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PRATAP CHAND

v.

REGINAM

[COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 30th September, 18th October] B

Criminal Jurisdiction

Criminal law—summing up—no verbatim record—judge's note—provocation the only defence relied upon—direction as to onus of proof on issue of provocation—whether adequate. C

Criminal law—provocation—onus of proof—adequacy of direction in summing up.

At the trial of the appellant on a charge of murder the only defence raised was one of provocation. There was no verbatim transcript of the summing up but among the trial judge's notes thereof was the passage :-

> "5. Onus of proof on prosecution throughout; no onus on accused to establish any defence he may put forward; for prosecution affirmatively to disprove that defence." D

The judge also gave a direction as to the requirements necessary to constitute such provocation as would reduce a charge of murder to manslaughter, and, at the end of the summing up, he said that it was the duty of the assessors not to give the opinion that the accused was guilty of murder unless they were satisfied beyond all reasonable doubt; otherwise to give the opinion that he was guilty of manslaughter. E

Held: 1. The assessors must have been fully aware that the only defence was one of provocation and it was to that defence that the judge's direction as to onus of proof applied.

2. In the circumstances the directions to the assessors on the issue of provocation were adequate and correct. F

Cases referred to: *R. v. McPherson* (1957) 41 Cr. App. R. 213: *Narayan Nair v. R.* (1958-59) F.L.R. 155: *Bullard v. The Queen* [1957] A.C. 635; 42 Cr. App. R. 1: *Bharat v. R.* [1959] 3 All E.R. 292; [1959] 3 W.L.R. 406.

Appeal from a conviction of murder by the Supreme Court. G

Judgment of the Court (read by MARSACK J.A.): [18th October, 1968]—

This is an appeal against a conviction for murder before the Supreme Court sitting at Suva on the 19th April, 1968. At the trial three of the five assessors gave the opinion that the appellant was guilty of manslaughter, while the other two were of the opinion that he was guilty of murder. The learned trial Judge accepted the opinion of the minority of the assessors, entered a conviction for murder and imposed the mandatory sentence of life imprisonment. H

There was little dispute as to the facts. About 22nd December 1967 the appellant, an Indian youth of 18, learned that his mother had been seen by his elder brother having sexual intercourse with the deceased, one Abdul Nabi. The appellant was greatly upset by the news and his distress may well have been deepened by an arrogant attitude on the part of Abdul Nabi; the appellant stated in evidence that on the evening of 27th December Abdul Nabi chased him with a stick, and on the morning of 28th December mocked him and said that there was nothing that the appellant could do to him. On the 29th December, about 7.30 p.m., the appellant went to Suva Market where Abdul Nabi had a vegetable stall. The appellant went over to the stall and inflicted a number of stab wounds with a knife on Abdul Nabi. Consequently upon this the appellant was, on 2nd January, 1968, charged at the Magistrate's Court, Suva, with causing grievous bodily harm to Abdul Nabi. He pleaded guilty, was convicted and sentenced to 8 months' imprisonment. On the 13th January, 1968, Abdul Nabi died as a result of the knife wounds inflicted by the appellant on the 29th December and appellant was thereupon charged with murder. It is against his conviction on that charge of murder that the present appeal is brought.

Three grounds of appeal were put forward, but in our view there was no substance in two of them and only one requires consideration by this Court. This was set out in the amended notice of appeal in these words : -

> "2. The learned trial Judge in his summing-up erred in omitting to put the Appellant's case on the issue of provocation adequately to the assessors and thereby disabled the assessors and himself from evaluating and weighing the evidence fully for and against the Appellant. In particular the learned trial Judge omitted to direct the assessors that if they were left in doubt as to whether the Appellant was acting under provocation or not they should find a verdict in favour of the Appellant on that issue."

Counsel for the appellant contended that in the course of his summing-up the learned trial Judge at no time gave a direction to the assessors such as that recommended in *McPherson* (1957) 41 Cr. App. 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."

In Counsel's submission it was never made clear to the assessors that, once the defence of provocation is raised, the onus is on the Crown to establish beyond reasonable doubt that the appellant had not acted under such provocation as would reduce the offence from murder to manslaughter. Counsel contended that this omission amounted to misdirection upon a material point.

This Court is in a position of some difficulty in that there is no verbatim transcript of the summing-up by the learned trial Judge, but only brief notes which are little more than headings; and neither Counsel who argued the appeal appeared at the hearing in the Court below. At the same time we are of opinion that there is sufficient information on the Record to enable us to decide the point raised.

In the notes of the summing-up this passage occurs :-

> " (5) Onus of proof on prosecution throughout; no onus on Accused to establish any defence he may put forward; for prosecution affirmatively to disprove that defence."

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Later there is a further direction as to the requirements necessary to constitute such provocation as would reduce a charge of murder to manslaughter.

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There was no suggestion by Counsel for the appellant that the trial Judge's direction on the subject of the onus of proof generally was inadequate or in any other way faulty and we are satisfied that the trial Judge did in fact make it clear that the onus was always on the prosecution to disprove any defence which might be put forward. The only question that arises is whether the direction was sufficiently specific in respect of the defence of provocation.

C

The trial Judge said that there was no onus on the accused to establish any defence he might raise; the onus lay on the prosecution affirmatively to disprove that defence. It is, however, perfectly clear that the only defence raised was one of provocation. The summing-up followed hard upon the address for Counsel for the defence, at the close of which he urged that "a verdict of manslaughter due to provocation should be brought in." In this respect the facts bear some similarity to a case heard before this Court, *Narayan Nair v. R.* (1958-59) F.L.R. 155 at p.158 :-

D

> "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."

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Further in the course of that judgment it is stated :-

> "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 he made.' "

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We have no doubt that similar considerations apply to the present case and that the assessors must have been fully aware that the only defence was one of provocation, and that it was with regard to that defence that the Judge's direction as to onus of proof applied.

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At the conclusion of his summing-up, according to the notes appearing in the Record, the trial Judge said it was the duty of the assessors not to give the opinion that the appellant was guilty of murder unless satisfied beyond all reasonable doubt; otherwise, to give the opinion that he was guilty of manslaughter. The general effect of the directions thus

given are, in our view, tantamount to what is recommended in *McPherson.* The reasonable doubt here referred to could apply only to the
A one question in issue, that of provocation.

That the trial Judge directed himself correctly on this point is shown by this passage from his judgment:-

> "It remains to be considered whether the prosecution has proved beyond all reasonable doubt that there was no provocation, as defined in s.235 P.C., which might reduce the offence from murder
> B to manslaughter under the provisions of s.234 P.C."

In the result we are satisfied that the directions given by the learned trial Judge to the assessors on the issue of provocation were adequate and accurate and we can find no reason for disturbing the verdict of the Court on this ground.

C That disposes of the appeal. There is, however, one aspect of the submissions put forward by Counsel for the appellant upon which some comment might usefully be made. Counsel contended that if the summing-up had been full and explicit on the question of provocation there might well have been unanimity among the assessors, and not merely a majority, in favour of a verdict of manslaughter; and this unanimity may have influenced the trial Judge to enter a conviction for manslaughter
D and not murder. The assessors are, of course, not a jury. They are there to advise the trial Judge, who is not bound to conform to their opinions, though he must at least take them into account: *Bharat v. R.* [1959] 3 All E.R. 292 at p.294. We are satisfied that the majority opinion in favour of manslaughter was fully taken into account. The judgment makes it clear that the course recommended by the majority opinion of the assessors was fully considered by the trial Judge; and in view of the
E reasoning in his judgment, it does not seem a reasonable possibility that his decision would have been different if the opinion of the assessors in favour of the verdict of manslaughter had been unanimous and not merely that of the majority.

Put shortly, our view is that the burden of proof of provocation was correctly explained to the assessors and the principle was correctly
F applied by the learned trial Judge in his judgment. For these reasons the appeal must fail.

Appeal dismissed.