It is not necessary for us to decide whether this irregularity is so grave as to justify or compel the setting aside of the conviction on that ground; as there are substantial grounds elsewhere in this appeal which, in our opinion, render such a course inevitable. We have dealt with this ground at some length chiefly because there does not appear to be any authority laying down the principles to be applied and the procedure to be followed with regard to the non-disclosure to the assessors of what takes place at the trial within a trial. We now state that in our opinion and disclosure to the assessors of the fact of holding a trial within a trial and its subject-matter, of the evidence or the arguments then put forward and any comment on that evidence or those arguments either by counsel or by the trial Judge, are improper.

The third ground of appeal covers a passage in the trial Judge's summing-up:

> " The next matter is the authorship of the statement the 3rd accused admits he signed. You have read that statement and you must decide whether you find it possible to believe that a third party, such as Inspector Koya, who had only come fresh to this case that very day, or even if this had not been the case, could on the spur of the moment concoct such a story. If however he had done so, you must consider whether you found it possible to believe that when later the 3rd accused was charged with murder, he would not, despite Mr. Mishra's advice to him not to say anything, have then said that the previous statement he had signed had been concocted and was not his statement at all and that he had been tricked into signing a paper of which not he, but Inspector Koya, was the author."

Appellant's statement of 18th June was, as has been pointed out, practically the sole evidence against the appellant. If that statement were rejected appellant could not be convicted. The credibility of appellant's evidence was, therefore, of vital importance. It is, we think, clear that the effect of the passage quoted in the summing-up was that the assessors were invited by the trial Judge to accept appellant's silence when charged, as a factor tending to establish the guilt of appellant, in that that silence was inconsistent with his own version of the giving of the statement. The learned trial Judge had found as a fact that appellant's solicitor, Mr. Mishra, had warned him to say nothing when he was charged. The reliance placed by an Indian client on the advice of his solicitor is well-known in Fiji to be very great. There is a line of cases from Whitehead [1929] 1 K.B. 99 onward establishing the principle that adverse comment on the prisoner's failure to make any statement when charged is improper. In Naylor 23 Cr. App. R. 177 where a conviction was quashed on this ground, Hewart, L.C.J., says at p. 181:

> " The matter becomes even stronger when one reflects that what was done here was done on the advice of an able and experienced solicitor. It would be strange if a point could properly be made against an accused person if, acting on the advice of his solicitor and following the very words of that which is said to him, he remains silent, that he did not then and there disclose his defence."

The general principle is well stated in the headnote to Davis (1959) 43 Cr. App. R. 215:

> " Where a comment in a summing-up on the prisoner's silence when arrested and cautioned by the police amounts to an invitation to the jury to form an adverse view of the prisoner from the fact of his silence, such comment amounts to a misdirection."

The light in which the matter is to be regarded in this Court is whether the Court is satisfied that the assessors would inevitably have expressed an opinion in favour of a verdict of guilty if the comment had not been made (Leckey 29 Cr. App. R. 128 at 137). We are unable to say that they would have done so. As it was two of the five assessors were in favour of a verdict of not guilty; and we cannot say that the three assessors who expressed the opinion that appellant was guilty would necessarily have expressed that same opinion if the comment in question had not been made. Further, if there had been a majority of assessors in favour of acquittal it is impossible for us to say that the learned trial Judge would still have given his own judgment in favour of the conviction. That being so, we hold the view that the proper course to follow is that which was adopted in Naylor and Leckey, to quash the conviction.

There remains for consideration the fourth ground of appeal with which we propose to deal shortly. Throughout the course of his summing-up the learned trial Judge has been meticulously careful to explain the onus of proof and the reasonable doubt rule on the general issue. The objection taken by appellant is that the trial Judge has not specifically referred to the onus of proof on the question of the voluntary nature of the statement to the extent that if the evidence as a whole leaves them in any reasonable doubt as to whether the statement was voluntarily made that doubt must be resolved in favour of appellant.

The only reference in the summing-up to the onus of proof of the voluntary nature of the statement consists of one sentence:

> " Unless a statement is proved to have been made voluntarily, it is not in law, admissible against an accused person."

Counsel for the respondent suggests that this sentence may be related back to the general directions on onus of proof occurring throughout the summing-up; and he submits that the assessors must necessarily draw the inference that the reasonable doubt rule applied with regard to that question in the same way as it did to the general issue of the guilt of the appellant. He invites us to look at the whole of the summing-up for that purpose, in accordance with principles enunciated in *Bullard v. The Queen* [1957] A.C. 635. We are unable to accept this argument; particularly as the passages in the summing-up immediately following that quoted concentrate only on the two alternatives, whether the assessors believed that the statement was made voluntarily, or they did not agree with the trial Judge's view of the facts when he admitted the statement. In our opinion a careful and express direction should have been given regarding the operation of the reasonable doubt rule in considering whether or not they should decide in favour of the appellant on the question of the voluntary nature of the statement. In this respect we think that the question should have been treated in the same way as when a defence of provocation is raised in a trial for murder, and a direction given on the lines recommended in McPherson 41 Cr. App. R. 213. Failure to give such an express direction amounts, in our opinion, to misdirection.

Taking into account the fact that the case against appellant depended almost entirely upon the statement made on the 18th June, in our opinion, for the reasons given, the judgment of the Court below cannot stand but must be set aside.

The conviction is accordingly quashed and we direct that a verdict of acquittal be entered.

Appeal allowed.

Solicitors for the appellant: *Koya & Co.*

Solicitor-General for the Crown.