3, 1958

IN THE PRIVY COUNCIL

. ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL.

IN THE SUPREME COURT OF BRITISH GUIANA.

BETWEEN -

52096

MOHAMED FIAZ BAKSH Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

Record.

1. This is an Appeal by Special Leave from the Judgment of the Court of Criminal Appeal in the Supreme Court of British Guiana (Holder C.J. Stoby and Date, J.J.) dated the 15th day of June, 1957, dismissing the Appellant's appeal from his conviction before the Honourable Mr.Justice Clare sitting with a Jury in the Supreme Court of British Guiana of the offence of Murder contrary to Section 100 of the Criminal Law (Offences) Ordinance, Chapter 10, for which offence your Appellant was sentenced to Death. pp.179 - 192 p.153

2. The principle questions involved in the Appeal are as to whether there has been a miscarriage of Justice by reason of the Court of Criminal Appeal misdirecting itself in Law in dismissing your Appellant's Appeal whilst allowing the Appeal of his Co-Defendant Nabi Baksh on the ground that fresh evidence which the Court had admitted established a discrepancy between the evidence of the prosecution witnesses at the trial and their earlier statements which was so startling that it struck at the very root of the Prosecution's case and had caused a miscarriage of justice, and also by reason of the Learned Trial Judge's misdirections to the Jury in his Summing Up on the onus of proof effecting your Appellant's alibi and on a finding that

your Appellant was an accessory before the fact when there was no evidence upon which such a finding could rest.

3. The following sections of the Criminal Appeal Ordinance (Cap.8 of the Laws of British Guiana 1953) are relevant to this Appeal :-

"6 (1) The Court of Criminal Appeal on any appeal against conviction shall allow the appeal if they think 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 convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(2) Subject to the provisions of this Ordinance, the Court of Criminal Appeal shall, if they allow an appeal, either 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".

4. Your Appellant was jointly indicted and jointly tried for the murder of Saffie Mohamed on the 12th day of June 1956 with the said Nabi Baksh (also called Jacko and Jacoob) The said Nabi Baksh was also convicted of murder by the Hon.Mr.Justice Clare sitting with a Jury as aforesaid and sentenced to death, but the Court of Criminal Appeal by its said Judgment dated the 7th day of June, 1957 quashed his conviction and directed a new trial of the said Nabi Baksh for the said offence pursuant to the provisions of Section 6 (2) of the Criminal Appeal Ordinance. On the 22nd day of June, 1957 the Crown entered a nolle prosequi against the said Nabi Baksh on this charge of murder and Nabi Baksh was thereupon released from custody. By letter dated the 20th day of September 1957 the Attorney General informed Counsel for your Appellant that the ground upon which the Nolle prosequi was entered was that the Prosecution considered it dangerous to ask a Jury to accept the evidence of identification given at the joint trial of your Appellant and Nabi

Baksh by the Prosecution witnesses Mohamed Haniff, Mohamed Nazir and Bebe Mariam because their evidence at the Trial had differed so materially from their written statements made to the Police immediately after the death of Saffie Mohamed

5. The evidence against your Appellant was that of the following witnesses :-

(a) MOHAMED HANIFF, the brother of Bebe Miriam who was living with the Deceased, stated that the Deceased was at the time of his death living at a house at Clonbrook, East Bank, Demerara. In this house there also lived his sister Bebe Miriam, Mohamed Nazir (also called Alli) and his wife, and the witness. On the 12th June, 1956 the witness awoke about 3 a.m. helped the Deceased and Nazir to load a boat with vegetable produce and then returned to the house with the Deceased whilst Nazir his wife and Bebe Miriam went away with the boat. He went to lie on his bed. Before Nazir returned with the boat he heard a gun fire, apparently from the kitchen and went to the window with his torch. In its light he saw two men whom he was able to identify. He shouted to them "Alright Fiaz and Jacoob no use run any more I see you already". Jacoob was the name by which Nabi Baksh was known. He saw a gun in your Appellant's right hand, he described the route the two men took. He ran downstairs and saw the deceased lying with his head on the house flooring at the top of the step leading from the kitchen and with his feet in the kitchen. Nazir was also there and they lifted the Deceased and placed him on his back. At the close of his cross-examination the foreman of the Jury asked certain questions in relation to the witnesses's acquaintance with the two accused and the witness told the Jury that he was acquainted with both accused for three to four weeks before the 12th June, 1956. In re-examination he said that at the time of his identification he saw the light from another torch shining on the accused apparently from downstairs.

pp6-15

(b) MOHAMED NAZIR, the brother of the

pp.16-24,27

Deceased, stated that on the 12th June, 1956 he heard a gun shot when he reached the spot where he usually tied his boat after he had taken his wife and Bebe Miriam with the vegetable produce to the bus. He ran underneath his house and from there saw your Appellant and Nabi Baksh crossing a trench near the house. He heard Mohamed Haniff shout to them 'Alright Fiaz and Jacoob, don't run a see you". He turned his torch light on them and saw your Appellant with a gun. He also described the route the two men took. He then went into the kitchen and saw the Deceased on the kitchen step with his head resting on the floor of the house. He went within a few minutes to a relative nearby, Majeed who brought the Police. In answer to questions by the foreman of the Jury he stated that he knew of a previous quarrel between your Appellant and the Deceased and in re-examination he said that the quarrelling between your Appellant and the Deceased had begun when the Deceased's wife Ofiran had left the Deceased and become friendly with your Appellant and that there was a court case pending between your Appellant and the Deceased. The Prosecution applied to have exhibited in the Case this witnesses' Deposition and whilst the trial Judge rejected this application, he allowed further re-examination to establish that the witness had given the same version to the examining Magistrate.

pp.25-26 (c) BASIL GILLETTE, a Registered Medical Practitioner and G.M.O. Mahaica Demerara stated that on the 12th June, 1956 he performed a post-mortem examination on the body of the Deceased and that the cause of death was (1) gunshot wounds and (2) Heamorrhage and shock. He found multiple punctured wounds in the front chest and said that death was practically instantaneous. The injuries were very severe and the heart was ruptured. He extracted 21 pellets from the body.

pp.31-35 37-41. (d) JOHN CHEE-A-TOW a Police Sergeant stated that at 6.30 a.m. on the 12th June, 1956, at Cove and John Police Station he received a report of the death from Majeed and later collected two torch lights from Haniff. He saw both accused and took voluntary statements in writing from each of them. Each of the statements was exhibited in the case.

He told the Court that Clonbrook, where the Deceased was killed was roughly 18½ miles by road from Georgetown, that this could be covered in about 35 minutes by car and that the last train from Georgetown left at 6.10 p.m. Cove and John Police Station was 1½ miles from Clonbrook. He said that he was present on the 22nd June, 1956 when a gun was found in a sluice box about 180 yards away from the place where the death occurred and about 80 yards from where your Appellant lived and about an equal distance from where Nabi Baksh lived. When the gun was found there was mud filling the muzzle and grease on the inside of the lock and he handed it in in this condition to Dr. Ho Yen.

(e) HILTON CUMMINGS a Police Constable, told the Court that he left Cove and John Police Station at 6.36 a.m. and at about 8.45 a.m. on the 12th June, 1956 in Georgetown he saw the two accused in the street and shortly thereafter he saw them again at the offices of their lawyers, Messrs. Luckhoo & Sons. He there told them that it was reported that they had shot Mohamed Saffie. Your Appellant replied "what murder me no know nothing man me sleep a town (meaning Georgetown) last night". Nabi Baksh said "Oh me mamma. Ah you come hear distress and a we sleep a town last night, Fiaz". At the Police Station your Appellant made a voluntary statement in writing which was made an exhibit. In this statement he dealt in detail with his movements over the previous 24 hours and the Police took statements from the people mentioned in your Appellant's statement that same day Upon being searched your Appellant had on him a receipt from the East Demerara Judicial District which further confirmed his statement as to his movements during the previous 24 hours. pp.41-43.

(f) JOSEPH EPHRAIM HO-YEN the Government Analyst, told the Court that he received a shot gun from Sergeant Chee-a-Tow on the 23rd June, 1956. He found no mud or rust or grease on it. He examined the gun for serial numbers but found that they had been removed. He could not say what bore gun had fired the pellets which killed the Deceased. pp.35-36.

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pp.50-54 (g) BEBE MIRIAM, the woman living with the deceased, told the Court that there was a case pending against your Appellant and one GUILERMO RODRIGUES for breaking the Deceased's foot, although she was not a witness to this. On the 12th June, 1956 at 2.30 a.m. she and the Deceased were awakened from their sleep by the barking of dogs and with a torch light from the yard she saw your Appellant and Nabi Baksh about 48 feet away from their house. She had known your Appellant and Nabi Baksh for about two years and she told Haniff and Nazir at about 3 a.m. of having seen your Appellant and Nabi Baksh at about 2.30 a.m.

pp.54-56 (h) MOHAMED MUSTAPHA a nephew of the Deceased told the Court that at about 11 p.m. on the 11th June, 1956 he had seen your Appellant and one Yassin standing at the side of the road about six or seven yards from your Appellant's house.

pp.56-62. (i) IVAN GOODING, stated that at about 11 p.m. on the 11th June, 1956 he was sitting on the wall of the koker, a culvert, at Clonbrook and saw your Appellant pass him within about six feet.

pp.64-67 (j) RICHARD CARBON, stated that on the 22nd June, 1956 he found the gun produced in Court. He found it in a sluice box which did not show as the water was deep. The box was about 1½ feet under the water. He had been asked to search on this occasion by Nazir.

pp.67-68 (k) MOHAMED MURSALIN, a nephew of the Deceased stated that on the 2nd December, 1955, at between 7 and 8 p.m. on a dark night at the Clonbrook Dam he had seen your Petitioner and Nabi Baksh about 12 feet away from him each with a gun in his hand similar to the gun found by the witness Carbon.

p.73 6. That your Appellant elected to make a statement from the Dock in which he confirmed
pp.197-200 that the statements which he had previously made to the Police were true, that he was not at Clonbrook on the night when the Deceased was killed but was at La Penitencem that he had

never held a gun or used a gun in his life, that the evidence given against him by Haniff, Nazir, Miriam, Gooding, Mustapha and Mursalin was false and had been given out of spite and ill will as he was on bad terms with the Deceased and his family. He had not shot the Deceased and he was innocent of the charge.

7. That your Appellant called 8 witnesses for his Defence :-

(a) LOUIS VIERA, told the Court that on the 12th June, 1956 he was living at Clonbrook and left home for his rice field at about 5.45 a.m. He met one Lochan and then heard a cry from Nazir's yard. He and Lochan entered and found the Deceased dead. He asked Nazir who had shot the Deceased Nazir told him he did not know, that morning he went to the bus to carry greens, on returning and when he was at the truck line he heard a gun fire and he went home, tied his boat, went in and slept and in the morning woke up Haniff and sent him down to see if the Deceased had finished cooking and he Haniff found him dead. pp.74-77

(b) LINDON BURNHAM, a Barrister-at-Law practising in British Guiana, stated that he was acting for your Appellant and Guilermo Rodrigues and that on the 11th June, 1956 he saw your Appellant in his Chambers between 3.30 and 4 p.m. On that occasion your Appellant produced certain records which, he the witness, had asked for. The interview on the 11th June was incomplete as Rodrigues wished to go back into the Country and he the witness gave instructions for them to return next day. pp.77-78

(c) LO-CHAN, a shopkeeper, stated that he left his house at ANN'S Grove Demerara at about 5.30 a.m. on the 12th June, 1956 and saw VIERA as he was about to pass the Deceased's house. He and VIERA went into the yard of the Deceased's house and he heard Viera ask Nazir what happened. Nazir said that his brother was dead, that he was carrying out a load to the bus and when he was coming back he heard a gun, that when he went home he tied up the boat and went up to sleep, pp.78-80

and that in the morning he woke up his brother-in-law Haniff to see if the Deceased had finished making tea whereupon he learned that the Deceased was dead.

pp.80-82 (d) ALFRED ALLEN who lived about 35 rods from the house of the Deceased told the Court that on the 12th June, 1956 he left home between 5.30 a.m. and 6 a.m. and went to the yard of the Deceased's house. There he heard Nazir say to 10 or 12 persons in the yard that he did not know who had killed his brother, that he went to post a load at the bus and when he was by the trench dam he heard a loud fire, that he moored the boat and went upstairs where he lay down until morning came and he sent his brother-in-law to see if the Deceased had finished cooking. They had then found the Deceased dead on the step and they took him off the step.

pp.83-85 (e) JOSHUA JERRICK, who lived about 35 rods from the house of the Deceased, stated that on the morning of the 12th June, 1956 he heard the report of a gun about 3 to 3.30 a.m. and went to the yard of the Deceased's house some minutes past 6 a.m. When he got there he saw about 10 or 12 persons including Haniff. In the presence and hearing of Haniff he asked the crowd if they knew who had done the shooting and received the reply "No". Haniff said nothing.

pp.85-88 (f) SHIRA ALI stated that she lived with her husband and 8 children at Field 11, Bed 1, La Pennitence. Your Petitioner came to her house at about 5.30 p.m. on the 11th June, 1956 and had dinner with them at about 6 p.m. When she went to bed about 9 p.m. she left your Appellant speaking to her husband. She arose at about 5.30 a.m. the following morning and about 6 a.m. saw your Appellant come out of the bedroom in which her son Ariff had been sleeping. Your Appellant washed and she gave him tea about 6.30 a.m. He left her home about 7 a.m. She stated that from the time when she got up no one came in or went out of the room from which your Appellant appeared until she awoke her son and your Appellant. Your Appellant was wearing the same clothes he was wearing the previous evening and she, her husband and her son Ariff had all given statements in these terms to the Police on the 12th June, 1956.

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(g) SHIRA KHAN, who lived at Field 9 Bed 10 Middle Row, La Penitence and was a neighbour of Shira Ali, stated that she knew your Appellant and saw him going into the yard of the house of Shira Ali on the evening of the 11th June, 1956 after 5 p.m. She next saw him the following morning at about 6 to 6.30 a.m. with a towel in his hand at the back steps of Shira Ali's house. pp.88-89

(h) JOSEPH JERRICK, who lived about 100 rods from the house of Richard Carbon, stated that about three days after he heard of the death of the Deceased he saw Richard Carbon with a gun in his hand. He asked him if he had shot a pig because he, the witness, was looking after pigs and knew that Carbon shot pigs. Carbon denied shooting anything, but the witness searched near his garden and found a dead pig. He pointed this out to Carbon, who did not reply. The gun which Carbon had in his hand had a piece of wire band near the trigger, similar to the one which had been produced by the Prosecution as having been found by Richard Carbon. pp.89-91

8. That after your Appellant's case had been closed his Co-Defendant Nabi Baksh made a statement from the Dock and called a witness in support of his alibi defence. No part of the evidence of this witness nor of the statement by Nabi Baksh reflected unfavourably upon the Defence of your Appellant. pp.92-93 pp.93-94

9. In the Summing-up by the Learned Trial Judge he made it clear to the Jury that the case against your Appellant rested almost entirely upon the evidence of the two witnesses Nazir and Haniff He said "Well, as I have already said to you the witnesses Haniff and Nazir are important witnesses and upon them you will decide as to the identity of the prisoners, if the proof is sufficient or not; and that proof as to identify is essential. The accused say that they were not in that area at the time and these are the two witnesses that say "we actually saw them on the dam". So then gentlemen, you will pay special attention to the evidence and decide whether you will accept that evidence or not. As I say, identity is most important". pp.120-121. 637

10. In the course of the Summing-up the Trial Judge commented most adversely on your Appellant's alibi defence and on the evidence given by certain witnesses called on his behalf and coupled these comments with views favouring the acceptance of the evidence of Nazir and Haniff. In one passage, he told the Jurors

"So, gentlemen, you will have to consider it and you will decide p.119 6.1

whether it was a remarkable conversation and that they came just at the psychological time and got all the evidence that was necessary for the defence and kept it all to themselves, except at a time when they found that it was most opportune to discharge it upon the Accused and his relatives. But that is for you to consider: that this most helpful evidence was just got from witnesses who were so callous at the time in such a grievous matter, that they arrived there and got this evidence in a couple of minutes and quickly disappeared to their mire water and rice. That is all they went there to do - to relieve their plantations of the water - but that they took no other interest in this early morning occurrence".

Furthermore, in a number of other passages in the Summing-up the Trial Judge whilst making it clear that the Jurors were the sole judge of fact, invited the Jury to accept a view adverse to your Appellant's case and plainly indicated to the Jury his view that the Prosecution had on the evidence before him established your Appellant's guilt.

11. In his Summing-up the Learned Trial Judge dealt with the onus of proof relating to your Petitioner's alibi in the following passage:-

p.1086.23 "The Defence in this case is that the prisoners were elsewhere when the crime was committed. They were saying that they are not the persons, and never could be the persons, who were seen as they were so far removed from the kitchen of the house. It is my duty to tell you that if you consider that the alibi has failed you must now turn to the facts of the case and consider them on their own merits.

In Law, when a person submits that type of Defence - that he was elsewhere when the crime was committed - we term it as an alibi: hence the use of the term.

If in your opinion the Defence of an alibi has failed the prosecution does not necesarily succeed. You still have to consider the facts of the case and see if the prosecution has proved

the case beyond reasonable doubt. The onus of proving an alibi is on the accused but the onus on the prosecution of proving the identity of the person or persons that did the act still remains. It does not prevent you, gentlemen, from finding that notwithstanding that the alibi is not proved the explanation given by the accused persons throws so much doubt on the evidence of the prosecution as to lead you to say "we have a doubt about the guilt of the prisoners" and you will therefore acquit them.

When an accused person is required to prove a fact he is not required to prove it beyond reasonable doubt as in the prosecutions case. He is only required to prove that on a balance of probabilities you come to the view that they are not the persons who discharged the shots that killed the deceased then they are not guilty".

In other passages in the Summing-up the Trial Judge dealt adequately with the onus of proof in a Criminal Trial, but it is submitted on behalf of your Appellant that these general directions on onus may not and indeed did not remove the misdirection which had been given with specific reference to your Appellant's defence of alibi.

12. In his Summing-up the Learned Trial Judge directed the Jury in five passages that they were entitled to convict your Appellant of the murder as an accessory before the fact. One such passage was

"If you find that one of the accused either counselled, procured or commanded the other accused to commit this offence but at the time that the murder was actually committed that accused was so far away that the person committing the offence could not be encouraged by the hope of any immediate help or assistance from that accused then you may convict". p.105 6.10

In the submission of your Appellant there was no evidence to support a conviction as an accessory before the fact and the mischief of these directions was that the Jury was invited to convict your Appellant even if it accepted

his alibi because the facts give rise to a strong case of suspicion against him. The Trial Judge failed to consider the strong motive of your Petitioner for the murder.

13. In the course of the hearing of the Appeals of your Appellant and Nabi Baksh by the Court of Criminal Appeal, on the 20th May, 1957 the Court granted your Appellant's application to admit fresh evidence, namely the statements in writing given to the Police on the morning of the 12th June, 1956 by Mohamed Nazir, Mohamed Haniff and Bebe Miriam and respectively signed by each of these witnesses. The variations between those written statements and the evidence given at the trial by the makers of the statements are such in the submission of your Appellant as to establish that a miscarriage of justice has occurred.

pp.172-179

14. In his statement Haniff said that he went to Clonbrook on the 3rd June, 1956 and saw your Appellant on the 4th June, 1956. At the trial he told the foreman of the Jury that he was acquainted with both of the accused for three to four weeks before the 12th June, 1956. In his statement he said that the Deceased went down to the kitchen with an oil lamp to cook, but he denied this at the trial. In his statement he said that after the shooting he saw two men, one of whom was your Appellant and the other of whom was a man whose face he knew and whom he could identify, but whom he did not know by name. He also said that he called out:- "Alright Fiaz, all you run, me see all you two". At the trial Haniff said that he recognised both men and shouted "Alright Fiaz and Jacoob, don't run a see you". In his statement he said that after the shooting he ran on to the platform and bridge but made no mention of this in his evidence. In his statement he said that when he went into the kitchen after identifying the accused as they ran away he found Nazir supporting the dying man who was standing up by the steps. In his evidence he said that he found the dying man lying on the steps and the fact of his standing would appear quite inconsistent with the evidence of Dr.Gillette, who said that death was practically instantaneous. Further, in his statement Haniff described the movements of the two men as they ran away as being quite

different to the movements he described at the trial and this evidence as to the movements of the two men which was given at the trial was altered in such a way that it agreed almost exactly with the evidence of Nazir.

15. In his statement to the Police, Nazir said that after hearing the shot he saw your Appellant and Co-Defendant running away. He described their movements quite differently to the description he gave at the trial. He made no mention in his statement of hearing Haniff call out to the two accused but at the trial he said that he heard him shout "Alright Fiaz and Jacoob, don't run, a see you". In his statement he said that he saw Haniff immediately after the shouting and that Haniff told him that he had seen the two men Mohamed Fiaz Baksh and Nabi Baksh running away and that he Haniff was also afraid to shout out because he was afraid that Mohamed Fiaz Baksh should shoot him. This statement if true, would render it even more unlikely that Haniff shouted what he gave in evidence or that Nazir heard him so shout. In his statement Nazir described what he found when he ran into the kitchen after he had watched the two men making their escape by scrambling up on to the parrapet running south along the rice field, crossing over a trench at the side of this field, and running south along Clonbrook side-line dam. He said that his brother was standing and swaying on his feet and told him in reply to a question "Oh, God. Fiaz Baksh shoot me and Jacko Been wid he". In his evidence at the trial he said that he found him lying on the step in the kitchen. His description of his brother still on his feet and still speaking is contrary to the medical evidence of Dr.Gillette and all the other evidence at the trial.

16. In Miriam's statement to the Police she said that when she and the Deceased went into the yard at about 2.30 a.m. on the 11th June, 1956 she saw your Petitioner and no-one else. At the trial she said in evidence that when she went there at that time she saw your Petitioner and the Co-Defendant and that at about 3 a.m. she told Nazir and Haniff that she had seen the two accused at 2.30 a.m.

17. These changes in the accounts given by the principal witnesses for the prosecution could not in your Appellant's submission be the result of accident or better recollection on a subsequent occasion. Until explained they must stand out as lies on fundamental and vital issues designed to incriminate both your Appellant and his Co-Defendant. The credit of these witnesses cannot be severed into their credit in relation to one accused and their credit in relation to the other. Their credit is indivisable and is so fundamentally shaken that the very basis of a fair trial was lost. Moreover, these changes in the accounts of the principal prosecution witnesses must have been known to those who were in charge of the prosecution at some stage and ought, in your Appellant's submission, to have been disclosed to the Defence Counsel at or before the trial. They were not disclosed, however, until after the trial, by which time your Appellant had lost his opportunity of placing this material before the Jury.

18. After admitting the fresh evidence the Court of Criminal Appeal in its judgment dated the 15th day of June, 1957 proceeded to consider the effect of this fresh evidence firstly in connection with the Appeal of Nabi Baksh. The Court took the view that the changes in the accounts of the three witnesses showed a discrepancy so startling that it struck at the very root of the prosecution case and justice demanded that disclosure should be made by the prosecutor. The Court was unable to hold that if the jury had known the facts in the additional evidence, they would inevitably have arrived at the same conclusion and therefore, in the interests of justice, the Court held that the value and weight of the additional evidence should be determined by a Jury at a new trial.

p.183 6.30

19. The Court then turned to consider the effect of the fresh evidence on your Appellant's Appeal and the weight to be given to the submission by his Counsel that if the witnesses were untruthful in their evidence concerning Nabi Baksh, then undoubtedly the jury might have taken the view that they were untruthful regarding your Appellant. Having stated that sub-

mission, however, the Court proceeded not to consider that aspect of the matter but solely the question as to whether the three statements made on the 12th June, 1956, contained anything favourable to your Appellant which was not obtained at the trial. The Court held that they could find a great deal which was unfavourable but nothing favourable to your Appellant and accordingly refused to disturb the verdict on this ground.

p.184 6637-39

p.184 6639-41

20. In your Appellant's submission the Court of Criminal Appeal failed to direct its attention to the substance of your Appellant's Appeal, which was that the credit of the three vital witnesses was so fundamentally destroyed that they were unlikely to be believed in respect of either of the accused. Moreover, the Court of Criminal Appeal not only failed to direct its attention to the substance of your Appellant's Appeal but in fact directed its attention to a point which was really irrelevant, namely as to whether there was anything favourable to your Appellant in the early statements, and decided the issue on this irrelevant point. In one sense "favourable" could have borne the interpretation which was sought by your Appellant's Appeal on this matter but it is clear that the Court construed "favourable" as excluding the impairment of the witnesses credit and as being limited to facts which would, without comparison with subsequent testimony, tell in favour of your Appellant. The Court had already held that the discrepancies, some but not all of which they set out in the judgment, struck at the very root of the prosecution case and in your Appellant's submission these discrepancies would have told equally in favour of your Appellant and entitled him to have his conviction quashed. It must be a fair conclusion that if the three vital prosecution witnesses had chosen to create a false case against Nabi Baksh, they were equally capable of creating a false case against your Appellant. Indeed, the evidence of your Appellant's witnesses, Viera, Lochan, Allen and Joshua Jerrick, that Haniff and Nazir had not found the deceased until some hours

after the shooting was borne out by the incredible account given by Haniff and Nazir in their statements on the 12th June, 1957 as to how they found the deceased after he had been shot.

21. On the alleged misdirection on the onus of establishing an alibi, the Court of Criminal Appeal held that there had been no misdirection in the passages complained of because a fact stated by an accused person can only be accepted by the jury if on the balance of probabilities, the jury believes it to be proved and failure to prove it, does not result in conviction. The Court referred to other passages in the summing-up concerned with onus of proof and held that these must have removed from the minds of the jury any misunderstanding or confusion that could have been caused by the statements complained of. In your Appellant's respectful submission, the passages complained of are a clear misdirection on the vital issue in the case and their effect would not be displaced by antecedent or subsequent directions on the onus of proof in a criminal case.

p.189 662-11

pp.189-191

22. On the alleged misdirection on the possibility of convicting your Appellant as an accessory before the fact, the Court of Criminal Appeal held that if there was no such evidence, it would be wrong to assume that the jury discovered evidence which did not exist. Furthermore the Court held that if the jury believed that your Appellant was seen leaving the vicinity from which the shot had come, there was some evidence on which the Jury could find that if he did not fire the shot, he was either a principal in the second degree or was an accessory before the fact. In your Appellant's respectful submission, there was no evidence for such a finding, the trial Judge never put forward any evidence upon which such a finding could be supported, and the mischief of the misdirections were not met by the assumption that the jury would not act upon them. Their mischief lay in the fact that they must have suggested to the minds of the Jurors that even if they accepted his

p.187 6633-40

p.188 66.1-10

alibi, they could convict your Appellant.

23. The Appellant submits that the judgment of the Court of Criminal Appeal should be reversed and his conviction quashed for the following among other.

REASONS

1. BECAUSE the fresh evidence admitted by the Court of Criminal Appeal disclosed that there had been a miscarriage of justice.

2. BECAUSE the prosecution failed to discharge its duty to communicate to your Appellant's counsel at or before the trial the substance of the written statements made on the 12th day of June, 1956 by the witnesses Mohamed Haniff, Mohamed Nazir, and Bebe Miriam, and thereby deprived your Appellant of the substance of a fair trial.

3. BECAUSE the trial Judge misdirected the Jury on the onus of proving your Appellant's defence that he was not at the scene of the crime.

4. BECAUSE the trial Judge misdirected the jury in offering them the possibility, as a matter of law, of convicting your Appellant as an accessory before the fact when there was no evidence to support such a conviction.

J.LLOYD-ELEY.

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MOHAMED FIAZ BAKSH .... Appellant.

- v -

THE QUEEN ..... Respondent.

CASE FOR THE APPELLANT

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