

16/1962

IN THE PRIVY COUNCIL

No. 18 of 1961

ON APPEAL FROM

THE FIJI COURT OF APPEAL

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

RAM BALI Appellant

- and -

THE QUEEN Respondent

68231

CASE FOR THE APPELLANT

Record

- 10 1. This is an appeal by special leave of the Judicial Committee, granted on the 26th day of May 1961, from a Judgment of the Fiji Court of Appeal (Adams P, Trainor, J.A. and Knox-Mawer J.A.) dated the 23rd December 1960, which dismissed an appeal from a verdict and sentence, dated 6th July 1960, of the Supreme Court of Fiji (Hammett J. and three assessors) whereby the Appellant was found guilty of attempting to murder Subarmani Pillay and one Muthu Sami Pillay and guilty of wounding one Dharma Reddy. On the two convictions of attempted murder the Appellant was sentenced to nine years imprisonment on each count and on the conviction for wounding to one year's imprisonment, all the sentences to run concurrently.
- 20 2. The information charged the Appellant with all three offences jointly with one Ishaq Ali. Ishaq Ali was tried together with the Appellant. Both accused pleaded not guilty to all three counts of the information and in the course of the trial set up defences of "alibi".
- 30 3. The trial took place before Hammett J. and three assessors between the 21st June and the 6th July 1960. All the assessors accepted the alibi of Ishaq Ali and found Ishaq Ali not guilty in their opinions on all three counts. Two of the assessors accepted the alibi of the Appellant, one assessor did not, and all the assessors found the Appellant not guilty in their opinions on all three counts.
- p.193
pp.180-192.
pp.173, 174.
pp.1-3.
p.167.

Record
p.172.

4. Hammett J. found Ishaq Ali not guilty on all three counts and found the Appellant guilty on all three counts.

5. The Ordinances relating to Criminal Appeals and to trial with Assessors provide:-

COURT OF APPEAL ORDINANCE CAP III

Section 18(1). The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict 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:

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Provided that 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 occurred.

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CRIMINAL PROCEDURE CODE CAP IX

Section 246. Every trial before the Supreme Court in which the accused or one of them or the person against whom the crime or offence has been committed or one of them is a native or of native descent, or of Asiatic origin or descent, shall be with the aid of assessors in lieu of a jury, unless the presiding judge for special reasons to be recorded in the minutes of the Court thinks fit otherwise to order, and upon every such trial the decision of the presiding judge with the aid of such assessors on all matters arising thereupon which in the case of trial by jury would be left to the decision of the jurors shall have the same force and effect as the finding or verdict of a jury thereon.

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Section 306(1). When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his

opinion orally, and shall record such opinion.

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(2) The judge shall then give judgment, but in so doing shall not be bound to conform to the opinions of the assessors.

6. The evidence called by the Crown included the following:-

(a) Subarmani Pillay was 76 years old. He lived with his four sons on a compound at Vitogo on which there were four houses. On the 28th December 1959 at about 9 p.m. his dogs began barking. He opened his door and saw a torch being flashed. He flashed his own torch and saw on the other side of a drain, which was five or six paces from his door, five men, three of whom had guns, but none of whom he recognised. He immediately closed his door and as he did so these men began to fire. They fired four or five shots, but he was not hit. He opened the door enough to put his head through, flashed his torch, and saw the Appellant standing where the five men had been standing, with a gun in his hand ready to fire. The Appellant fired and the shot hit the door and ricocheted and hit him. He did not keep his torch on long on either occasion and was still frightened when he flashed it for the second time. But for the torch light he would not have recognized the Appellant. He knew of no trouble in Vitogo and was not at enmity with the Appellant. He had heard that one Wali Mohammed was an Inspector of Police but had never spoken to him. He bore no grudge against the Appellant after the killing of one Gopal Reddy. When asked to identify the Appellant in the Court below he had hesitated long enough for the interpreter to repeat "is he here?" He had never used glasses not even for reading.

pp. 6-16.

(b) Muthu Kumar Pillay lived in the same compound as his father, Subarmani Pillay, but in a separate house. At about 9 p.m. on the 28th December 1959 he heard gun shots and opened the door of his house and flashed his torch in the direction from which the shots had come. He saw Ishaq Ali whom he had known for five or six years and who was by himself. He switched off his torch and a shot coming from the direction in which Ishaq Ali was standing hit his

p.19, 21-28.

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door. He had said in the lower Court that there appeared to be a second person with Ishaq Ali. In his statements to the Police he had named this other person as being Latchmi Narayan but had done so only because he was excited and frightened. He did not see the Appellant. There was no trouble between himself and the Appellant, but there was trouble between two factions in Vitogo on the one side his brothers and others and the Appellant and others on the other.

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pp.28-32.

(c) Muthu Sami Pillay lived in the same compound as his father, Subarmani Pillay, but in a separate house. When the shooting began he was in his house with Dharma Reddy. He opened the door, flashed his torch, and saw Ishaq Ali with a gun in his hand together with five or six other men whom he could not recognize. He was shot in the left leg. There were more shots fired but not at his house. There was no enmity between him and the Appellant. Up to four or five years before his father had for a long time used glasses for reading.

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pp.32-35.

(d) Dharma Reddy was at the house of Muthu Sami Pillay on the 28th December 1959. At about 9 p.m. he was lying on the floor when he was hit by the shot which also hit Muthu Sami Pillay.

pp.35-44.

(e) Atmaram Maharaj was at the house of one Lalla on the night of the 28th December 1959. At about 9 o'clock he heard shots and saw flashes from the direction of Subarmani Pillay's house. He and Lalla set out to go to that house but when they became aware of people approaching them along the track on which they were walking they hid in a guava bush two or three paces from the track. When these people came opposite to him one of them flashed a torch and it was then that he saw there were four of them. The first man was the Appellant whom he recognized. He had a gun in his right hand. Behind him was another man who had a gun in his left hand, a torch in his right. The third man had a gun in his right hand. He could not recognize the other three men. He was an ex-constable. He went to Subarmani Pillay's house at about midnight that night. There was a Policeman there. He did not tell

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either the Policeman or Subarmani Pillay that he had seen the Appellant. He did not make a report to the Police until the 7th January 1960. He was very frightened of the Appellant. He had nothing against the Appellant and was not a member of the faction opposed to the Appellant. He had only feared the Appellant since the night of the shooting.

- 10 (f) Lalla gave evidence corroborating that given by Atmaram Maharaj and said that it was the man behind the Appellant who flashed the torch. There were intervals of two to three paces between the men. He had made a report to the Police on the same day as Atmaram Maharaj. He had testified against the Appellant in earlier criminal proceedings. He had said in those proceedings that the Appellant had threatened to hit him. There was no trouble between him and the Appellant. He had said in the lower Court that he recognized the Appellant by the flash of the torch, notwithstanding that his statement in the lower Court (Exhibit H) was put to him. pp. 44-51.
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- (g) Munsami Reddy was near the Vitogo River on the day of the shooting at about 8 p.m. He saw three men one of whom looked like the Appellant going in the direction of Vitogo. On the day after the shooting he went to the house of Subarmani Pillay, to whom he was related. He did not tell Subarmani Pillay what he had seen or report to the Police until a week later. It was a very dark night. He was frightened of the Appellant. He had said to the Police and in the lower Court he was sure that it was the Appellant he had seen, but looking back he could not be sure that it was the Appellant. pp.52-59.
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- (h) Subarmani was unemployed, but in December 1959 had been a taxi driver working for a firm in Lautoka. A record was kept of all trips made. On the 28th December 1959 between 9.5 p.m. and 9.35 p.m. he remembered, by refreshing his memory from the relevant record, taking a trip during which he saw a car belonging to one Bechu driven by Bechu's son Hari Krishna. The car crossed the road in front of him and there was nearly an accident. There were two or three passengers in the car but he could not recognize them. He would not be able to pp.62-67.
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remember the date on which he took the trip without reference to the record card. The card contained no record of the near accident. When the Police questioned him about the matter they had the card relating to the 28th December in their possession and for that reason he remembered the date. If the Police had got another card which showed that he did the trip on another day then he would have said that the incident happened on that other day. He had made other trips on the same route during December but could not say how many. He did not make a statement to the Police until the 12th January 1960. He reluctantly agreed it to be possible that it was a few days before the 28th December 1959 that he saw Bechu's car.

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pp.72-80.

- (i) Wali Mohammed, an Assistant Superintendent of Police, went to the house of Bechu at Tuvu at 11.53 p.m. on the 28th December 1959. He there saw the Appellant who said that he had not been out that night but that he had been with Baiju, Ram Khelawan, Baburam Jagai, and a man also named Ram Bali together with Bechu and that they were all drinking yaqona until 11 p.m. He did not check Bechu's car to see if it were cold or hot. The following morning at day-break he went to Subarmani Pillay's house. He found some empty shotgun cartridge shells on the other side of the drain about 12 or 14 paces away from Subarmani Pillay's house. He saw Atmaram and Lalla that morning. He knew Subarmani Pillay well. It was correct that there were two factions in Vitogo and that the faction opposed to the Appellant included the sons of Subarmani Pillay as well as Atmaram and Lalla. He did not know whether Subarmani Pillay himself was included. On the 2nd January 1960 there was a meeting at which he was present with Superintendent Beatt and which 20 to 30 people from Vitogo attended. Bola Subarmani son of Subarmani Pillay was there. There was some talk of Ishaq Ali but he could not recollect if anything was said about the Appellant.

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The learned Judge disallowed cross-examination on behalf of the Appellant designed to show that pressure had been applied to the Police to induce them to institute the prosecution against the Appellant.

- (j) Jai Raj, a Detective Constable, went to the house of Bechu at Tuvu on the 29th December 1959 and saw the Appellant. He told the Appellant he was investigating a case of shooting at Vitogo during the night and asked him if he knew anything about it. The Appellant replied, "I do not know anything about it". When asked where he had been during the night the Appellant replied that he was at the house of Bechu. Record
pp.84-86.
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7. The evidence called on behalf of the Appellant included the following:-
- (a) The Appellant was at Bechu's house on the evening in question. He had a meal at 6.30 p.m. and then went and sat in a shed with Bechu's son Hari Krishna. Bechu followed a little later and while they were there Babu Ram, Ram Khelawan Sardar, Baiju, Jagai and Ram Bali came. They drank yaqona from 7 p.m. to 11 p.m. Bechu's car was there while they were drinking and was not taken out of the yard at any time during that period. He went to bed soon after the others left in the same room as Bechu. Superintendent Wali Mohammed arrived close on midnight. Subarmani Pillay and his sons were the Appellant's enemies as also were Lalla and Atmaram Maharaj as well as Gopal Reddy's family and Govind Reddy. pp.91-102.
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- (b) Ram Khelawan, Jagai, Babu Ram, Bechu and Hari Krishna all gave evidence that there had been a gathering at Bechu's premises that they had attended, and that none had left during the evening. Hari Krishna had never driven at night on the road where Subarmani said he had seen him. He had only been there once and that was in the day time. pp.109-132.
p.132.
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8. Ishaq Ali testified that on the evening of the 28th December 1959 he was at a house in the compound of one Silar Saheb. This was corroborated by Silar Saheb. One Prem Krishna a Police Corporal said that he saw Ishaq Ali at 7.35 p.m. at that house that night and again at 11.35 p.m. pp.103-107.
pp.108, 109,
86-88.
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9. After addresses by both Counsel, Hammett J. summed up to the assessors. He reviewed the respective functions of himself and the assessors and said that while he was not bound by law by the assessors' opinions they would carry great weight pp.134-145,
146-166.

Record with him when he retired to write his judgment. He stated the nature and elements of the charges and then directed them as to the onus of proof saying that it was for the Crown to prove the guilt of the accused beyond reasonable doubt and that if they were left in reasonable doubt as to the guilt of the accused they should express an opinion of not guilty. He outlined the evidence offered by the Crown and by each accused and said that the defence of each was an alibi. Referring to the evidence of Subarmani the taxi-driver and Hari Krishna he said that it seemed the assessors would have to rule out the possibility of a mistake in the date, for if Subarmani could have mistaken it for another date Hari Krishna would have said so. He said that Subarmani was one of the few independent witnesses in the case, that his evidence appeared to have the ring of truth and that if his evidence were accepted the defendant's witnesses could appear to have falsely and deliberately denied that Hari Krishna left Bechu's house in his car that evening. In those circumstances they should reject the Appellant's alibi. He directed the assessors that "The onus of proof rests on the prosecution, but if the defence set up proves conclusively to your satisfaction that the accused were elsewhere at the actual time the offence was committed, the accused are entitled to be acquitted and there would be no need for you to consider further the evidence of the actual shooting". In relation to the defence of Ishaq Ali he directed the assessors "if after considering that evidence as a whole you do accept the second accused's alibi you should express the opinion that he is not guilty and there is no need for you to consider further the evidence against him concerning the actual shooting. If however you do not accept the evidence in support of the second accused's alibi you should go on to consider the evidence of the actual shooting". In concluding his summing up the learned Judge invited the assessors to return their opinions on the following matters, "Firstly: I wish to know whether or not you believe and accept the alibi of each accused in this case. Secondly: I wish to know your opinion as to the guilt or otherwise of each of the accused on each of counts 1, 2 and 3."

pp.148, 149. 10

p. 157. 10

p. 159. 20

p.154. 20

pp. 160, 161. 30

p. 166. 40

p.167. 10. The assessors returned the following opinions:-

1(a) As to the alibi of the first accused.

First Assessor: I do not accept the first accused's alibi.

Second Assessor: I accept the alibi of the first accused.

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Third Assessor: I accept it.

(b) As to the alibi of the second accused.

p. 167.

First Assessor: I accept it.

Second Assessor: I also accept it.

Third Assessor: I accept it.

2. As to the general issue.

10 All three assessors were of the opinion that each of the accused was not guilty on all three counts.

11. In his judgment, Hammett J. briefly outlined the cases for the prosecution and the accused respectively and stated that he had directed himself in accordance with the terms of his summing up to the assessors. He said that the assessors had unanimously expressed their opinion that they accepted the alibi of the second accused and he could see no reason to differ from them. He was impressed by the evidence of Subarmani, the taxi-driver, and held as a fact that on the 28th December 1959 Hari Krishna the son of Bechu drove Bechu's car from the direction of Drasa Farm towards Tuvu at about 9.20 p.m. and he rejected the evidence of the first accused and his witnesses that at that time Hari Krishna was with the first accused and the others at Bechu's house. The divided opinion of the assessors on that issue had caused the learned Judge to consider the matter carefully, but he had no hesitation in reaching his conclusion, and in accepting the evidence of Subramana the taxi-driver and rejecting that of the first accused and his witnesses. Since he did not accept the Appellant's alibi and believed the evidence of Subarmani Pillay and Atmaram and Lalla he did not feel able to accept the opinion of the assessors that the Appellant was not guilty. He found the Appellant guilty on all three counts and sentenced him on the first and second counts to nine years imprisonment and on the third count to one year imprisonment all sentences to run concurrently.

pp.168-172.

p. 170.

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12. On the 23rd December 1960 the Fiji Court of Appeal (Adams P, Trainor J.A., and Knox-Mawer J.A.) dismissed the appeal of the Appellant against his convictions.

pp.180-192.

13. The judgment of the Court of Appeal was read by Trainor J.A. The judgment referred to the opinions of the assessors and to the circumstances of the alleged offences; the Court rejected the suggestion that Hammett J. in the course of his summing up to the assessors had committed himself to premature decisions on questions of fact thus disabling himself from receiving the aid of the assessors thereon, and considered the unreported decision of the Fiji Court of Appeal in Ram Lal v. The Queen (Criminal Appeal No. 3 of 1958). The Court also rejected submissions that Hammett J. had erred in failing to consider the evidence relating to each count separately, in accepting or rejecting the evidence of particular witnesses, and in improperly taking judicial notice of certain facts. As to the disallowance of certain questions in the cross-examination of Wali Mohammed the Court thought it not unlikely that Hammett J. might have acted quite properly in what he did, but that in any event the Appellant had failed to satisfy the Court that the disallowance involved a miscarriage of justice or raised any other ground for allowing the appeal. When dealing with Hammett J.'s direction of the assessors as to the proof of an alibi the Court were forced to the conclusion that had this been a trial by jury it might well have been necessary to quash the conviction; the position might, however, be different in the case of a trial such as this which was conducted by a Judge with the aid of assessors whose opinions were merely advisory; the only detriment to the Appellant lay in the fact that one only of the three assessors might perhaps have been misled in declining to "accept" the Appellant's alibi; it was possible that had a different direction been given, and had the acceptance of the alibi by the assessors been unanimous, the learned Judge might have had to consider a somewhat stronger expression of opinion on the part of the assessors in relation to the alibi; the Court were satisfied however that the learned Judge's decision would not have been influenced in any way if the dissentient assessor had accepted, instead of declining to accept, the alibi. In relation to the submission on behalf of the Appellant that Hammett J. had misdirected himself in

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his judgment by incorporating therein his direction to the assessors, the Court did not think it necessary to decide whether there had been such misdirection as the learned Judge had come emphatically to the affirmative conclusion that the alibi was false; his judgment did not depend in any degree whatsoever upon any question as to the burden of proof, but was governed by his unhesitating acceptance of the evidence for the prosecution in regard to the relevant facts, and by his equally unhesitating rejection of the evidence tendered in support of the alibi. If there had been such misdirection as constituted a "miscarriage of justice" it was certain that "no substantial miscarriage of justice has occurred".

14. The Appellant respectfully submits that the judgment of the Fiji Court of Appeal was wrong and should be reversed. The learned trial Judge was wrong in rejecting out of hand any possibility of mistake on the part of Subramani, the taxi-driver, on whose evidence he largely based his acceptance of the prosecution witnesses and his rejection of those for the Appellant; Subramani clearly had no recollection independent of the record card as to the date of the events whereto his evidence related and had the Police produced to him a record card bearing a different date he would have been equally sure that the events had occurred on that other date. The evidence of the witnesses who identified the Appellant as being present at or near the scene of the shooting was unsatisfactory and should have been rejected. It is submitted that the cross-examination of Wali Mohammed which the learned Judge disallowed might have revealed the reason why Atmaram, Lalla, and Munsami Reddy did not give statements to the Police until after the meeting of the 2nd of January 1960, and that pursuit of this line of cross-examination might have entirely discredited these three witnesses; apart from these witnesses the only other evidence identifying the Appellant was that of Subarmani Pillay whose evidence the learned Judge hesitated to accept without reserve unless corroborated in some material way. It is submitted that it is wrong to assume that the learned judge would have been uninfluenced by an unanimous opinion of the assessors accepting the Appellant's alibi, as the learned Judge himself was clearly of the opinion that a rejection of the alibi was an essential step in the conviction of

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the Appellant. It is submitted that the learned Judge misdirected not only the assessors but himself and gave judgment upon the basis that the issues before him were to be resolved by accepting or rejecting the evidence of the various witnesses; there was no intermediate ground and the accepting of the evidence of the prosecution meant the rejection of the evidence of the Appellant. The Court of Appeal erred in isolating the learned Judge's unhesitating acceptance and rejection of certain witnesses from the process of reasoning upon which such acceptance and rejection was based. It cannot be said in the circumstances that no substantial miscarriage of justice occurred.

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15. The Appellant respectfully submits that his conviction should be quashed and that this appeal should be allowed for the following (amongst other)

R E A S O N S

- (1) BECAUSE there was not sufficient evidence upon which the Appellant could properly be found guilty. 20
- (2) BECAUSE the learned Judge misdirected the assessors and himself.
- (3) BECAUSE the learned Judge erred in accepting and placed undue reliance upon the evidence of certain witnesses and in particular that of Subarmani Reddy.
- (4) BECAUSE the learned Judge erred in disallowing certain questions in the cross-examination of Wali Mohammed. 30
- (5) BECAUSE there has been a substantial miscarriage of justice.

CHRISTOPHER FRENCH.

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