Privy Council Appeal No. 2 of 1989

Fazal Mohammed *Appellant*

v.

The State *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY
MR. JUSTICE TELFORD GEORGES

*[Delivered by **Lord Griffiths**]*

The appellant was convicted of the murder of Glenda Marshall, his "common law wife", at the San Fernando Assizes on 19th February 1982. His appeal was dismissed by the Court of Appeal of Trinidad and Tobago on 31st July 1985. He now appeals by special leave granted on 26th May 1988.

The prosecution case against the appellant was that he murdered Glenda Marshall on the night of 14/15th January 1979 by cutting her throat with a razor. The evidence in support of that case may be summarised as follows. Mackie Baptiste deposed that, on the morning of 14th January, he sharpened a razor for the appellant which had a blade of about $4\frac{1}{2}$ inches with a black handle. George Fredericks, a neighbour who lived opposite to Glenda Marshall, heard knocking outside his house at about 1.30 a.m. on 15th January and, on going to investigate, he saw Glenda Marshall lying in the road bleeding from her throat. She was able to do no more than point to her cut throat. He and his brother took her immediately to hospital.

Glenda Marshall died in the early hours of the morning and a post mortem was performed at 1.30 p.m. on 15th January by Dr. Vivian Dominique. The principal wound was a "sharp gaping wound about 4 inches, front

of the neck at the level of the larynx cutting the larynx into two, cutting the carotid cartilage, cutting the carotid vessels on both sides of the neck as far back as the level of the cervical vertebrae". In addition there were other cuts to the head, face and chest and the hands, which the doctor regarded as defensive wounds. He said the principal wound could not have been caused accidentally and would have been caused by a thin sharp cutting instrument.

George Fredericks reported the incident to the police at about 2 a.m. and they went to the house of the appellant's mother but he was not there. They also visited the house of Glenda Marshall but he was not there either. Shortly before 9 a.m. the appellant, together with his mother and stepfather came to the police station and according to the police he dictated the following voluntary statement:-

> "Well sir, I sorry what happen, I really went by my wife Glenda about nine o'clock last night, as we separated for about three weeks now, and I am living by my mother at Alamby Street in St. Clement Village, I left my mother home with a razor which I buy in Port-of-Spain on Friday 12th January 1979 from a man on the pavement on George Street for eighteen dollars and I keep it at my mother's home over the weekend and when I leave by my mother about 8 o'clock last night, I took out the razor from the case and left the case at home. I put the razor in my pants pocket and I walked to the house of my wife with the razor in my pocket. It is a black handle razor. When I reached by my wife's house, I knock on the window and called my wife. I asked she for my passport and insurance policy and as she opened the window and I jumped and sat on the window asking she for the passport and insurance policy, she began to look for it and she tell me to come inside. I went in and sit on the bed and I was talking to she to make back up. She say she don't know. I then left and gone in the next room to get some water to drink and when I went back into the room, I see she jumping through the window. I jump behind she through the same window and she started to run to the road. I run behind she and I hold she on the road. We started struggling until we reached under the mango tree. I take out the razor from my pocket and she held my hand with the razor. I had my hand raised and this was my right hand and while trying to get away my hand, she get cut on the neck, but during the time of the struggle she was bawling. I leave she there when she get cut, and I went through the bush in the back with the razor and in the bush the razor fell out from my hand. I then walked through a trace in the back by the cane and I hide in the cane until daylight, then I gone home by my mother and she and my stepfather tell me the police was

> looking for me and me, my mother and my stepfather left and went to the San Fernando Detective office, where I gave this statement to the police in the presence of my mother and stepfather."

Cyril Smith, a justice of the peace, gave evidence that he had seen the appellant at 12.40 p.m. on 15th January at the Police Station. He had read the police statement to the appellant and confirmed with him that it was voluntary and made without threats, violence or promises, and the appellant had signed a certificate to this effect.

There was further police evidence that a razor case had been found in the mother's house which the appellant agreed was his and that the appellant had pointed out a mango tree outside Glenda Marshall's house where there were stains resembling blood and said "Its here it happened, she was lying down here". Despite a search in places indicated by the appellant the razor was not found and the appellant's offer to find it if he was allowed to go alone was, not surprisingly, refused. The police gave evidence that the appellant was wearing a blood stained shirt on arrival at the police station and forensic evidence confirmed the presence of blood on the shirt.

There was one further prosecution witness, Sharon Marshall, the daughter of the deceased, who was eleven at the date of her mother's death and thirteen, almost fourteen, when she gave evidence at the trial. Her evidence was that the appellant had come round to her mother's house on the evening of 14th January asking for his passport. Her mother did not want to let him in but he had climbed in through the window. Her mother and the appellant then sat on the bed as she said "talking easy" and she, Sharon, then went to bed and to sleep. She awoke later to see the appellant holding her mother with a shining blade with a black handle by her neck. He pushed her mother on to the bed and went through into the kitchen. Her mother then climbed out through the window, the appellant heard her and returned from the kitchen and followed her through the window carrying the shining blade in his hand. She heard her mother shout "O God". She looked out of the window but saw nothing. She never saw her mother alive again.

The appellant gave evidence in which he denied the whole of the prosecution case. He denied that he gave Baptiste a razor to sharpen, he denied that he made a statement to the police and said that he was shown a document and told to sign it. He denied that he told the magistrate he had given a voluntary statement. He said he had visited his wife's house on the evening of 14th January, but had never threatened her with a razor. His wife had climbed out of the window and

some twenty minutes later he had climbed out of the window to look for her. However, he had been unable to find her and, after searching for about fifteen minutes, he went to a friend at about 10.15 where he spent the night. He heard from his mother next morning that his wife had been killed, and so he went to the police station to make enquiries.

The appellant's mother gave evidence in support of her son's version of what occurred in the police station when the statement was taken.

The jury returned a unanimous verdict of guilty.

Before the Court of Appeal the appellant's counsel raised the question whether Sharon should have been examined by the judge to ascertain that she had sufficient understanding of the nature of the oath to give sworn evidence.

The only available record of the proceedings was contained in the judge's note which showed that, before she was sworn, Sharon said that she was thirteen years old and a pupil at Ste. Madeliene Junior Secondary School. She was then sworn. Under the relevant statute, section 19 of the Children Act [Chap. 46:01] of the Laws of Trinidad and Tobago, the unsworn evidence of a child of thirteen years is not receivable in a murder case. The Court of Appeal held that there is a settled practice in Trinidad and Tobago that requires a judge, in the case of a child under fourteen years of age, to satisfy himself by appropriate enquiry that the child has sufficient understanding of the nature of an oath and the solemn obligation to tell the truth that it implies before allowing the child to give sworn evidence. They referred to the decisions in *R. v. Whitely* (1978) 27 WIR 247 supporting the same practice in Jamaica, and *R. v. Khan* (1981) 73 Cr.App.R. 190, an English case in which the Court of Appeal had referred to the general working rule that a child under 14 should be questioned as to his or her understanding of the nature of an oath.

Because the judge's note did not disclose that he had made any enquiry of Sharon's understanding of the oath the Court of Appeal ruled that Sharon's evidence must be treated as inadmissible on the ground that she should not have been permitted to give sworn evidence in the absence of such an enquiry.

It was submitted on behalf of the prosecution that the Court of Appeal were not justified in concluding that the judge had not satisfied himself that Sharon had sufficient understanding to give sworn evidence. The prosecution pointed out that the judge's note showed that Sharon was the only witness the judge questioned before the oath was administered, and that the only purpose of this must have been to satisfy himself of her

fitness to take the oath. Their Lordships have felt some doubt about this matter and it may be, that the judge's questions went further than he recorded, but the fact remains that no questions or answers are recorded in the judge's note that bear upon the child's understanding of the nature of the oath. In these circumstances their Lordships are not prepared to depart from the view of the Court of Appeal that the judge did not make the enquiry that good practice demands. The lesson to be learned is that in future the judge should record in his note the whole enquiry he makes of a child under fourteen before allowing the oath to be taken, as is now done in England by the shorthand writer, see *R. v. Khan (supra)*. Their Lordships also endorse the clear rule of practice in Trinidad and Tobago that enquiry should be made of any child under 14 before he or she is permitted to take the oath.

The Court of Appeal also upheld a submission that the judge should have left the issue of manslaughter to the jury upon the basis that this issue was raised by the form of the appellant's statement to the police. The prosecution conceded that manslaughter should have been left to the jury.

The Court of Appeal nevertheless upheld the conviction for murder by application of the proviso to section 44 (1) of the Supreme Court of Judicature Act (Chap. 4.01) of the Laws of Trinidad and Tobago.

The principal challenge to the judgment of the Court of Appeal has centred on their application of the proviso after ruling that Sharon's evidence was inadmissible.

Section 44 (1) of the Supreme Court of Judicature provides:-

> "The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was considered should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: but the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

This wording is the same as was contained in the Criminal Appeal Act 1907.

The Court of Appeal directed themselves in the following terms:-

> "We now return to the question of the evidence of Sharon. What must be determined is whether in view of this inadmissible evidence having been led we should allow this appeal or whether it ought to be held that there was no miscarriage of justice.
>
> The question, as was stated by Channel J, in *R v. Cohen and Bateman* (1909) 2 Cr.App.R. 197 and repeated with approval in *R v. Haddy* (1944) 29 Cr.App.R. 182 at 190, is whether 'on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty'.
>
> In the instant case it is the effect of the inadmissible evidence that we have to consider.
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> To adapt the words of Lord Normand in *Lejzor Taper v. R* [1952] A.C. 480 at 492:-
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> > 'The test is whether on a fair consideration of the whole proceedings the (Court) must hold that there is a probability that the improper admission of evidence turned the scale against the appellant'.
>
> No eye-witness gave evidence of the cutting of Glenda's throat which must have taken place outside, but in the vicinity of her house.

The case for the prosecution excluding the testimony of Sharon was very convincing. According to Dr. Dominique, death could have been caused by a razor. The appellant took a razor to Baptiste on the afternoon of 14th January who at his request sharpened it. In his written statement to the Police and in his evidence at the trial he admitted having visited Glenda's house on the afternoon of 14th January. His evidence as to the events that transpired at the house is substantially the same as the account given by Sharon. The notable exception is that he denied having held a razor to Glenda's throat at her house. In his written statement, however, he acknowledged that he carried the razor with him to her house and that he removed it from his pocket after he had followed her from the house.

On 15th January he directed the Police in their search for the razor to the spot near to the mango tree in the vicinity of Glenda's house from which there was a trail of bloodstains leading to the drain in front of Frederick's house where Frederick found Glenda wounded and bleeding earlier that morning. He then and there said 'It's here it happen. She was lying down here'.

> Although motive need not be established there had been quarrels between Glenda and the appellant who suspected her of having improper relations with other men and in his written statement he mentioned that she had not agreed to a reconciliation.
>
> In our opinion the residual evidence was so compelling that if on those facts there had been a correct direction by the judge to the jury the only reasonable and proper verdict would be one of guilty of murder. We do not consider that the evidence as to the holding of the razor to Glenda's throat at the house earlier that night was essential to the case for the prosecution or that it did turn the scale against the appellant.
>
> Notwithstanding the non-direction on the issue of manslaughter and the improper admission of Sharon's evidence, we consider that there has been no miscarriage of justice and we accordingly dismiss the appeal under section 44 (1) of the Supreme Court of Judicature Act and we affirm the conviction and sentence."

The appellant criticises this passage and points out that *Lejzor Taper v. R (supra)* was not a case concerned with the application of the proviso and if it is used as a guide to the application of the proviso may lead to the application of the wrong burden of proof- the question is not whether the inadmissible evidence must have turned the scales against the accused but whether if the evidence had not been given a jury would nevertheless have been sure to convict upon the remainder of the evidence.

In *Lejzor Taper v. R* the case against the accused apart from the inadmissible hearsay evidence was very weak and therefore the admission of that hearsay evidence tipped the scales against the accused. Once the hearsay evidence was eliminated from the case no question of applying the proviso arose as the remainder of the evidence was so weak. Their Lordships therefore accept the appellant's submission that *Lejzor Taper v. R* is of no obvious relevance to the circumstances of the present case and are left in some doubt as to the assistance that the Court of Appeal believed they derived from the decision. It seems probable that the citation reflects a later observation of the Court of Appeal to the effect that Sharon's evidence was not the factor that turned the scales against the appellant. If such had been the case it would of course have been inappropriate to apply the proviso.

It is however clear that the Court of Appeal founded their approach to the application of the proviso upon the two English decisions on the identical wording in the Criminal Appeal Act 1907 and that the test they

applied was whether if the jury had not heard Sharon's evidence the only reasonable and proper verdict they could have returned was one of guilty. This was the correct approach.

As the Court of Appeal pointed out the case against the accused was, quite apart from Sharon's evidence, a very convincing one based on the appellant's own confession supported by the evidence of the possession and sharpening of a razor on the day of the attack and the forensic evidence. The appellant criticized the Court of Appeal's analysis of the evidence suggesting that the Court of Appeal had re-introduced Sharon's evidence to support the strength of the prosecution case thereby undermining their finding that her evidence was inadmissible. Their Lordships do not so read the judgment of the Court of Appeal. The reference to Sharon's evidence was to show that the only thing that it added to the remainder of the prosecution evidence was the possession of a razor and the threat to her mother in the house. The Court of Appeal did not consider that this evidence tipped the scales in favour of a conviction. The truth of the matter is that, once the jury rejected the appellant's evidence that his statement was untrue and invented by the police, the case against him, even without Sharon's evidence, was overwhelming.

The function of the Board when considering the exercise of the proviso by an appellate court was reviewed in *Lee Chun-Chuen v. The Queen* [1963] A.C. 220 at p. 231 Lord Devlin giving the judgment of the Board said:-

> "Their Lordships apprehend that the Board will not put itself in the position of the first appellate court and review every exercise of the proviso as a matter of course. If the relevant factors have been considered and weighed by that court, the Board will not repeat the process in order to adjust the balance according to its own ideas. But if the process employed by that court is defective in that it has made a wrong approach to the problem or considered irrelevant factors or given them a weight that is gravely out of proportion to their true value, the Board will disregard the finding of the appellate court and approach the matter anew."

In the present case their Lordships discern neither a wrong approach nor a failure to make a fair evaluation of the evidence by the Court of Appeal and find no grounds upon which it would be right to interfere with the Court of Appeal's application of the proviso.

As to the question of whether the judge should have left manslaughter to the jury their Lordships are unable to agree with the Court of Appeal that the judge in this case was under any duty to leave such a verdict to the jury. The medical evidence established beyond any

possible doubt that the terrible injury to the throat could not have been accidentally inflicted; the woman's throat had been cut down to the level of her back bone. Whoever inflicted that injury must have intended to kill or at least cause serious injury. The defence did not raise the issue of manslaughter; the defence was "I was not there, I had nothing to do with the attack". The issue the jury had to decide was whether or not the appellant was the man who attacked the deceased. If the jury found that he was the attacker a verdict of murder was inevitable. For the judge to have suggested to the jury that they should consider the possibility that such a wound could have been unlawfully inflicted without intention to cause serious harm would have been to introduce a wholly unrealistic and totally unnecessary confusion into the clear-cut decision that the jury had to make, which was, whether the prosecution had proved that the appellant was the attacker. The judge was right to leave murder to the jury without the alternative of manslaughter.

Their Lordships are satisfied that there has been no miscarriage of justice in this case and dismiss this appeal.