A

CESSION LAL AND ANOTHER

v.

REGINAM

B

[COURT OF APPEAL, 1974 (Gould V.P., Marsack J.A., Bodilly J.A.), 25th July, 2nd August]

Criminal Jurisdiction

Criminal law—summing up—self defence—only necessary to direct assessors on issue of self-defence if evidence present to support such a plea. C

Criminal law—summing up—provocation—obligation on judge to direct assessors on provocation if evidence present from which provocation may be deduced.

Criminal law—sentence—murder—whether Court has jurisdiction to interfere with death sentence

In a trial for murder the appellants contended that the trial judge had D inadequately directed the assessors, inter alia, on the issues of self-defence, and provocation.

Held : 1. If there was no evidence to support a plea of self-defence, then there was no onus on a trial judge to direct the assessors upon that issue. (*Chan Kau v. R.* [1955] A.C. 206 applied).

2. There was an obligation on a trial judge to direct the assessors on pro- E vocation if there was evidence from which provocation might be deduced although not pleaded. However in this case, there was no such evidence. (*Lee Chun Chuen v. R.* [1963] 1 All E.R. 73; [1963] A.C. 220 applied).

3. The Court had no jurisdiction to interfere with the death sentence. (*Uday Narayan v. R.* 19 F.L.R. 127 applied).

Appeal against the conviction and sentence by the Supreme Court for F murder.

F. M. K. Sherani for the appellants.

G. Trafford-Walker for the respondent.

Judgment of the Court (read by MARSACK J.A.): [2nd August 1974]—

These are appeals against convictions for murder entered in the Supreme G Court sitting a Suva on the 17th May 1974 and also against sentences of death imposed in each case. The two appellants were tried together before a Judge sitting with five assessors. The assessors all expressed the opinion that both appellants were guilty of murder as charged. The learned trial Judge accepted this unanimous opinions, gave judgment convicting each appellant of murder and passing sentence of death in each case.

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On the 20th October 1975, the Privy Council allowed the appellants' appeal against sentence and directed that the case be remitted to the Fiji Court of Appeal with a direction that it should remit it to the trial judge for a further hearing on the question as to whether the case of each appellant was a proper case for not sentencing to death.

The facts disclosed in the evidence may be shortly stated. The appellant Shiu Lal is the father of the appellant Cession Lal. The appellants, the deceased Apimeleki Uca, and one Jawahir Lal all lived in the same vicinity in Tamavua, Suva. Relations among the neighbours had for some time been unfriendly, the matter in dispute being the lands occupied by the different parties. On at least three occasions towards the latter end of 1973 there were quarrels between the appellants on the one hand and the deceased and his family on the other. No serious incidents occurred in the course of these quarrels until the night of Christmas 1973. Then disturbances among the families concerned broke out late at night. In the course of the troubles Apimeleki sustained a number of stab wounds and cut wounds on the head and upper limbs, the chest, side and back, as a result of which he died the same night. According to the medical evidence the cut wounds could have been caused by a cane knife similar to that produced at the trial, and the stab wounds were consistent with having been caused by a short dagger-bladed knife also produced. The medical evidence was to the effect that the cause of death was a stab wound to the heart. It is clear that Apimeleki, both appellants and one Jawahir Lal, among others, were all in the general vicinity during the disturbance; and the main question for determination at the trial was who had inflicted the wounds on Apimeleki, and in what circumstances.

A considerable volume of evidence at the trial was directed towards the previous quarrels which had occurred among the parties; but it does not seem necessary to traverse that evidence in detail now. All that it is necessary to say is that it showed the existence of strong ill-feeling between Apimeleki and his family on one side, and appellants and their families on the other.

The prosecution evidence as to what took place on Christmas night was given in the main by four witnesses. The first of these was the deceased's daughter Tuliana who gave her age as 14. She stated that she and her parents were at the house of one Ilaisa. Late that night she heard a woman calling out that there was trouble. She and her parents rushed outside, and she saw both appellants at Jawahir's house " brandishing their knives " and challenging " Apimeleki's gang. " She said her father went towards the appellants who were close to Cession Lal's house. She then stated, " I got the impression that someone was hitting my father with something and my father then fell down ".

Ilaisa deposed that he had heard the appellants shouting and second appellant saying in English, " If anyone comes to my compound I will kill him ". He noticed the deceased struggling with the accused; it is not clear from the Record if he were referring to either of the accused or both. He saw the deceased coming back staggering and then falling to the ground. He was wounded in the chest and he seemed to have died. Aseri, the wife of Ilaisa, stated that during this altercation she heard Cession Lal say in English, " If anyone comes in my boundary I'll kill him ".

The most direct evidence came from Nacanieli Lavilavi who said that shortly after midnight he heard a disturbance in that general area and heard someone say " Bring a knife ". He was afraid of growing trouble and went along to warn the people concerned not to resort to violence. In particular he said to the second appellant, " Shiu, don't fight; somebody could get hurt ". He went to the people outside Jawahir Lal's house and warned them that the appellants had knives. He then noticed the appellants rush at a man whom he did not immediately recognise, but who turned out to be the deceased.

Nacanieli hurried to try to stop the fight. He then saw the man fall to the ground. He went on :

> " As I came close I saw Cession Lal with a knife in his hand—he raised his hand with the knife and struck the man on the ground who was in a sitting position. After Cession had chopped at the man, the latter got up and rushed back but he only went a few paces and he dropped to the ground. "

He went to lift up the fallen man and found that his back was covered with blood. He also identified a cane knife as similar to one he saw in the hand of the first appellant that night.

Jawahir Lal deposed that on the night in question the deceased Apimeleki went along the path towards Shiu Lal's house. Then he heard what sounded like a knife blow ; and he saw " a hand moving with a knife in a chopping or stabbing motion ". He could not identify the persons concerned as it was dark.

Two weapons were produced at the hearing ; a cane knife which Nacanieli identified as similar to one that he had seen in the hand of the first appellant, and a dagger-like short knife which Tuliana identified from among ten knives at the police station as that which she had seen brandished by the second appellant.

The following day a police detective found blood-stained grass, and the dagger produced, in what seemed like blood, at the scene of the disturbance the previous night. Two other witnesses swore that they had seen the dagger-like knife produced, in the possession of the second appellant. One of these witnesses, Kavaia, swore that on one occasion the second appellant had said, " I will use this knife on Apimeleki ".

This Court is placed in a position of some difficulty in that there are no findings of fact by the learned trial Judge. We do not derive any assistance from the provision in the 1973 amendment to section 281 of the Criminal Procedure Code, to the effect that the trial Judge may elect to give a short judgment without finding facts, and in such cases the summing up shall form part of the judgment. In the present case there is no part of the summing up from which we are able to deduce a finding of fact on the part of the learned trial Judge.

The notices of appeal submitted fifteen grounds in each case. These were to some extent repetitive and in some cases had in our opinion no substance. Those which required consideration by this Court may be summarised as follows :

1. That the judgment is unreasonable and cannot be supported having regard to the evidence.
2. That the learned trial Judge failed to direct the assessors adequately and accurately regarding the inconsistencies and contradictions in the evidence of witnesses for the prosecution.
3. That the learned trial Judge erred in law in failing to direct the assessors adequately as to
   (*a*) the defences put forward by the appellants ;
   (*b*) self-defence ;
   (*c*) provocation.

4. (The second appellant only) That the learned trial Judge did not correctly direct the assessors on the question of common intention at the material time to murder the deceased.

It will be convenient to deal with grounds 1 and 2 together. Counsel's argument as to the insufficiency of the evidence adduced to prove the guilt of the appellants was largely directed towards an examination of the contradictions and inconsistencies between the evidence of one main witness and that of another. A number of these discrepancies upon which counsel for the appellant relied related to the earlier incidents when trouble broke out between the two families concerned. Except to the extent that those particular discrepancies might tend to show that the witness was generally unreliable we do not think that they can have any bearing on the question now before the Court, that is to say what took place on Christmas night when the deceased was killed. Counsel's submission on this point was that if the inconsistencies relating to the previous incidents were ignored then the assessors would be inclined to accept as true the evidence of the witnesses concerned on more important matters. The learned trial Judge comments on the discrepancies in evidence regarding one of the earlier incidents in these terms :

> " There are four witnesses testify to the incident. Have they invented this ? Does it sound to you as though for some reason, they had got their heads together and allocated to each one the part he or she had to play. They were cross-examined at length about the details of that incident and you will have considered whether they were revealed as unreliable or whether their credibility remained unshaken. "

It may be thought that this is putting the position rather favourably to the prosecution. At the same time it is well established that honest witnesses, giving evidence to the best of their recollection, will often disagree on minor details; and such disagreement is never regarded as a sufficient ground for total rejection of a witness's evidence. In the present case we can find in the evidence no such disagreement on any material point concerning the incidents leading to the death of Apimeleki as to justify the Court in holding that any witness has been untruthful on any material aspect.

The accepted evidence establishes beyond reasonable doubt that on Christmas night there was a fight; that the two appellants were holding weapons, one a cane knife and one a knife shaped like a dagger; that they had both struggled with the deceased and one at least had been seen striking a blow at him ; that when the appellants went away the deceased shortly afterwards fell to the ground and died, having received wounds which according to the medical evidence were consistent with having been caused by the weapons produced. Once this evidence is accepted—as it clearly was by the learned trial Judge and the assessors—it could not be said that their verdict of guilty in each case was unreasonable and not supported by the evidence. Accordingly we can find no merit in grounds 1 and 2.

With reference to ground 3(a) it has frequently been laid down that there is no obligation on the learned trial Judge to explain in detail everything that has been put forward by way of defence, provided that his summing up as a whole can be considered adequate as to the facts and in no way unfair to the accused person. We are unable to say that in the present case anything of vital importance to the defence was omitted in the course of summing up.

Counsel for the defence was careful to draw the attention of the assessors to what he contended were weaknesses in the prosecution case and the strength of the case for the defence; and there is nothing in the summing up which in our opinion is either unfair to the accused or unduly favourable to the prosecution. That being so we cannot uphold this ground of appeal. A

With regard to the ground that the learned trial Judge should have directed the assessors on the issue of self-defence, it is necessary to point out that the appellants both denied on oath that they had inflicted the wounds which caused the death of Apimeleki ; and it is accordingly no part of their case B that they were acting in self-defence. It would still be the duty of the trial Judge, in accordance with the principle set out in *Chan Kau v. R.* [1955] A.C. 206, to direct the assessors on that issue if there were evidence upon which a defence of self-defence could be based. But here there is no evidence whatever that the deceased had attacked the appellants or had done anything which might cause them on reasonable grounds to fear that their lives were C in danger from the actions of the deceased. There was then not one piece of evidence before the court upon which a plea of self-defence could be based; and therefore there was no obligation on the learned trial Judge to direct the assessors upon that issue.

As to the issue of provocation, it is well established that where there is evidence from which provocation might be deduced, although not pleaded by defence, there is still an obligation on the learned trial Judge to direct the D assessors on the point. The evidence of the witness Nacanieli, who must be considered as independent, as he was not connected with either side, makes it clear that the deceased had done nothing which would justify the murderous assault resulting in the death of the deceased. The only evidence which might form a basis for a defence of provocation is that of the second appellant who deposed at the trial :

> " Then a Fijian came to fight with me. We began to fight. Jawahir was E then in front of his door. Many people had gathered. Then I heard Jawahir call, " Bring the knife, bring the knife ". Jawahir's wife was at the front of the door. I saw Jawahir's wife in the house with her eldest son; she gave him the knife and he took it to Jawahir. There were 9 or 10 people at this time in front of the door. I was about 20 feet away. Jawahir said in Fijian, " You people get aside and I'll kill this Indian ". And he approached me and struck at me 3 times with F the knife. I dodged the first two blows but the third struck my arm. "

The second appellant did not state who was the Fijian who began to fight with him ; but in any event that little episode had finished some time before the attack by both appellants on Apemeleki. The assault on the second appellant by Jawahir Lal could not amount to provocation justifying retaliation on Apemeleki unless it could be shown that he was in some way associated G with Jawahir Lal in his attack. There is no evidence to this effect. In the result we can find nothing in the evidence either for the prosecution or for the defence upon which a defence of provocation could be founded. Accordingly we consider we should apply the principle set out in the oft-quoted dictum of Lord Devlin in *Lee Chun Chuen v. R.* [1963] 1 All E.R. 73 at p. 79 :

> " Provocation in law consists mainly of three elements—the act of provocation, the loss of self-control, both actual and reasonable, and the H 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 event suggesting the presence of these three elements. "

As we can find no credible narrative suggesting the presence of the three
A elements set out this ground of appeal must fail.

With regard to the fourth ground of appeal it is perfectly true, as is conceded by Mr Trafford-Walker, that when two persons are charged with the same offence a careful direction on the subject of common intention is often required. This present case, however, is not one of two persons doing separate, individual acts which the prosecution alleges are being directed to
B a common criminal end. Here the evidence which was tendered—and clearly accepted by the learned trial Judge and the assessors—was that of a joint attack made on the deceased by both appellants at the same time, an attack which resulted in the death of the victim. In these circumstances the intention of each of the assailants to inflict grievous bodily harm on the deceased was clearly demonstrated by the evidence, and we are satisfied that no specific direction on the subject of common intention was called for.

C For these reasons we find that none of the grounds of appeal, which were carefully and fully argued by Mr Sherani, can succeed and the appeals against convictions are accordingly dismissed.

Each of the appellants has also appealed against the death sentence imposed by the learned trial Judge. For the reasons which are fully set out in the judgment of this court in *Uday Narayan v. R.* (19 F.L.R. 127) we are of the
D opinion that we have no jurisdiction to interfere with a sentence of this character. In the result the appeals against sentence are also dismissed.

Appeals Dismissed.