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RAMESH CHAND

v.

B

REGINAM

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.), 18th, 27th June]

Criminal Jurisdiction

C *Criminal law—evidence and proof—res gestae—words uttered by deceased admissible if contemporaneous with attack causing death—dying declaration—proof of settled hopeless expectation of death—declaration identifying assailant—identity not in issue at trial—no need for judge in the circumstances to point out to assessors that declaration not subject to cross examination.*

Criminal law—provocation—question not left to assessors—no sufficient material capable of supporting finding of loss of self control commensurate with measure of retaliation.

D

At the trial of the appellant for murder evidence was given that cries in a woman's voice were heard from a distance, to the effect that the appellant was attacking her. In a statement made in answer to a charge of wounding the deceased, the appellant admitted that he had struck her with a knife and that she had "yelled out" words similar to those E given in evidence.

Held: The evidence in question was rightly admitted as part of the *res gestae* as the words used by the deceased, together with the circumstantial evidence, indicated that the words were uttered contemporaneously with the attack; this being confirmed by the appellant's own statement.

F *Teper v. R.* [1952] A.C. 480; [1952] 2 All E.R. 447, distinguished.

The deceased suffered four deep stab wounds, one of which penetrated the heart. In the ambulance on the way to the hospital she named the appellant as her assailant, requested that her children be looked after, and twice said that she would not live.

Held: 1. The words used, considered with the grave nature of her injuries, left no doubt that the deceased had a settled hopeless expecta- G tation of imminent death.

2. As the identity of the appellant as the person who attacked the deceased was never an issue at the trial it was not necessary for the judge to point out to the assessors that the dying declaration had not been subject to cross examination.

3. Taking the most favourable view of the evidence given by the appel- H lant, there was no material upon which reasonable assessors, properly directed, could possible have concluded that the appellant may have suffered loss of self control to which the measure of retaliation was in any way proportionate. It was not therefore necessary for the trial judge to leave the question of provocation to the assessors.

Cases referred to:

Waugh v. R. [1950] A.C. 203; 66 T.L.R. (Pt. 1) 554: *Sukh Raj v. R.* (1968) 14 F.L.R. 241: *Bharat v. R.* [1959] A.C. 533; [1959] 3 All E.R. 292: *Bullard v. R.* [1957] A.C. 635; 42 Cr.App.R. 1: *Lee Chun-Chuen v. R.* [1963] A.C. 220; [1963] 3 All E.R. 73.

A

Appeal from a conviction of murder by the Supreme Court.

B. C. Ramrakha for the appellant.

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G. N. Mishra for the respondent.

The facts sufficiently appear from the judgment of the court.

Judgment of the Court (read by GOULD V.P.) : [27th June 1969]—

The appellant was convicted by the Supreme Court sitting at Lautoka, of murdering Bindra Mati d/o Ram Nath at Asi Asi, Tavua, on the 16th October, 1968. The three assessors were unanimously of opinion that he was guilty of murder as charged and he was convicted and sentenced on the 17th April, 1969. He now appeals against his conviction.

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The deceased, Bindra Mati, was the wife of Raj Kumar and the appellant is the husband of Raj Kumar's sister. At the time in question both the appellant and Raj Kumar, whose houses were a few chains apart, worked for and lived on land owned by Jitendra Lal. Jitendra Lal's house was about ten and a half chains from that of Raj Kumar, the intervening space at the relevant time being under young sugar cane.

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After dark on the evening of the 16th October, 1968, a number of people, including the appellant and Raj Kumar, gathered at the house of Jitendra Lal, where they partook of yaqona and, later, beer. It has not been suggested, either at the trial or this appeal, that the alcohol then consumed was a factor in what later occurred. After drinking, the people present had a meal, though apparently they did not all eat at the same time. The appellant left the gathering before Raj Kumar, following a track around the canefield. Raj Kumar then heard and recognised his wife's voice crying out, and he ran straight to his house across the canefield, followed or accompanied by others. One of those who heard the cries and followed Raj Kumar was Opendra Lal, who testified that he heard the woman's voice call "See Bhakkua is holding me" and then "See Bhakkua is hitting me". It was common ground that Bhakkua is a name by which the appellant is known.

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Bindra Mati was found a few yards from the house in which she lived with her husband, covered with blood from a number of stab wounds. She was taken to Tavua Health Centre but after preliminary treatment was sent by ambulance to Lautoka. During this journey she made statements to which reference will be made later in this judgment. At Lautoka Bindra Mati was operated on but died on the operating table at about 5 a.m. the next day. Her wounds consisted of three deep stab wounds through the chest, penetrating the lungs and one of them the heart, and a deep stab wound from the back, penetrating the stomach and major blood vessels.

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The most cogent part of the evidence implicating the appellant consisted of his own admissions. When visited by the police at his house

A on the night of the 16th October, he gave a false explanation of the presence of what appeared to be blood on his foot. Later, under questioning, he admitted it was Bindra Mati's blood and made the following statement :—

> "Bindra Mati called me when I was going home. When I went to her, in order to implicate me, she cried out loudly 'See, Bakku is holding me'. I became angry and I hit her on her chest with pen knife two or three times. When she fell down I threw the pen knife and went away home running."

B

The appellant also affixed his thumb-print to two cautioned statements, the first when formally charged, at 4 a.m. on the 17th October 1968, with wounding, and the second when formally charged with murder at 11 a.m. on the same date. These statements read respectively :—

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> "Yesterday, Wednesday 16.10.68 from about 5 o'clock in the evening myself, Jitendra, Opendra, Rup Chand, Deo Kumar and Raj Kumar were drinking beer at Jitendra's house. About two carton of beer was consumed. At about 10.30 at night all the beer finished then meals were had. Rice and goat meat. I did not cut the goat meat nor did I see who had cut it. After having the meal I went away first. I followed the track past Raj Kumar's house. As I arrived near Raj Kumar's house, the same time his wife came outside the house. I saw there was no-one there. I went close to her and held her. She yelled out 'See Bakku is holding me'. Her children were sleeping inside the house. She cried out three or four times. Then I took out a pen knife from my pocket and hit her on her chest about three or four times. She fell down in the canefield. I quickly ran away to my house from the canefield. I threw my pen knife somewhere in the canefield, went and slept inside the house."

D

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and —

> "Yesterday when I came out of the house from the party, when I arrived near Bindra Mati's house then Bindra Mati came out on the road. Then I held her hand. Then Bindra Mati yelled out. Then I hit her with pen knife three times. After hitting her I ran away home and went to sleep. When I hit her with the pen knife it was about 10.30 at night."

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In the Supreme Court the admissibility of this evidence was challenged but after holding a trial within a trial the learned Judge ruled that it was admissible. Except for a comparatively minor matter referred to G below this has not been made an issue on the appeal. At the trial the appellant gave evidence in his defence, in which he admitted having been, at the relevant place and time, involved in a struggle with Bindra Mati while he had an open knife in his hand, but gave an explanation which will be considered in relation to the final ground of appeal.

The first three grounds of appeal argued on behalf of the appellant H were expressed in the "Additional Grounds" filed as follows :—

> "1. That certain evidence given by the witness Opendra Lal did not form part of the res gestae and ought not to have been admitted and hence there was a miscarriage of justice.

2. That the dying declaration admitted as a result of the witness Suruj Pal's evidence (page 52 of the record) ought not to have been admitted as it was not established that the deceased had a settled hopeless expectation of imminent death and thus there was a miscarriage of justice.

"3. That the learned trial judge did not direct himself and the assessors that a dying declaration is not liable to cross-examination and there was thus a miscarriage of justice."

The evidence to which objection was taken in ground 1 is that of Opendra Lal set out above. The words which he said were used "See Bhakkua is holding me" and "See Bhakkua is hitting me" afford substantial corroboration of the appellant's own statements, in two of which he said that Bindra Mati cried out "See, Bakku is holding me". Opendra Lal's evidence was not objected to at the trial but counsel argued in this Court that they were not shown to have been sufficiently contemporaneous with the attack on the deceased to be admissible as part of the *res gestae*. *Teper v. Reginam* [1952] 2 All E.R. 447 was relied upon, but the facts in that case are not in any way comparable with the present. The words in issue in Teper's case (which were excluded from evidence) were said to have been used by a woman not identified and were related to the cause of a fire alleged to have been started maliciously. They were spoken, however, some twenty-six minutes after the fire had been started. In the present case the very content of the statements, together with the circumstantial evidence, indicates that they were uttered contemporaneously with the attack. The appellant's own statements tend to confirm this. We are satisfied that the evidence falls within the words used in Teper's case (at p.449) :—

"...... it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement",

and was admissible.

The dying declaration referred to in ground 2 was testified to by Suruj Pal, who had known Bindra Mati since her childhood, and who accompanied her in the ambulance from Tavua to Lautoka. Bindra Mati was at this time receiving a transfusion of fluid and was obviously in a very low condition. According to Suruj Pal she first enquired whether her husband had come and then said "Please look after my four children they would be ruined now — I will not live". She then asked Suruj Pal to tell her husband to take money which was kept in a tin and finally, according to Suruj Pal, said "Bhakku hit her on her heart and I will not live".

Again, no objection was taken to this evidence at the trial, and indeed the identity of the appellant as the person who held the knife by which Bindra Mati's wounds were caused was never made an issue at the trial by the defence. Counsel has now argued that there was insufficient indication of the "settled hopeless expectation of imminent death" which is the prerequisite of admissibility of a dying declaration. He also indicated the apparent change from direct to indirect speech in the sentence implicating Bhakku as showing that the exact words used by the deceased

had not been given. As no objection was taken at the trial there was no specific ruling by the trial Judge on the question of admissibility but we are satisfied from the record that he was in any event amply justified in receiving the evidence. Her words "I will not live" twice uttered and her reference to her children, considered with the grave nature of her actual injuries, leave no doubt that she had a settled hopeless expectation of imminent death. We do not consider that the way in which her final sentence was expressed in evidence could lead to any ambiguity. In any event, as the identity of the appellant was never an issue at the trial no possible miscarriage of justice can have arisen by the admission of the evidence. This consideration also disposes of the third ground of appeal. In *Waugh v. R.* [1950] A.C. 203 and by this Court in *Sukh Raj v. Reginam* (Cr. Appeal 25/1968 — unreported) the importance of pointing out to a jury or assessors that a dying declaration has not been subject to cross-examination has been stressed. That rule, however, can have no application in circumstances such as the present, in which the dying declaration related only to the identity of the assailant which was never in dispute. When the learned Judge summed up to the assessors, the appellant had already given evidence of his part in the matter and the learned Judge, we think quite naturally in the circumstances, did not find it necessary to remind the assessors of the evidence of the dying declaration at all.

In the fourth ground of appeal the appellant takes objection to the admissibility of part of the evidence of Senior Inspector C. H. Koya, who interrogated the appellant on the night of the events in question. In the early part of this questioning the appellant had accounted for the blood on his foot by saying he had cut fowl at the house of Jitendra Lal. Having obtained further information the Inspector spoke again to the appellant and evidence of the following conversation was given :—

"Q: What did you say to him when you went back?

A: "I came to know from Jitendra Lal that you did not cut any mutton or fowl at his house and he had cooked frozen goat meat at his home and after eating that you left from there at 10.30." Then he replied sir, "Yes, I did it".

Q: Yes, what did you then say?

A: "Q: What have you done?". Then he made a further statement to me.

Q: What did he say?

A: "Bindra Mati called me while I was going home and to implicate me she started crying. With this I became annoyed and I hit her on her chest with the pen knife about two or three times and when she fell down I threw the pen knife and ran home."

Q: Yes?

A: "Q: Can you tell me you have blood on your foot, what sort of blood is that?

A: Bindra Mati's blood." "

Counsel submitted to this Court that all the conversation following the words "Yes, I did it" should have been excluded, on the ground that the Inspector should at that stage have arrested the appellant. We are

unable to regard this submission as valid. The Inspector had earlier cautioned the appellant as a suspected person pursuant to Rule 2 of the Judges' Rules. We think, in the circumstances, that the answer "Yes, I did it" was entirely ambiguous and may have been intended as a continued assertion that the appellant had cut fowl. The Inspector, in our view, was entitled to ask the ensuing question to clarify this point.

A

The fifth and final ground of appeal reads :—

"5. That the appellant in his defence set up such facts as to raise a defence of provocation to the charge of murder and the learned trial judge failed to direct himself and the assessors on the issue of provocation as a possible defence to the charge and there was thus a miscarriage of justice and the verdict ought not to stand."

B

For the purpose of this ground it is necessary to refer to the appellant's evidence which introduced certain matter at variance with his earlier statements. In his cautioned statement after being charged with having wounded Bindra Mati the appellant had said (inter alia) — "as I arrived near Raj Kumar's house, the same time his wife came outside the house. I saw there was no one there". In his evidence he said :—

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"While I was going to my home from Jitendra Lal's house the road which went to Raj Kumar's house. When I reached near Raj Kumar's house there I saw two persons or two men ran from there downwards. I saw them and I became very scared, I thought that person was Shiu Lingam because he at one time caused some stones to be thrown at me by Fijians. I saw him running and I got very frightened and I took out my pen knife in my hand. When I proceeded further from there then Bindra Mati came on the road and held me with her arms around me.

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Q: Did she say anything at that stage?

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A: Yes sir. She yelled out and said "Run I am holding Bakkua".

He then described a struggle with Bindra Mati and conceded the possibility that she was struck by the pen knife during the struggle. He later said, with reference to the two men he claimed to have seen — "I thought it was Shiu Lingam and he would kill me today". In cross-examination he admitted that he was on good terms with Bindra Mati and Raj Kumar and could advance no reason for her alleged action. It should be added that, though the appellant did not refer to the matter in his own testimony, there was evidence elicited in the cross-examination of Crown witnesses that the appellant had been to Tavua on the 16th October in connection with a court case with one or more Fijians. Jitendra Lal stated that Shiu Lingam was connected with the case, not directly, but to the extent that the Fijian involved worked for Shiu Lingam.

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In his summing-up the learned trial Judge told the assessors that while counsel for the appellant had frankly conceded that there was no evidence upon which he could base a plea of self-defence he had nevertheless raised the issue — the learned Judge therefore explained the law as to the use of excessive force in self-defence, saying that :—

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"The suggestion is that Bindra Mati might have been acting in collaboration with the two men that the accused had allegedly seen and the alleged holding was a preliminary to a planned impending attack on the deceased."

A It is evident from the opinions of the assessors that they rejected any such plea. The learned Judge's own view of the matter was expressed in his judgment where he stated that he was satisfied without a shadow of a doubt, that the matters which the appellant had raised in court were fabrications on his part. The appellant's main defence was accident, which was clearly rejected by the assessors and the court.

B The question raised by the final ground of appeal is whether the learned Judge ought to have directed the assessors that, even though they rejected the plea of excessive force in self-defence, it was open to them to reach the view, if they accepted or were left in doubt as to the circumstances alleged by the accused in evidence, that the appellant may have been provoked to such an extent as to reduce his offence to manslaughter. If he should have done so it may be that the principle of the decision in *Bharat v. The Queen* [1959] A.C. 533 would apply, on C the basis that the assessors by reason of the non-direction were disabled from giving him the aid which they might have given. The fact that the Judge himself disbelieved the evidence does not deny effect to this principle — see p.539 of the report.

D It is clear law that if there is any evidence of provocation fit to be left to a jury it is the duty of the judge to direct the jury on the subject whether or not the issue has been raised by counsel: *Bullard v. The Queen* [1957] A.C. 635. But whether there is evidence fit to be left to a jury or assessors is a question which must be looked at in the light of the authoritative words of the Privy Council in *Lee Chun-Chuen v. The Queen* [1963] A.C. 220 at 231-2 :—

> E "Provocation in law consists mainly of three elements — the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other — particularly in point of time, whether there was time for passion to cool — is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more F than provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from *Holmes v. Director of Public Prosecutions*. In *Mancini v. Director of Public Prosecutions* the House of Lords proceeded on the basis that there was an act of provocation — the G aiming of a blow with the fist — but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate."

H Taking, as we are required to do for the present purposes, the most favourable view of the evidence given by the appellant, we find that there is here no credible narrative of events suggesting the presence of at least one of the three elements mentioned. We refer to the necessity for the retaliation to be proportionate to the provocation. The appellant made no claim that the persons he saw running ever approached him or menaced him in any way. It was when he had "proceeded further" that Bindra Mati came and held him with her arms. Even considered in the

light of his alleged fear of a person he had "seen earlier" we find here no material which could show a loss of self-control connecting the provocation and the retaliation. The medical evidence showed that each of the stab wounds penetrating deep into the body of the deceased could by itself have been fatal. The appellant made no direct claim to loss of self-control and, while this of itself is not fatal to his case, we are satisfied that there was no material in the whole of the evidence upon which reasonable assessors, properly directed, could possibly conclude that there may have been loss of self-control to which the measure of retaliation was in any way proportionate. It is evident that the learned trial Judge left the question of excessive use of force in self-defence to the assessors only *ex maxima cautela;* in our view there was no sufficient material either on that issue or on the issue of provocation to go to the assessors. This ground of appeal therefore fails.

For the reasons we have given the appeal is dismissed.

Appeal dismissed.