3,1958

IN THE PRIVY COUNCIL

No. 26 of 1957

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA

BETWEEN

MOHAMED FIAZ BAKSH ... Appellant

- and -

THE QUEEN ... ... Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from a judgment, dated the 7th June, 1957, of the Court of Criminal Appeal of British Guiana (Holder, C.J., Stoby and Date, JJ.), dismissing an appeal from a judgment, dated the 5th December, 1956, of the Supreme Court of British Guiana (Clare, J. and a jury), whereby the Appellant was convicted of murder and was sentenced to death. pp.179-192 pp.96-153

2. The indictment charged the Appellant jointly with one Nabi Baksh with the murder of one Mohamed Saffie. Nabi Baksh was also convicted, but the Court of Criminal Appeal, after admitting fresh evidence which threw some doubt on the identification of Nabi Baksh, set aside his conviction and ordered that he be re-tried. A nolle prosequi was subsequently entered on the charge against him. The principal question in this appeal is whether the Court of Criminal Appeal ought also to have ordered a re-trial of the Appellant. p.1 p.180 l.10-p.183 l.44

3. The common law of England relating to criminal matters prevails in British Guiana. The following provisions of the Criminal Appeal Ordinance (Laws of British Guiana, 1953, cap.8) 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:

Provided that the Court of Criminal Appeal may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they are of the opinion that no substantial miscarriage of justice has actually occurred.

(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.

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12. For the purposes of this Ordinance, the Court of Criminal Appeal may, if they think it necessary or expedient in the interests of justice -

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(b) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses .... and allow the admission of any depositions so taken as evidence before the Court;

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4. The trial took place before Clare, J. and a jury between the 19th November and the 5th December, 1956. The evidence for the Crown included the following:-

p.6 (i) Mohamed Haniff, brother-in-law of the

deceased, said that he had lived in the same group of houses as the deceased, the deceased's wife (Bebe Mariam), Mohamed Nazir and his wife. At about 3 a.m. on the 12th June, 1956 he had woken up and helped the deceased, his wife, Nazir and Nazir's wife to load a boat. He returned to his house with the deceased and sat on his bed, waiting for Nazir to return with the boat. He then heard a gun-shot from the direction of the kitchen, and a voice sounding like that of the deceased. He went p.7
to the window with a torch in his hand and shone it in the direction of a trench running parallel to the side of the house. He saw two men crossing the trench with their backs to him. They ran to a rice field dam and then came opposite to the window. He then identified them as the Appellant and Nabi Baksh. They were then about 3 rods away. He shouted, "Alright Fiaz and Jacoob no use run any more I see you already". There was a gun in the Appellant's right hand. Both men turned and looked at him and then jumped over a fence and ran away along the dam. He then ran downstairs and met Nazir in the kitchen. The deceased was lying with p.7 l.22
his face on his hands on the step leading to the kitchen, bleeding from wounds to his chest. Nazir and the witness lifted the deceased from the step and laid him in the kitchen. The police, when they arrived, took the torch from him. In answer to the p.14
foreman of the jury, he said he had known both the accused for three or four weeks before this incident.

(ii) Mohamed Nazir, brother-in-law of Mohamed p.16
Haniff, said that he and his wife lived in the board house next to the bush house where the deceased had lived. He awoke at 3 a.m. on the 12th June, 1956 and helped to load the boat. He took the boat down to the bus-stop, unloaded it, and returned to his house. As soon as he got back to the mooring, he heard a shot, whereupon he got out of the boat and ran underneath the house. He heard a scrambling in the trench at the side of the house. He stood up and saw the Appellant and Nabi Baksh crossing the trench. Haniff shouted "Alright Fiaz and Jacoob don't run a see you". Thereupon they made a swing to turn back, then jumped over the wire and ran away. When the two men were in front of the witness, he turned his torch on them while they were on the dam. The Appellant had a gun. There was a torch shining from a window upstairs. The witness p.17
went to the deceased's kitchen, where he found the deceased lying face down on the kitchen step. He shouted to Haniff, and together they lifted the deceased into the kitchen. The police, when they arrived, had taken his torch. There was litigation

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pending between the Appellant and the deceased.

p.25 l.38, p. 26 l.29 (iii) Dr. Basil Gillette said that he performed a post-mortem examination. The cause of death was (1) gunshot wounds, (2) haemorrhage and shock. In his opinion, death must have been practically instantaneous.

p.31 (iv) John Chee-a-Tow, Detective Sergeant, said that at 6.45 a.m. on 12th June, 1956 he went to the

p.32 l.3 - p.34 l.9 deceased's house with other officers. In the kitchen he found the body of Mohamed Saffie, with blood oozing from gunshot wounds in the chest. Part of

pp.37 - 41 the southern wall of the kitchen, which was made of dry wild cane, was damaged and there were gunshot holes in the cane. On the side of a trench on the southern side of the kitchen, there were human footprints. There was a barbed wire fence along the parapet, which continued for 1½ rods in an easterly direction. A dam then ran south, and about 25 yards along the dam there were footprints on both sides of the dam. He collected a lamp from the kitchen, and two torches from Nazir and Haniff. A shotgun was found on the 22nd June in a sluice box in a trench about 180 yards north of the deceased's house and about 80 yards from the Appellant's home. The gun appeared to have been recently used. The serial numbers had been filed off, and it was unloaded. On the 12th June he charged the Appellant, who said, "I am innocent".

pp. 41 - 43 (v) Hilton Cummings, Police Constable, said that on the 12th June, 1956 he saw the Appellant and Nabi Baksh in Georgetown at 8.45 a.m. On being told they were reported to have shot Mohamed Saffie, the Appellant said, "What murder me no know nothing man me sleep a town (meaning Georgetown) last night".

pp. 44 - 46 (vi) Henry Fraser, Police Sergeant, said that on the 12th June, 1956 the Appellant made a voluntary statement in writing, to the following effect:-

"He lived at Clonbrook and knew the deceased, who was his cousin. He was on terms of intimacy with the deceased's wife, whom the deceased had left in 1954, and in consequence of this he was not on speaking terms with the deceased. On 11th June he had left home at about 6 a.m. for Georgetown. He had spent the day and the following night in Georgetown, and had not returned to Clonbrook after leaving in the early morning of the 11th June".

pp.50 - 54 (vii) Bebe Mariam said that she had been living with the deceased. There was a case pending in the

Supreme Court against the Appellant for breaking the deceased's foot. On the night of the 11th June, 1956, the dog had barked at 8.30 p.m., but neither she nor the deceased had seen anything, and they had then gone to bed. About 2.30 a.m. she heard the dogs barking again. She went out to the back-yard with the deceased, who was carrying a torch. By its light she saw the Appellant and Nabi Baksh standing about 48 feet away on a ricebed facing the house. She had known them both for about two years. She and the deceased returned to the house about 3 a.m. She loaded the boat and went down to market, where she was later told of the deceased's death.

(viii) Mohamed Mustapha said that he was the deceased's nephew. He had known the Appellant and Nabi Baksh for about six years. At about 11 p.m. on the 11th June, 1956 he had passed the Appellant's house and seen the Appellant standing about six to seven rods from his house with the brother of Nabi Baksh. pp. 54 - 56

(ix) Ivan Gooding said that he had known the Appellant and Nabi Baksh since they were boys. At about 11 p.m. on the 11th June, 1956 he was sitting on the wall of a culvert at Clonbrook when the Appellant passed within six feet of him along a dam, and then turned eastwards. pp. 56 - 62

(x) Mohamed Mursalin said he was the deceased's nephew. On the 2nd December, 1955 he had seen the Appellant and Nabi Baksh about 100 rods from the deceased's house. Each had a shot-gun in his hand. pp. 67 - 68

5. The Appellant elected to make an unsworn statement from the dock. He said that his statement to Sergeant Fraser was true. He had not known Mohamed Haniff and had never spoken to him. Mohamed Haniff, Mohamed Nazir, Bebe Mariam, Ivan Gooding, Mohamed Mustapha and Mohamed Mursalin had spoken falsely against him out of spite and ill-will. He had not shot the deceased, and did not know who had. p. 73

6. The Appellant called evidence to the following effect:-

(i) Louis Viera said that on the morning of 12th June, 1956 he had gone with one Lochan to the deceased's house. He had spoken to Mohamed Nazir, who had said he did not know who had committed the murder, that he had heard a shot while returning in his boat, and that after tying up his boat he had gone to bed, and had only learned of the murder when pp. 74 - 77

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he awoke.

pp.78 - 80 (ii) Lochan said he had gone to the house with Viera. Nazir had said that he had heard a shot while on his way home, and had then gone to sleep, and had only discovered the murder when he awoke.

pp.80 - 82 (iii) Alfred Allen said that he had gone to the house at about 6 a.m. on the 12th June, 1956. Nazir had been there, and had said he did not know who had killed his brother. He had said that he heard a gun when he was still in his boat, and that after mooring his boat he had gone upstairs and lain down until the morning. He had then heard his brother-in-law shout that he had found the body.

pp.83 - 85 (iv) Joshua Jerrick said he had gone to the deceased's yard at about 6 a.m. on the 12th June, 1956, and had found a small crowd there. He had asked them if they knew who had done the shooting, and they had said 'No'. Haniff had heard this, and had said nothing.

pp.85 - 88 (v) Shira Ali said that she was the sister-in-law of the Appellant and lived at La Penitence, Georgetown. At about 5 p.m. on the 11th June, 1956 the Appellant had come to her house and had dinner. She had gone to bed at 9 p.m. when, she said, the Appellant had still been there talking to her husband. At 6 a.m. the next morning the Appellant had come out of her son's room, and had been in the house until after 7 a.m.

pp.88 - 89 (vi) Shira Khan said that she was a neighbour of Shira Ali, and on 11th June, 1956 had seen the Appellant going into Shira Ali's yard after 5 p.m. She said she had seen him on the back steps of the house between 6 and 6.30 a.m. the next morning.

pp.92 - 93 7. Nabi Baksh elected to make a statement from the dock, affirming his previous statement to the police and denying that he was concerned in the murder. He called evidence to show that he had slept the night at home.

pp.96 - 151 8. Clare, J. began his charge by telling the jury what their duty was. The verdict could only be either guilty or not guilty of murder. The jury must deal with the evidence against each accused separately. The burden of proof was on the Crown throughout, to establish their case beyond any reasonable doubt. If the jury were satisfied that one or other of the accused had caused the death,

they must consider whether there had been a common design. If there was a common design they would not have to decide which had fired the shot: both were guilty. The learned Judge explained the law as to the position of an accessory before the fact and a principal in the second degree, and told the jury that, if they thought that either accused fulfilled those requirements, they should find him guilty. The prosecution based its case on circumstantial evidence, which should be approached with caution. The defence was an alibi, and if the jury thought the alibi had failed, they should consider the merits of the Crown's case. Even if the jury did not accept the evidence of an alibi, they must still see whether the Crown had proved the case beyond reasonable doubt. The onus of proving an alibi was on the accused, but the onus on the Crown of proving the identity of the persons who did the act still remained. Even if the alibi were not proved, the accused's explanation might throw such doubt on the evidence for the Crown as to cause the jury to feel doubt about their guilt. In a case where circumstantial evidence was given, the jury must be satisfied that the evidence led only to the conclusion that the accused were guilty, and the Crown had to prove that guilt beyond reasonable doubt. The learned Judge then summarised the evidence, pointing out to the jury that they were the judges of fact, and that they could consider the demeanour and credit of the witnesses. He reminded the jury of such inconsistencies as had been elicited in the cross-examination of Mohamed Haniff, Mohamed Nazir, and Bebe Mariam, particularly the differences between their evidence in Court and their evidence on the depositions. Finally, the learned Judge told the jury that if the truth of the statements of the accused and their evidence were accepted by the jury or left the jury in any doubt, the accused should be acquitted. If that evidence was not accepted, the Crown's case must still be established as he had previously described. If the jury were left in any doubt, it would be their duty to acquit.

9. The jury found both the Appellant and Nabi Baksh guilty of murder, and they were both sentenced to death. p.153

10. The Appellant and Nabi Baksh both appealed to the Court of Criminal Appeal. The Appellant's Notice of Appeal, dated the 14th December, 1956, contained, among others, the following grounds:- p.153 - p.157

(i) The learned trial Judge misdirected the jury as to the law relating to an accessory before the fact.

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(ii) The learned trial Judge misdirected the jury as to the law relating to the defence of an alibi,

(iii) The learned trial Judge misdirected the jury to the effect that the onus of proving an alibi was on the accused.

11. The appeals were argued between the 13th and 21st May, 1957, and the judgment of the Court of Criminal Appeal (Holder, C.J., Stoby and Date, JJ.) was delivered on the 7th June, 1957. Nabi Baksh had asked for, and obtained, leave under the Criminal Appeal Ordinance, s.12 to call fresh evidence, on the ground that it had not been available to the defence at the time of the trial. The further
pp.172 - 179 evidence consisted of the statements made to police-officers by Mohamed Nazir, Mohamed Haniff and Bebe Mariam on the morning of the 12th June, 1956. These statements differed from the evidence given by these witnesses at the trial on important points affecting Nabi Baksh. Neither Mohamed Haniff nor Bebe Mariam had identified Nabi Baksh in their statements, and Mohamed Nazir said nothing in his statement about hearing Mohamed Haniff shout at the two men they saw running away. Haniff and Nazir said in their statements that on entering the kitchen they found Saffie Mohamed still standing by the door, and Nazir said Saffie named the two accused as his assailants. In their evidence, Haniff and Nazir both said they found Saffie lying on the steps. The learned Judges considered that the discrepancies were sufficient to justify ordering a new trial in the case of Nabi Baksh. So far as the Appellant was concerned, entirely different considerations applied, and the learned Judges pointed out that in each of the three statements made to the police the Appellant had been positively identified. If the statements had been in evidence, much that would have been unfavourable to the Appellant would have been introduced, but nothing that would have been favourable to him. Consequently, the jury's verdict against the Appellant would not on this ground be disturbed. The learned Judges, after disposing of three of the grounds of appeal, then considered whether Clare, J. had misdirected the jury on the law relating to an accessory before the fact. No complaint had been made of the direction in law, and therefore it should not be assumed that the jury had acted contrary to that direction and had found evidence of aiding, abetting, etc. which did not exist. Further, the evidence of Bebe Mariam provided some basis for a finding against the Appellant of being an accessory before the fact. Finally, as to the direction of

Clare, J. on the onus of proving the defence of an alibi, the learned Judges held that, looking at the charge as a whole, there had been no misdirection. Although certain particular passages might not have been happily worded, the jury was properly directed in a number of other passages, particularly in two passages at the end of the charge, as to the burden of proof. There could not have been any confusion in the minds of the jury caused by the impugned statements. The remaining grounds of appeal, which raised the point that the learned trial Judge did not adequately put the case for the defence, were dismissed by the learned Judges, who said that the case for the defence had been adequately put to the jury. Accordingly, the Appellant's appeal was dismissed.

12. On the 22nd July, 1957 the Crown entered a nolle prosequi on the charge against Nabi Baksh.

13. The Respondent respectfully submits that the Court of Criminal Appeal was right in declining to order a re-trial of the Appellant in the light of the fresh evidence admitted. The statements of the three witnesses did not materially differ in any matter affecting the Appellant from their evidence at the trial. If the statements had been available at the trial, their effect would not have been of assistance to the Appellant, for there were several passages in the statements which were damaging to him and none which assisted him in establishing his case. The Respondent further submits that the learned Judge directed the jury properly about the law relating to an accessory before the fact, and the jury must be assumed to have understood and applied the direction properly. Further, the learned Judge directed the jury properly about the onus of proof relating to the defence of an alibi. Even if certain passages in his charge were not impeccably phrased, the effect of the charge as a whole was to direct the jury clearly and properly as to the burden of proof to be discharged by the Crown throughout the case.

14. The Respondent respectfully submits that the refusal of the Court of Criminal Appeal to order a re-trial of the Appellant has worked no injustice. The credit of the three witnesses, whose statements were admitted as further evidence, was attacked at the trial, and the learned Judge in his charge reminded the jury of the discrepancies which had been established in cross-examination. It is clear from the verdict of the jury that these discrepancies were not sufficient to cause the jury to doubt the evidence which incriminated the Appellant.

Any discrepancies which might have arisen between the contents of the statements and the evidence given at the trial could not have produced any greater effect regarding the Appellant, for the statements shewed that all three witnesses positively identified him on the very morrow of the crime. The Respondent submits that the learned Judges of the Court of Criminal Appeal, having considered the fresh evidence, exercised their discretion correctly and on proper grounds in deciding that a new trial of the Appellant should not be ordered.

15. The Respondent respectfully submits that the Judgment of the Court of Criminal Appeal of British Guiana was right, and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the further evidence admitted did not affect the case against the Appellant or his conviction:

2. BECAUSE Clare, J. directed the jury rightly about the law relating to an accessory before the fact:

3. BECAUSE Clare, J. directed the jury rightly about the law relating to the onus of proof in a criminal case:

4. BECAUSE of the other reasons set out in the judgment of the Court of Criminal Appeal.

J.G. LE QUESNE

No. 26 of 1957

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA

B E T W E E N

MOHAMED FIAZ BAKSH — Appellant

- and -

THE QUEEN ... — Respondent

CASE FOR THE RESPONDENT

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