16/1962

IN THE PRIVY COUNCIL No. 18 of 1961

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN :-

RAM BALI ... ... Appellant

- and -

THE QUEEN ... ... Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal from a judgment, dated the 23rd December, 1960, of the Fiji Court of Appeal (Adams, P., Trainor and Knox-Mawer, JJ.A.) dismissing an appeal from a judgment, dated the 6th July, 1960, of the Supreme Court of Fiji (Hammett, J., sitting with three assessors), whereby the Appellant was convicted of two offences of attempted murder and one of wounding and was sentenced to nine years' imprisonment. pp.180-193 pp.168-174

2. The information contained three counts of attempted murder charged against the Appellant and one Ishaq Ali jointly. The charge in the first count was that of the attempted murder of Subramaniam Pillay at Vitogo on the 28th December, 1959. The second and third counts charged the attempted murders of Muthu Sami Pillay and Dharma Reddy respectively at the place and on the date mentioned in the first count. The Appellant was convicted on the first and second counts; on the third count he was found not guilty of attempted murder, but guilty of wounding. He was sentenced to nine years' imprisonment on each of the first two counts and to one year's imprisonment on the third count, all three sentences to run concurrently. Ishaq Ali was acquitted at the trial on all three counts. pp. 1-2

3. The following statutory provisions are relevant to the appeal:

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Criminal Procedure Code (Laws of Fiji, 1955, Cap.9)

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.

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

(3) If the accused person is convicted, the judge shall pass sentence on him according to law.

(4) Nothing in this section shall be read as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish, or, during any such retirement or at any time during the trial, from consultation with one another.

Court of Appeal Ordinance (Laws of Fiji, 1955, Cap.3)

17. (1) A person convicted on a trial held before the Supreme Court of Fiji may appeal under this part of the Ordinance to the Court of Appeal -

(a) against his conviction on any ground of appeal which involves a question of law alone;

(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

(2) .....

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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:

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.

(2) Subject to the special provisions of this Ordinance the Court of Appeal shall, if they allow an appeal against conviction, 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.

(3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just.

4. The trial took place before Hammett, J., sitting with three assessors, on nine days between the 21st June and 6th July, 1960. The case for the Crown was that Subramaniam Pillay and his family lived in a small group of houses in the middle of cane fields at Vitogo. At about 9 p.m. on the 28th December, 1959, a number of men armed with guns came to these houses, and eight or nine shots were fired into the houses. One shot hit and injured Subramaniam Pillay at the door of his house. Another shot was fired at Muthu Sami Pillay, Subramaniam Pillay's son, at the door of his house, but in fact p. 7 pp. 19,21 p. 33

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injured Dharma Reddy, who was inside the house.

p. 7 Subramaniam Pillay flashed a torch just before he was hit, and by the light of the torch recognized the man firing at him, whom he identified as the Appellant. He had known the Appellant for many years. The Appellant was also identified by two witnesses named Atmaram and Lalla.

pp. 35-51 At about 9 p.m. on the 28th December, 1959, these two witnesses were in Lalla's house, which was about 500 or 600 yards from Subramaniam Pillay's house. They heard gun shots, and on looking out of the door saw the flash of guns in the direction of Subramaniam Pillay's house and heard Subramaniam Pillay crying out. They set out through the cane fields in the direction of that house, and on the way they saw somebody coming and hid in the bush beside the path. Four people passed them. The leading man was carrying a gun, and they identified him as the Appellant. They had both known the Appellant for many years.

5. The Appellant put forward an alibi. He said in

p. 92 evidence that he spent the evening of the 28th December, 1959 from about 6.30 p.m. onward, and the following night, at the house of a man named Bechu at Tuvu. Tuvu is about half an hour's journey from

p.82,Ll.20-27 Subramaniam Pillay's house at Vitogo, and the Police found the Appellant at Bechu's house at 11.53 p.m.

p.72,Ll.27-29 on the 28th December, 1959. Five witnesses who said they had been at Bechu's house that evening, including Bechu's son, Hari Krishna, gave evidence that the Appellant had spent the evening there.

p. 127 Hari Krishna said he had not left his father's house that evening between 7 p.m. and 11 p.m.

6. The Crown called two witnesses whose evidence, although given before the defence was opened, was treated as evidence in rebuttal of this alibi. The

pp.52-59 first of these witnesses,Munsami Reddy, said that about 8.30 p.m. on the 28th December, 1959 he was in a field beside the track leading from the road to the bank of the river, on the other side of which Vitogo stands. He saw three men walking towards Vitogo. One of them was like the Appellant, whom

pp. 62-67 he had known for many years. Subramani was a taxi driver, who said he had been driving along the main road near Vitogo at about 9.20 p.m. on the 28th December, 1959. A car which he had recognized as Bechu's car had come from a turning into the main road at that spot. It had been driven by Bechu's

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son, Hari Krishna, and in it there had been two or three passengers whom the witness had not recognized.

7. One of the witnesses for the Crown was an assistant superintendent of police, Wali Mohammed, who had investigated the shooting. In the course of his evidence, he said there had been a meeting in Lautoka on the 2nd January, 1960, attended by 20 or 30 people from Vitogo, at which the shooting had been discussed. The witness had been present at this meeting. Counsel for the Appellant cross-examined him in an attempt to show that the prosecution had been the result of pressure exerted upon the police by Subramaniam Pillay and his family. The witness denied that Subramaniam Pillay or his family had put any pressure upon him, and said that they had not to his knowledge made any complaint about him. Counsel then asked whether, at the meeting on the 2nd January, 1960, a request had been made that someone else should investigate the case instead of Superintendent Wali Mohammed. Counsel for the Crown objected at this point, and the learned Judge disallowed the question.

pp. 72-80
p.77, l.38-p.78, l.42
p.79, Ll.1-23

8. After the evidence had been completed and counsel on both sides had addressed the Court, Hammett, J. charged the assessors. He explained to them the relevant rules of law and summarized the evidence. When dealing with the onus of proof, he told them that the onus rested on the Crown to prove the guilt of the accused beyond reasonable doubt; if, after considering the evidence as a whole, the assessors were left in reasonable doubt as to the guilt of the accused, it would be their duty to express the opinion that the accused were not guilty. When discussing the evidence of alibi, the learned Judge said that, if the defence set up proved conclusively to the satisfaction of the assessors that the accused were elsewhere at the time the offence was committed, the accused would be entitled to be acquitted. Towards the end of his charge, Hammett, J. reminded the assessors not to overlook his direction on the onus of proof. He concluded by asking them to express their opinions on two matters, viz.

(1) whether or not they believed and accepted the alibi of each accused;

(2) as to the guilt or otherwise of each of the accused on each count.

pp.146-166
p.148, l.44-p.149, 5
p.154,Ll.12-17
p.165, Ll.36-38
p.166, Ll.32-38

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p.167 9. After retiring, the assessors expressed their opinions on these matters. The first assessor said he did not accept the Appellant's alibi, the second and third assessors said they did accept it. All three assessors accepted the alibi of Ishaq Ali. All three assessors expressed the opinion that both the Appellant and Ishaq Ali were not guilty on all three counts. The learned Judge then adjourned the proceedings to consider his judgment.

pp.168-172 10. Delivering judgment, Hammett, J. summarized
p.169, Ll.36-37 the evidence, and said he had directed himself in accordance with the terms of his charge to the
p.170, Ll.9-19 assessors. As far as the alibi of Ishaq Ali was concerned, he said he had been impressed by the evidence of the witness at whose house Ishaq Ali said he had been, and it was only by a very narrow margin of time, if at all, that Ishaq Ali could have travelled from that house to Vitogo in time for the shooting. The assessors had unaminously accepted Ishaq Ali's alibi, and the learned Judge
p.170-L.20-p.171, 13 saw no reason to differ from them. Turning to the Appellant's alibi, he said he was not at all favourably impressed by the demeanour of the witnesses supporting it, but the evidence of Subramani the taxi driver, had impressed him. He held as a fact that Hari Krishna had driven Bechu's car away from the neighbourhood of Vitogo at about 9.20 p.m. on the 28th December, 1959, and rejected the evidence of the Appellant and his witnesses that Hari Krishna had been at that time at Bechu's house. Hammett, J. went on to say that he was quite satisfied that the evidence of the Appellant and his witnesses about the movements of Hari Krishna and Bechu's car that evening was false evidence, and he did not accept their evidence concerning the Appellant's alibi at all. It was abundantly clear that it must have been pre-arranged. The divided opinion of the assessors had led him to consider the matter carefully, but he had no hesitation in accepting the evidence of Subramani and rejecting that of the Appellant and his witnesses. He also accepted the evidence of
p.171,Ll.14-44 Munsami Reddy. The learned Judge said that Subramaniam Pillay appeared to him to be telling the truth in identifying the Appellant, and he believed him. He also accepted the evidence of Lalla and Atmaram. He had reconsidered the evidence carefully in view of the opinion of the

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assessors that the Appellant was not guilty. However, since he did not accept the Appellant's alibi and did believe the evidence of Subramaniam Pillay, Atmaram and Lalla, he was not able to accept the assessors' opinion. He did not feel the slightest shadow of doubt of the Appellant's guilt. Hammett, J. said he was abundantly satisfied that the Appellant's intention had been to kill Subramaniam Pillay. He also held that the Appellant had been present when some other person fired at, and wounded, Muthu Sami Pillay with intent to murder him, and the Appellant had acted under a common design with that other person. He therefore found the Appellant guilty on the first two counts. As to the third count, he held there was no evidence of intention to kill Dharma Reddy. He therefore acquitted the Appellant of the attempted murder charged in the third count, but convicted him of wounding Dharma Reddy. Ishaq Ali was acquitted on all three counts. The learned Judge then sentenced the Appellant as set out in paragraph 2 of this case.

p.172,Ll.10-42

p.174

11. The Appellant appealed to the Fiji Court of Appeal. His Notice of Appeal, dated the 1st August, 1960, contained nineteen grounds of appeal, and six more were filed on the 28th November, 1960. Among the points raised in these grounds of appeal were the learned Judge's disallowance of the question during the cross-examination of Superintendent Wali Mohammed, and his direction to the assessors about the onus of proof.

pp.174-178
pp.179-180

12. The judgment of the Court of Appeal (Adams, P., Trainor and Knox-Mawer, JJ.A.) was delivered on the 23rd December, 1960. The learned Judges said that Hammett, J's comments to the assessors on matters of fact had not gone beyond reasonable and proper limits, and they saw no reason for holding that he had failed to take the opinions of the assessors into account. He had not disregarded the criticisms of the evidence of particular witnesses, his reliance on such of the evidence as he had accepted had not been unreasonable, nor had his views been such as could not be supported with regard to the evidence. Turning to the matter of the cross-examination of Superintendent Wali Mohammed, the learned Judges said that counsel for the Appellant had agreed that his argument based on the question disallowed was that that question

pp.180-193

p.181. l.43-p.182 l.38

p.183, l.46-p.184, l.23

pp.185-188

p.187, Ll.14-30

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might have enabled him to show that a particular officer had been appointed to investigate the case instead of Wali Mohammed, and this would have given him the opportunity of cross-examining Atmaram, Lalla, Munsami Reddy and Subramani as to why they had preferred to make statements to one officer and not the other. The learned Judges pointed out that all four witnesses had already given their evidence and been cross-examined before Superintendent Wali Mohammed was called. They thought it not unlikely that Hammett, J. might have acted quite properly in disallowing the question, but, however that might be, they were not satisfied that the disallowing of the question involved a miscarriage of justice or provided any other ground for allowing an appeal under Section 18(1) of the Court of Appeal Ordinance. They were quite satisfied that the admission of the disallowed question, and any further questions which might have followed upon it, would have had no effect upon the decision of the case. The learned Judges then considered the allegation of misdirection as to the onus of proof in respect of the Appellant's alibi. They said that Hammett, J's general direction about onus had been unexceptionable, but he had not addressed himself to a full formulation of the rule about onus applicable to an alibi, and, in their opinion, what he had said about this had been capable of misunderstanding. He had been technically right in saying that conclusive proof of an alibi necessarily led to acquittal, but the learned Judges thought that this statement might have been interpreted by laymen as meaning that an alibi required to be proved conclusively by the defence. Had the trial been a trial by jury, it might, they went on, have been necessary to quash the conviction on this ground. The position might, however, be different in the case of a trial by the judge with the aid of assessors, the opinions of the assessors being merely advisory and the actual decision resting with the judge. Even if the assessors had misunderstood Hammett, J.'s direction, it had not led any of them to consider the Appellant guilty on any count and had not prevented the majority of them from actually accepting his alibi. The only conceivable detriment to the Appellant was that the first assessor might have been misled into declining to "accept" the alibi; but the learned Judges were satisfied that Hammett, J.'s decision would not have been influenced in any way if the first assessor had accepted, instead of declining

p.187, Ll.31-40

p.188, Ll.2-20

p.188, l.21-p.189, l.41

p.189,l.42-p.190, l.38

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to accept, the alibi. It was not necessary to consider whether, when he came to deliver his judgment, Hammett, J. had misdirected himself about the onus of proof. On a careful consideration of the evidence, he had come emphatically to the conclusion that the alibi was false. As regarded the alibi, the judgment did not depend on any question of burden of proof, but simply upon Hammett, J.'s unhesitating acceptance of the evidence of the Crown and rejection of the evidence in support of the alibi. Questions of onus were irrelevant where the evidence carried the mind of the tribunal to a positive conclusion one way or the other. In these circumstances, even if Hammett, J. had misdirected himself about the onus of proof in relation to the alibi, this would not have been a fatal error. Even if the unsatisfactory direction to the assessors had to be regarded as a miscarriage of justice within the meaning of Section 18 of the Court of Appeal Ordinance, it was certain that there had been no substantial miscarriage of justice. The appeal accordingly was dismissed. p.190,l.39-p.191, l.46

13. The Respondent respectfully submits that Hammett, J. was justified in disallowing the question which he did disallow in the cross-examination of Superintendent Wali Mohammed. The matter to which that question was directed was not relevant to any issue in the case. The submission for the Appellant on this point in the Court of Appeal was that the disallowed question might, had it been answered, have enabled counsel to ask Atmaram, Lalla, Munsami Reddy and Subramani why they had preferred to give statements to one police officer rather than another. There was, in the Respondent's submission, nothing to stop counsel putting to these witnesses such questions; but, although all four of them gave evidence before Superintendent Wali Mohammed was called, no attempt was made to put such questions to any of them in cross-examination.

14. Even if the learned Judge failed adequately to direct the assessors about the burden of proof as it affected the alibi, that failure, in the Respondent's respectful submission, did not lead to any miscarriage of justice of which the Appellant can complain. In spite of it, all the assessors expressed the opinion that the Appellant was not guilty. The second and third assessors accepted the evidence of the Appellant's alibi; it is obvious

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that no direction on the burden of proof could have made this finding more favourable to the Appellant. The only thing which can be suggested is that the first assessor, who said he did not accept the Appellant's alibi, might, had the possibility been put to him, have said that the evidence of that alibi raised some doubt in his mind. It would, the Respondent submits, be fanciful to suppose that this might have led Hammett, J. to acquit the Appellant. On account of the divided views of the assessors, the learned Judge reconsidered the matter carefully and rejected the evidence of the Appellant's alibi. It was for the learned Judge ultimately to decide the guilt or innocence of the Appellant upon the evidence. He made up his mind upon it, and it is not to be supposed that a somewhat narrower divergence between the opinions of the assessors would have sufficed to lead him to a different decision.

15. The Respondent respectfully submits that the decision reached by Hammett, J. in his judgment was not influenced by any inadequate direction, about the burden of proof affecting the alibi, which may have been imported into the judgment from the charge to the assessors. The learned Judge expressly found that the evidence given by the Appellant and his witnesses to establish the Appellant's alibi was false. Even if the learned Judge had stated in terms that the question was whether the evidence of an alibi raised any doubt in his mind, the decision must, on this finding, have been the same; for no doubt could be raised by evidence found to be false and pre-arranged.

16. The Respondent respectfully submits that the judgment of the Fiji Court of Appeal was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the question which Hammett, J. disallowed in the cross-examination of Superintendent Wali Mohammed was not relevant to any issue in the case:

2. BECAUSE Hammett, J. found the evidence of the Appellant's alibi to be false:

3. BECAUSE Hammett, J.'s direction to the jury about the burden of proof, even if it was inadequate, did not lead to any injustice:

4. BECAUSE Hammett, J.'s decision was a reasonable decision upon the evidence:

5. BECAUSE of the other reasons given in the judgment of the Court of Appeal.

J. G. LE QUESNE

No. 18 of 1961

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N:

RAM BALI — Appellant

- and -

THE QUEEN — Respondent

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