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MAHA NARAYAN

v.

B

REGINAM

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Perry J.A.), 30th March, 6th April]

Criminal Jurisdiction

C *Criminal law—summing up—standard of proof—credibility of witnesses—unsworn statement by accused from dock—direction on weight.*

Criminal law—evidence and proof—unsworn statement by accused—trial within trial—cross-examination of person making voluntary statement—meaning of "in custody."

In the appellant's trial for murder the trial judge, in directing the assessors on the question of the credibility of witnesses, used the words —

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> "In doing so you must apply the same standards of judgment that you apply in your day to day life with your fellow men, in reaching a decision on any matter of major importance."

Held: The words used could not have given rise to any idea in the minds of the assessors that in weighing up the case against the accused E they could properly adopt the standard of the balance of probabilities.

In relation to an unsworn statement made by the appellant from the dock the trial judge directed the assessors that they could attach such weight to it as they thought fit and should take it into consideration in deciding whether the prosecution had proved what it sought to prove.

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Held: In conjunction with the general direction on ous of proof and reasonable doubt, this direction was adequate.

For the purpose of considering whether a statement made by an accused person is voluntary the expression "in custody" imports that the person concerned is being detained against his will; and the term "cross-examina- G tion" is to be understood in the sense that certain facts in a statement are not accepted and an attempt is being made to whittle down or to differentiate the answers already given.

R. v. Convery [1968] N.Z.L.R. 426, and

R. v. Weaver [1956] N.Z.L.R. 590, followed.

H Other cases referred to:

Lee Chun Chuen v. R. [1963] A.C.220; [1963] 1 All E.R.73.

Brown v. R. (1913) 17 C.L.R.570.

R. v. El Mir (1957) 75 W.N. (NSW) 191.

Sykes v. R. (1913) 8 Cr. App. R.233. A

Appeal against a conviction of murder in the Supreme Court.

M. Sahu Khan for the appellant.

G. Trafford-Walker for the respondent.

The facts sufficiently appear from the judgment of the court. B

6th April 1972

Judgment of the Court (read by Marsack J.A.) :

This is an appeal against a conviction of murder entered in the Supreme Court sitting at Lautokta on 15th December, 1971. The trial Judge sat with five assessors who expressed the unanimous opinion that appellant C was guilty of murder. The trial Judge concurred with this opinion, convicted appellant of murder and passed the mandatory sentence of life imprisonment.

The basic facts may be shortly stated. The deceased Timoci Nasilasila was at material times farming land at Bilabila which previously had been farmed by one Mathura Singh father of the appellant. The appellant also D occupied land in the vicinity on which he had kept a horse and some cattle. Disputes arose from time to time between appellant and deceased in connection with the farming of their respective lands, and relations between the two were unfriendly. On 1st September, 1971, deceased worked on his land during the day and in the evening went to his hut which was situated on the land. Early the following morning the dead body of deceased was found in the hut. The body bore a number of deep E cuts, mainly about the neck and shoulders, one of which almost completely severed the head. Medical evidence was to the effect that the nature of the injuries was consistent with having been caused by a cane-knife. The post mortem examination disclosed, according to the medical witness, that death had probably taken place some four hours after deceased had taken a meal. Appellant was seen at the house of a neighbour of deceased, Sailasa, between five and six o'clock on the evening F of 1st September. Between 7.30 and 8 p.m. that same evening appellant went to the house of Mathura Singh, which was in the same general vicinity, and stayed for about half an hour. He then left.

The evidence against the appellant consisted almost entirely of the statement made by him to the Police, confessing that it was he who had murdered Timoci Nasilasila on the night of 1st September, 1971 by striking G him a number of times with a cane-knife; and that he had done so because Timoci treated appellant and his family badly in the matter of land and cattle and used abusive language to them.

The notice of appeal set out fifteen grounds, one of them including a number of sub-headings. At the hearing Counsel for appellant intimated that he would confine his argument solely to the amended grounds, H eight in number, which he had lodged with the Court subsequently to the original notice. We do not find it necessary to set out these grounds in full. Those which require consideration by the Court may be shortly summarised as under :

(1) that the learned trial Judge did not adequately direct the assessors and himself as to

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(a) the onus and standard of proof;

(b) the weight to be given to an unsworn statement made by the accused person at the trial;

B (2) that the learned trial Judge erred in law and in fact in admitting in evidence the alleged oral statement of the accused;

(3) that the appellant should not have been convicted solely upon his own confession which was not corroborated in any material particular;

C (4) that the verdict was unreasonable and could not be supported having regard to the evidence.

Counsel for appellant also argued that the issue of provocation should have been put to the assessors, in view of the statement made by appellant to the Police to this effect: that "he had had lots of trouble with Timoci about land and the trespass of cattle and Timoci had abused him
D a number of times. On that particular day while he was ploughing Timoci had abused him." In our view it could not be said that there had been produced a credible narrative of events suggesting the presence of the three elements referred to in *Lee Chun Chuen v. R.* [1963] A.C.220 at page 231: the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. Accordingly there was no basis upon which the learned trial Judge could be required
E to direct the assessors and himself on this issue. For this reason Counsel for the Crown was not called upon to reply to the argument on provocation.

In his submissions on the ground numbered 1(a) above Counsel for appellant, while conceding that the learned trial Judge had emphasised in his summing up that the onus lay on the Crown to establish the guilt
F of the accused beyond reasonable doubt, urged that some confusion would have been caused in the minds of the assessors by his direction that in considering the question as to whether any doubt was left in their minds —

> "in doing so you must apply the same standards of judgment that you apply in your day to day life with your fellow men, in reaching
G a decision on any matter of major importance."

Counsel's submission was that in deciding questions arising in their day to day life the assessors might well adopt the standard of reasonable probability; and this direction might very well have caused them to believe that this was the standard they must adopt in deciding whether or not a reasonable doubt existed in their minds. Counsel cited the
H Australian case of *Brown v. R.* (1913) 17 C.L.R.570 and a passage from the judgment of Barton A.C.J. at page 585 :

> "In the ordinary affairs of life we are frequently compelled to arrive at conclusions where moral certainty is out of the question. There,

> we have no more to guide us than a mere preponderance of probability; and where the juryman perceives such a preponderance in a civil case sustaining the burden of proof, he is justified in deciding according to that greater weight of evidence. But the danger of applying a similar rule of action to criminal cases is manifest, because of the much more serious consequences which must result from a mistaken conclusion."

The passage cited from the summing-up, however, has reference not to the onus of proof which lay on the Prosecution, but to the question of the credibility of the witnesses; and that is made clear from the context in which the words quoted are used. The learned trial Judge is specifically directing the assessors as to the course they should follow when there are discrepancies in the evidence of different witnesses, and explaining their duty carefully to examine the evidence in case of conflict, and decide which they can accept and which they must reject. His direction is in our opinion perfectly clear, and cannot give rise to any idea in the minds of the assessors that in weighing up the case against the accused they can properly adopt the standard of balance of probabilities. Accordingly we cannot find any validity in this ground of appeal.

In any event, even if the words complained of had been used in the course of a general direction on the onus of proof, we must not be taken as agreeing that they amounted to a misdirection.

We now turn to ground 1(b), with regard to the weight which should be given to an unsworn statement made by the accused person at the trial. The summing up by the learned trial Judge on this point was in the following words :—

> "The Accused when his rights were explained at the end of the prosecution's case elected to make an unsworn statement. He was entitled to do so instead of giving evidence on oath. Though it is not sworn evidence which can be subject of cross-examination, nevertheless you can attach to it such weight as you think fit and should take it into consideration in deciding whether the prosecution has proved what they are seeking to prove in this case."

In Counsel's submission this direction was inadequate, in that the assessors should have been directed in terms of the judgment in *R. v. El Mir* (1957) 75 WN (NSW) 191, where it was held that —

> "there were three positions open to the jury first, they might be satisfied that the truth was to be found in the evidence of the Crown witnesses, and if they were satisfied to that effect they were bound to convict; second, they might affirmatively find that the truth appeared in the statement made by the accused from the dock, in which case they would acquit; third, they might not be affirmatively satisfied of the story told by the accused, but it might raise a doubt in their minds, in whch case the accused would be entitled to an acquittal.

In El Mir's case the Court of Criminal Appeal of N.S.W. held that the summing up of the trial Judge was bad because it did not draw the Jury's attentiton to the third position.

In our opinion the direction of the trial Judge to the assessors on the question of the unsworn statement must be read in conjunction with his general directions on the onus of proof. The learned trial Judge at all times emphasised that the onus of proof remained on the prosecution throughout; and if there was, at the conclusion of the trial, a reasonable doubt in their minds on any matter which the prosecution was required to prove in order to obtain a conviction, that doubt must be resolved in favour of the accused. We are unable to say that the Judge's direction on the subject of the unsworn statement made by the appellant was in any way inadequate or likely to mislead. When considered together with his general direction it must be taken to have made it clear to the assessors that they were entitled to give such weight as they thought fit to the statement, and if it raised a reasonable doubt in their minds as to the guilt of the accused they should express the opinion that the prosecution had failed to prove its case. We can accordingly find no merit in this ground of appeal.

In his submission with regard to ground (2) Counsel for appellant argued that it was not affirmatively proved that the appellant's statement was a voluntary one. As a preliminary point he contended that the trial Judge had not in so many words stated that he exercised his discretion in the direction of admitting the statement. It is true that the trial Judge has a discretion — which he must exercise judicially — whether or not to admit an incriminatory statement made by the accused person but there is, in our opinion, no authority for the proposition that he must prelude his ruling by the words "I now exercise my discretion". The records shows clearly that the learned trial Judge did in fact exercise his discretion in favour of admitting the statement, even though he did not actually use those words.

The burden of Counsel's argument on ground (2) was that there was evidence of harassment by the Police before the statement was made, to such an extent that the statement could not be regarded as voluntary; and that what appellant is alleged to have said was elicited by what really amounted to cross-examination by ASP Muniappa Swamy. He further contended that at this time the appellant was a suspect and, though not arrested, he was in fact in the custody of the Police.

In the first place we are definitely of opinion that there is no evidence justifying a finding that when the statement was made the appellant was in custody. On this point we respectfully agree with what was said by North P. in *R. v. Convery* [1968] NZLR 426 at page 434:

> "In my opinion therefore the words "in custody" clearly import that the person concerned is being detained against his will."

Here the evidence shows that when the interview by the Police was concluded the appellant got up, walked out of the house, and went over to speak to his father. It was then, not earlier, that he was arrested and taken into custody.

With regard to the general question as to whether or not the statement made to the Police in the house was a voluntary one as the term is understood by the Courts, the trial Judge found as a fact on the evidence that the statement was freely and voluntarily given; and that

no undue pressure was put on the appellant by the Police to make the statement. Before questions were actually put to him in the house at Bilabila appellant was warned by ASP Muniappa Swamy in these words :—

> "We are making enquiries into the murder of Timoci. You are not obliged to say anything unless you wish to do so but whatever you say may be taken down in writing and may be given in evidence."

In his unsworn statement appellant alleged that he had been threatened with physical violence if he refused to make a statement. He further said that Detective Sergeaent Jay Raj had written something on the page and asked appellant to sign it; which appellant refused to do. The tenor of appellant's unsworn statement is that the Police witnesses had told lies and that appellant had said nothing by way of admission that it was he who had killed the deceased.

The learned trial Judge accepted the evidence of the Police officers as being the truth and rejected appellants allegation of threatened violence and improper conduct on the part of the Police.

With regard to the submission that appellant was subjected to cross-examination by the Police we accept the view expressed by McGregor J. in the New Zealand case, cited by the Counsel for appellant, *R. v. Weaver* [1956] NZLR 590. This is set out in the headnote in these words :—

> "The term "cross-examination" where it is referred to in regard to the admissibility of statements given to the Police before or after arrest, means cross-examination in the sense that certain facts in a voluntary statement are not accepted, and an attempt is being made to whittle down or to differentiate the answers already given."

There is nothing in the evidence to suggest that any cross-examination, in this sense of the term, took place when appellant was interviewed by the Police at his house.

An Appeal Court will not lightly interfere with the exercise of a discretion by the trial Judge, and will do so only when there are cogent reasons for taking that action. In the present case we are satisfied, on the evidence accepted in the Court below, that the discretion of the learned trial Judge in admitting the statement of appellant in evidence was properly exercised on good and sufficient grounds. Accordingly we can find no merit in this ground of appeal.

There remain for consideration grounds 3 and 4, that appellant should not have been convicted solely upon his own uncorroborated confession, and that the verdict was unreasonable and could not be supported having regard to the evidence.

It is well established law that a man may be convicted of any crime upon his own confession alone. But, as is pointed out by Ridley J. in *Sykes v. R.* 8 Cr. App. R.233 at page 236, the necessity seldom, if ever, arises, as the Court always examines the surrounding circumstances to ascertain if the confession is consistent with other facts which have

been proved. In the present case there was evidence, accepted by the learned trial Judge and clearly by the assessors also, of several other A circumstances tending strongly to show that the confession of appellant was true. This may be set out briefly as under :

(a) appellant was admittedly present in the general vicinity at the time the crime was being committed, and had the opportunity to commit it (c.f. *Sykes v. R.* at page 236);

B (b) appellant and deceased were not on friendly speaking terms, and an unfriendly relationship existed between them because of the trespass on deceased's land of cattle belonging to appellant and his father;

(c) appellant was seen at 5.30 p.m. on the evening before deceased was killed, near the house of one Sailasa, some five or six C chains along the track from deceased's house, in a sparsely populated locality;

(d) when deceased's body was discovered there was found a match box gripped in deceased's right hand, and what is described as "a rolled Fiji tobacco" in the pool of blood beside the body. In the course of his statement to the Police appellant said, "on D Wednesday I was sitting at Sailasa's house. After the lights were lit, I went and saw Timoci was smoking. I entered in quietly. After striking two or three times with the knife I ran away when Timoci fell down."

The facts detailed above are so clearly consistent with the statement made by the appellant that they in some degree amount to confirmation E of that statement. Hence it can be said, in the words of Ridley J. in *Sykes v. R.* at page 237, that the statement was properly corroborated by facts.

Accordingly, in our view, there is no merit in any of the grounds of appeal submitted on behalf of appellant and the appeal is therefore dismissed.

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Appeal dismissed.