

UNIVERSITY OF LONDON
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LONDON, W.C.1.

16, 1959

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IN THE PRIVY COUNCIL

No. 18 of 1959

55515

ON APPEAL

FROM THE COURT OF APPEAL OF FIJI

B E T W E E N :

BHARAT son of DORSAMY Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

- 10 1. This is an appeal by Special Leave against a written order (which was read out by the Registrar of the Court of Appeal of Fiji on the 16th February 1959) purporting to dismiss the Appellant's appeal to the said Court against his conviction and sentence for murder in the Supreme Court of Fiji. Record
pp.119-128
- 20 2. The Appellant was charged in the Supreme Court of Fiji with having committed the murder of a man named Chanan Singh on the 29th May 1958. He was tried before the Honourable Mr. Justice Lowe, Chief Justice, and five Assessors selected under the provisions of Sections 246 and 280 of the Criminal Procedure Code of Fiji Chap. 9. At the conclusion of the trial on the 18th October 1958 the learned judge convicted the Appellant of murder and sentenced him to death by hanging. Each of the five Assessors had previously stated his opinion under Section 306 (1) of the Code that the Appellant was guilty of murder. p.38
p.102
p.93
- 30 3. The Appellant appealed thereafter to the Court of Appeal of Fiji against the said conviction and sentence. The appeal was argued on the 21st November 1958 before a Bench of two acting Judges of the Court, namely Sir George Finlay (Acting President) and Sir Joseph Stanton. The Court reserved its judgment at the conclusion of the argument. pp.108-109

Record

4. The judgment of the Court of Appeal was at no time thereafter pronounced by or in the presence of either of the learned Judges as required by Section 30 of the Court of Appeal Ordinance of Fiji (Chap. 3) which is to the following effect:

"30. In an appeal under this part of the Ordinance the judgment of the Court of Appeal shall be pronounced by the senior judge present at such appeal, or by such other judge present as the senior judge may direct, and no judgment with respect to the determination of any question shall be separately pronounced by any other judge of such Court:

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Provided that, where in the opinion of such Court the appeal involves a question of law on which it is convenient that separate judgments be pronounced, separate judgments shall be pronounced by the judges present at the appeal."

Instead, the Registrar of the Court, in the absence of the learned Judges, purported on 16th February 1959 to read out the separate undated written determinations of Sir George Finlay and Sir Joseph Stanton respectively. Sir George Finlay's written determination expressed the opinion that the Appellant's conviction should be quashed and that a retrial should be ordered. Sir Joseph Stanton's written determination on the other hand expressed the opinion that the appeal should be dismissed.

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p. 119

p. 111

5. In view of the fact that the learned Judges who heard the appeal were divided in the opinions set out in their respective written determinations, the Acting President purported to make an order dismissing the Appellant's appeal in terms of Section 6(3) of the aforesaid Court of Appeal Ordinance which reads as follows:

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"(3) In all appeals and applications brought before the Court of Appeal the determination of any question shall be according to the opinion of the majority. If on the hearing of an appeal or application the Court of Appeal is equally divided the appeal or application as the case may be shall be dismissed."

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6. Special Leave to Appeal in forma pauperis to Her Majesty in Council was granted to the Appellant

p. 129

by an Order in Council dated the 13th May 1959.

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7. The principal grounds of appeal are as follows:

- (a) That the learned trial judge misdirected the Assessors and himself as to the burden of proof with regard to the issue of provocation which arose for consideration at the trial.
- 10 (b) That the learned trial judge also misdirected the Assessors and himself by stating that a verdict of manslaughter in the case under consideration would involve a finding that the Appellant "was justified in resisting force by using force". p. 100
- 20 (c) That the learned trial judge, having rejected the defence of self-defence, did not proceed to consider the further question whether upon the evidence the Prosecution had established beyond reasonable doubt that the death of Chanan Singh had not been caused by the Appellant in the heat of passion caused by sudden provocation and before there was time for the Appellant's passion to cool.
- (d) That the purported dismissal of the appeal in terms of Section 6(3) of the Court of Appeal Ordinance of Fiji was bad in law because neither the judgment of the Court of Appeal nor the separate judgments of the members of the said Court had been duly pronounced as required by Section 30 of the said Ordinance.

30 8. The Appellant gave evidence at the trial and admitted that he had killed Chanan Singh as well as Chanan Singh's companion Govindappa on the night in question. His evidence however introduced inter alia the issue of provocation of a kind which it is submitted would have justified a verdict acquitting him of murder and convicting him of manslaughter only. The learned judge had pointed out to the Assessors in his summing up that the evidence for the Prosecution indicated "some sort of struggle" at the scene of the killing. In
40 addition the Appellant's evidence was to the following effect:

"I went off and went for a stroll towards town. p. 87

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I went nowhere in particular but went along the road some distance and then walked back towards the hotel. On my way about 3 or 4 chains from the hotel I met Chanan Singh and Govindappa. They both stood and Govindappa said "You were showing a lot of cunning in the hotel. I will fix you up now." Then he attacked me with a stick. He raised the stick. As he tried to deliver the first blow I got hold of the stick. A struggle for possession of the stick ensued and the stick fell to the ground. To save myself I wanted to run away. Just then Chanan came and got hold of my. Govindappa came and got hold of my throat. I struggled to free myself. My state of mind was upset. I was helpless and could not do anything so I took out my pocket knife and attacked. While Govindappa had me by the throat Chanan Singh was holding me. I was very excited, so much so that I did not know what I was doing. I can't even say on whom and how many times I struck with the knife. After a while I found myself free of the others. I got up and ran towards the hotel. Later on S/Insp. Akuila came and sent me to the police station. I knew Chanan Singh for about three years before that night. I had no trouble with him at any time during that period. He was an acquaintance of me. There was never any trouble with him at any time nor was there any trouble with him at the bar that evening." 10 20 30

9. On the issue of provocation the learned Judge summed up as follows to the Assessors:

pp. 99-100

"It has been suggested that you might think the accused guilty of manslaughter. Before you can be justified in thinking that you would have to come to the conclusion that the accused's story in that particular respect is true. You would have to be satisfied beyond reasonable doubt that it might be that the Crown were wrong as to that aspect, and you would have to believe that he was justified in resisting force by using force. I think you might find it difficult to believe that such was the case." 40

10. It was conceded on behalf of the Crown at the hearing of the appeal that the learned judge had mis-directed the Assessors in this part of his summing

up. It is submitted that in these circumstances the Appellant was not properly tried for murder "with the aid of Assessors" as required by Section 246 of the Criminal Procedure Code of Fiji. The Appellant respectfully submits that it is an essential prerequisite to a trial "with the aid of Assessors" that, in the words of the Acting President of the Court of Appeal, the trial judge should have the assistance of assessors "not misled as to the law".

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11. It is submitted that it is an obligatory requirement of Section 30 of the Court of Appeal Ordinance that the judgment of the Court should be pronounced either by the senior Judge present or by some other judge present as directed by the senior Judge or (in terms of the proviso) by each of the judges separately, and that the failure of the Court to comply with these provisions in the Appellant's case vitiated the dismissal of his appeal.

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12. In their letter dated 8th April 1959 addressed to the Appellant's Solicitors in London the Crown's Solicitors in London offered the following explanation of the circumstances in which the Registrar read out the written determinations of the judges:

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"(2) The judgments were read by the Registrar in the following circumstances. Both the Judges had left Fiji and had returned to New Zealand before their judgments were delivered. Under those circumstances the Registrar asked Counsel for both parties whether they had any objections to the judgments being read by him. Both Counsel said they had no objection although it seems that Counsel for the Appellant indicated that his failure to object should not be taken as implying consent as it might well be that it was not open to him to consent to this course. The Registrar then read the judgments. This course was taken to avoid the considerable public expense involved in bringing one or both the Judges back to Fiji. As far as the Law Officers in Fiji are aware, there is no precedent in Fiji for such a course. If it involved any irregularity, this could hardly, we suggest, be of such a nature that it would warrant interference by the Privy Council."

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The Appellant submits that the reading of the written determinations of the Acting President and Sir Joseph Stanton respectively by the Registrar of the Court in the absence of the said learned judges did not constitute a due or sufficient compliance with the provisions of Section 30. The said learned judges had no power to delegate to the Registrar the function of "pronouncing" the judgment of the Court in a criminal appeal. In any event, the Appellant did not consent to this procedure.

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13. The Appellant humbly submits that his appeal should be allowed with costs throughout and that his conviction should be quashed and his sentence set aside for the following amongst other

R E A S O N S

1. BECAUSE the conviction of the Appellant was vitiated by misdirection and by non-direction on fundamental issues which arose upon the evidence.
2. BECAUSE for the reasons set out in the written determination of the Acting President of the Court of Appeal the trial of the Appellant was unsatisfactory. 20
3. BECAUSE the failure of the Court of Appeal to comply with the provisions of Section 30 of the Court of Appeal Ordinance of Fiji constituted a disregard of the forms of justice and vitiated the purported dismissal of the Appellant's appeal.
4. BECAUSE a grave and substantial miscarriage of justice has therefore occurred. 30

E.F.N. GRATIAEN.

L. KADIRGAMAR.

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