

IN THE PRIVY COUNCILNo.46 of 1970ON APPEAL FROM THE FIJI COURT OF APPEALB E T W E E N :NIRMAL son of Chandar Bali Appellant

- and -

THE QUEEN

RespondentAND B E T W E E N :

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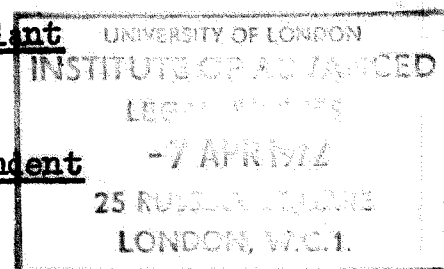
Appellant

- and -

NIRMAL son of Chandar Bali

Respondent

(Consolidated)



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CASE FOR THE APPELLANTRecord

1. This is an Appeal and Cross-appeal from the Judgment of the Fiji Court of Appeal, dated the 7th day of November 1969, which quashed the Appellant's conviction of murder in the Fiji Supreme Court on the 13th day of March 1969 and ordered a new trial. By an Order in Council dated the 11th day of November 1970, the Appellant was granted Special Leave to Appeal in forma pauperis from that part of the said Judgment which ordered a new trial; and by Order in Council dated the 25th day of May 1971, the Respondent was granted Special Leave to Cross-appeal from that part of the said Judgment which quashed the Appellant's conviction. It was directed that the said Appeal and Cross-appeal be consolidated and heard together on one case on each side.

pp.160-164

pp.165-166

pp.167-168

2. The principal issues for determination in this Appeal and Cross-appeal are:-

- (a) Whether the Court of Appeal were right in quashing the Appellant's conviction on the basis that the evidence before the Trial Judge

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did not justify his ruling that the Crown had discharged the onus lying on it of showing that the confessions made by the Appellant were voluntary and therefore admissible.

In the respectful submission of the Appellant, the Court of Appeal were right in holding that the Crown had not discharged this onus and that the alleged confessions should have been ruled inadmissible.

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- (b) Whether the Court of Appeal having quashed the conviction, were justified in ordering a new trial in the circumstances of this case.

The Appellant respectfully submits that the Court of Appeal erred in ordering a re-trial.

pp.146-156

3. The Appellant was tried together with two others (Sharma and Mahesh) before Moti Tikaram Ag.J. sitting with five Assessors for the murder on the 14th September 1968 of one Davendra Sharma. The Appellant and the second accused, Sharma, were convicted and sentenced to imprisonment for life. The third accused, Mahesh, was acquitted.

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4. The case for the Crown was summarised by the Trial Judge as follows:-

pp.148
ls.6-27

"The Crown's case is that the three Accused persons in pursuance of a pre-arranged plan lay in wait for Davendra Sharma on the evening of 4th of September, 1968 with the intention of attacking him murderously and did, in fact attack and kill him with malice aforethought near the No.11 bridge on the Koronubu tramline soon after 11.00 p.m. It is also the Crown's case that the actual assailants were the first and the second Accused, the first Accused using a knife and the second Accused using a vaivai stick. In regard to the third Accused it concedes that there is no evidence against him to establish that he physically took part in the attack. However, the Crown contends that the third Accused was a party to the offence either within the meaning of section 22 or section 21 or both, of the Penal Code, he being at least aware of the plan to attack Davendra Sharma and he being present at the

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time of the attack as an aider and abettor with the knowledge that Davendra Sharma was to be either killed or grievously harmed".

5. The relevant facts may be summarised as follows:-

The body of Davendra Sharma was found at about 3.00 a.m. on the morning of the 5th September, 1968, lying face downwards near the tramline at Koronubu. The police arrived at the scene at 4.15 a.m. They found a vaivai stick lying near the head of the deceased. Doctor Mangai Singh was called and after viewing the body expressed the opinion that death had occurred between 9.30 p.m. and 11.30 p.m. on the evening of the 4th September, 1968. Dr. Holmes carried out a post-mortem examination and concluded that death was due to multiple wounds of the head, face and neck; at least three of the wounds being inflicted by a sharp instrument. There was also a wound on the front of the deceased's left leg which was consistent with the deceased being struck by a blunt instrument. Jagat Singh, who was the last prosecution witness to see the deceased alive on the night of the 4th September, 1968, gave evidence that he had walked along the Koronubu tramline with the deceased until they reached the junction of the Nabatolu Road at 11.00 p.m. when they separated. The deceased then walked along the tramline towards his house.

Evidence was given by two Fijians that on the night of the murder after 10.30 p.m. at night a man was heard to yell out in a "scared" manner and 5 to 10 minutes later the Appellant and Sharma the second Accused were seen approaching Sharma's house from the direction where the deceased's body was later found - a distance of 27 to 31 chains from the house.

6. The case against the Appellant rested essentially on alleged oral and written confessions which he made to the police on the 11th September 1968.

7. At the appropriate stage of the trial, objection was taken to the admissibility of the alleged confessions on the ground that they were not made voluntarily. The Trial Judge held a trial within a trial and ruled that the evidence was admissible.

p.24 1.30

pp.25-130

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p.81 1.17-
p.109 1.11

p.165 1.25-
p.172 1.11

p.172 1.15-
p.176 1.24

8. The Appellant gave evidence in the trial within the trial in which he said that he never made the alleged statements and that they were fabrications to which he was forced to attach his signatures under threat, violence, torture and certain indignity. The Appellant also testified that when he signed the statement F at various places, it was written up in some places only and other parts were blank; and that when he signed the statement G it was completely blank.

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9. In support of his allegations, the Appellant called the following witnesses at the trial within a trial:-

p.109 1.12-
p.113 1.18

(a) Inspector Terito Nadalo, who testified that the Appellant made a complaint to him between 8 and 9 p.m. on the 11th September that he (the Appellant) was assaulted by the police when making the statements.

p.113 1.19-
p.114 1.28

(b) Billy Obed (a Justice of the Peace) who gave evidence that he was called to the Police Station on the night of the 11th September and saw the three Accused. Two of them complained that the police had assaulted them, punched them, one said they spat in his mouth, and the statements they made were under pressure and they were forced to sign them.

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p.114 1.29-
p.117

(c) K.N. Govind (a Solicitor) who testified that he went to the police station between 8 and 9 p.m. on the 11th September to see the Appellant. The Appellant complained that he had been ill-treated and assaulted by police officers when they were taking statements from him.

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p.118-122

(d) Shiu Devi (the Appellant's mother) who testified that on the morning of the 11th September, the police took her by the river side and after a while (at about 11 a.m.) she heard her son, the Appellant, yell out from a tent. She heard him saying "Somebody assaulting me, save me". She then yelled out herself "Why are you people assaulting my son", whereupon a corporal came out and took her further away from the tent. She asked him why her son was being assaulted and he replied "It is usual to assault boys like that. Don't make noise".

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10. The trial Judge ruled that the statements were admissible. He said:-

"Although the question whether the Accused made any statements in question or not is essentially a question of facts, their admissibility can only be adjudicated upon if at first it is established that the statements in question were made i.e. they are not fabrication on the part of the police. The question of the weight and value of the statements if admitted are another matter.

p.126 1.19-
p.127 1.33

The prosecution has satisfied me beyond any reasonable doubt that the statements in question are not fabrication.

I am therefore now in a position to deal with the next ground of objection namely that if the Accused did make the statements then he did so under threat of violence, actual violence, torture and certain indignities. According to the first Accused the main person responsible for the violence and oppression was Senior Inspector Muniappa Swami aided and abetted by Sgt. Rameshwar Prasad and Constable Mahendra Singh. It is also the contention of the learned Counsel for the First Accused that police employed certain unfair psychological devices to obtain the alleged statements.

It is a fundamental condition of admissibility in evidence against any person equally of any oral answer given by that person to question put by police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear of prejudice, or hope or advantage, exercised or held out by a person in authority, or by oppression. The disputed statements amounted to a confession and to be admissible, they must be free and voluntarily and it is for the prosecution to show affirmatively that they were made without the prisoner being induced to make them by any pressure or force or by menace or violence or terror.

I have had the advantage of hearing the evidence of not only the First Accused and his

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witnesses on the one hand but also the evidence of the police officers concerned on the other hand.

The First Accused gave me the clear impression of giving fabricated evidence which he appeared to have rehearsed in detail. Similarly I found the evidence of his mother Shiu Devi suspect. On the other hand I was impressed by the evidence of Sgt. Rameshwar Prasad, Constable Mahendra Singh and Senior Inspector Muniappa who denied applying threat, pressure or force on the First Accused or of seeing anyone applying any threat pressure or force on the First Accused. I am satisfied that the First Accused had no injuries on his person.

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The prosecution has satisfied me beyond any reasonable doubt that the statements in question by the First Accused were voluntarily and free and that were not obtained from him by fear of prejudice or hope of advantage or by oppression. Nor do I find any cogent reasons why these statements should be rejected on grounds of any alleged unfairness."

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pp.144-145
pp.146-156

11. On the 12th March 1969, after the Judge's summing-up, the five Assessors gave their opinion that the Appellant was guilty of murder. In a Judgment delivered on the 13th March 1969, the Trial Judge convicted the Appellant of murder and sentenced him to imprisonment for life.

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p.156 1.19-
p.159

12. The Appellant appealed to the Fiji Court of Appeal, the principal ground being that the learned Trial Judge was wrong in admitting the oral and written confessions made on the 11th September 1968.

pp.160-164

p.161 1s.43-
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13. The Judgment of the Court (Gould, V.C., Hutchinson J.A. and Marsack, J.A.) was delivered by Hutchinson J.A. on the 7th November 1969. The Court held, it is submitted correctly, that with regard to the credibility of witnesses on the question of the alleged confessions, "the learned Judge fell into error of endeavouring to assess the respective credibility of witnesses by their demeanour and the way they gave their evidence, and by that alone". The Court then recited what transpired on the 11th September, stressing the various early complaints

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made by the Appellant to various people regarding the behaviour of the police and then said, it is submitted correctly:-

10 "One would naturally, and should, look critically at the evidence given by Appellant; and the testimony of the doctor supports the case for the Crown. On the other hand, what really can a person facing a serious accusation do when surrounded by police while he is being interrogated, other than (a) call out, as he and his mother say that he did, or (b) ask for a senior officer to whom he could complain as he says he did, on both of which matters some facts appear to give him limited support, and what could such a person do afterwards other than complain at the first opportunity, as Appellant did, that his statement was not a voluntary one, but was forced from him?

p.163 1.34-
p.164 1.11

20 For ourselves, with all respect for the view taken by the learned trial Judge, we do not think that the evidence justified his ruling that the Crown had discharged the onus lying on it of showing that the main statement made by Appellant was a voluntary one, and, in our opinion, on the case as presented it should have been ruled inadmissible. The statement attributed to Appellant when charged with the crime should stand or fall with the earlier statement."

30 14. The Court then dealt with the other grounds of appeal and concluded their judgment as follows:-

"It would be impossible to say that there was no miscarriage of justice when a piece of evidence so important as this was admitted, when, in our view, it was wrongly admitted. The conviction is therefore quashed and a new trial is ordered."

p.164 1s.23-
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40 15. The power to order a new trial in Fiji is contained in Section 23(2) of the Court of Appeal Ordinance (Cap.8 Laws of Fiji, 1967) which provides:-

"Subject to the special provisions of this Ordinance, the Court of Appeal shall, if they allow an appeal against conviction, either

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quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."

16. The Appellant respectfully submits that this appeal should be allowed and a verdict of acquittal should be entered in lieu of the order for a new trial and that the Cross-appeal should be dismissed for the following amongst other

R E A S O N S

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As to the Cross-appeal

1. BECAUSE the Trial Judge was wrong in admitting evidence of oral and written statements amounting to a confession made by the Appellant to the police on the 11th September 1968.
2. BECAUSE the alleged confessions were not voluntary.
3. BECAUSE the learned Trial Judge erred in endeavouring to assess the credibility of witnesses by their demeanour and the way they gave their evidence and by that alone. 20
4. BECAUSE the Trial Judge failed to pay sufficient regard to the various early complaints made by the Appellant with regard to the police officers' behaviour.
5. BECAUSE the Court of Appeal were entitled to disturb the findings of fact of the Trial Judge in regard to the alleged confessions and rightly did so.
6. BECAUSE the Court of Appeal rightly found that the evidence did not justify the Trial Judge's ruling that the Crown had discharged the onus lying on it of showing that the Appellant's alleged confessions were voluntary. 30
7. BECAUSE the Court of Appeal rightly found that in the case as presented by the Crown the alleged confessions should have been ruled inadmissible.
8. BECAUSE the Judgment of the Court of Appeal in

regard to the admissibility of the confessions
is right for the reasons stated therein.

As to the appeal

9. BECAUSE the Court of Appeal failed to consider,
in the terms of section 23(2) of the Court of
Appeal Ordinance whether the "interests of
justice" require the ordering of a new trial.
10. BECAUSE in the circumstances of this case the
interest of justice will not be served by a new
trial.
11. BECAUSE the evidence relating to the confessions
is the only evidence against the Appellant, and
having been ruled inadmissible by the Court of
Appeal, there is no other evidence upon which a
new trial can proceed.
12. BECAUSE the only result of a new trial would be
to allow the prosecution to fill gaps in their
case.
13. BECAUSE the Court of Appeal erred in ordering a
new trial in this case.

EUGENE COTRAN

No.46 of 1970

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Appellant

- and -

THE QUEEN Respondent

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(Consolidated)

CASE FOR THE APPELLANT

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