~~P.C.~~

~~G.M.C.A.~~ IN THE PRIVY COUNCIL

Judgment 26/1966

Appeal No. 4 of 1966

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

B E T W E E N:

1. MAWAZ KHAN alias FAZAL KARIM

2. AMANAT KHAN — Appellants

v.

THE QUEEN — Respondent

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10 C A S E FOR THE APPELLANTS — Record

1. This is an appeal in forma pauperis by Special Leave of the Judicial Committee from the Judgment of the Court of Appeal of the Supreme Court of Hong Kong (Hogan C.J., Rigby J.A. with Briggs J.A. dissenting) dated the 23rd day of August, 1965, whereby the said Court dismissed the Appellants' appeal against their conviction and sentence to death by the Supreme Court of Hong Kong (Huggins J. sitting with a 20 Jury) on the 5th day of May, 1965, for the offence of murder. — p.584 pp.546-584

2. The principal question raised in this appeal is whether the learned trial judge misdirected the jury in telling them that in certain circumstances they are entitled to use the unsworn statements, both oral and written, made by each accused in the absence of the other, not only as evidence against the maker of that statement but also against his co-accused.

30 3. The Appellants were charged that on the 10th day of February, 1965, they murdered Said Afzal. The evidence disclosed that on the morning of the

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11th February, 1965, the deceased's body was found lying on the 4th floor of a room of a partially constructed flat; that the body was that of a Pakistani watchman aged 49; and that there were no less than 49 wounds on his body, pointing to the fact that he had been savagely stabbed and hacked to death. Medical evidence estimated that the time of death was about 10 p.m. on the previous night.

4. The case for the prosecution rested on circumstantial evidence as follows:-

pp.414-416

(a) A witness named Farid Khan testified that in 1958 in his village of Haider in West Pakistan he had seen the deceased stab and kill one Wassal Khan. At that time the witness said that the Appellants were residing in the same village. The deceased was sentenced to imprisonment for five years which sentence he had served before coming to Hong Kong where he had been for about one year at the time of his death. The Police found a photograph of a girl among the possessions of the 2nd Appellant on the back of which the name "Wassal Khan" and the words "West Pakistan" were written. The suggestion of the prosecution was that a possible motive for the killing of the deceased was revenge for his having killed Wassal Khan in 1958 .

(b) The blood group of the deceased was group 'B'; that of the 1st Appellant group 'O' and that of the 2nd Appellant group 'A'. Blood stains found at the scene of the crime were of group 'B' and group 'C'. Group 'O' blood stains were also found on the shoes and clothing of the 1st Appellant. However, Group 'B' and Group 'O' blood stains were found on the shoes and part of the clothing of the 2nd Appellant.

(c) A small oval shaped metal ring was found at the scene of the crime. A photograph taken of the 2nd Appellant about a month before the incident shows him wearing a small ring on his signet finger, although he was not wearing that ring when interviewed by the Police after the incident.

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(d) The police found a number of shoe impressions at the scene of the crime, three of which were sufficiently clear for photographs of them to be taken. One of these impressions corresponded with the rubber heel of the shoes the deceased was wearing. The premises occupied by the Appellants were searched and their belongings taken away. Amongst the belongings of the 2nd Appellant was a pair of rubber heeled shoes with the trade mark "Biltrite" on its heels. A comparison of the heel impressions found at the scene of the crime, with the heel impressions of each of the shoes found in the possession of the 2nd Appellant showed six similar points of comparison including the impression "Biltrite" marked on the floor where the body was found. Furthermore, an enlarged photographic comparison of a 3rd heel impression found at the scene of the crime with the right heel impression of shoes taken from the 1st Appellant showed five points of similarity including an impression on the floor corresponding in pattern and position with a nail hammered into the right heel of this pair belonging to the 1st Appellant.

(e) When the Police interviewed the two Appellants on the 12th February at about 11.30 a.m., they found that they both had injuries on their hands, and further, that the 2nd Appellant had a small cut on the left side of his forehead. When asked how these injuries had been caused they answered that their injuries were caused through a fight they had had between them.

5. In addition to the above circumstantial evidence the prosecution relied on statements which were made by the two Appellants, not in the presence of each other, when they were taken to the police station.

pp.586-591

The 1st Appellant in his statement said that at about 7 p.m. of the evening of the 10th February he and the 2nd Appellant went to a bar called the Ocean Bar, they consumed a lot of drink at the bar, and when they left he was carrying a bottle of beer which he had bought. He then had a quarrel with the 2nd Appellant, because the 2nd Appellant demanded the bottle of beer and attacked him with a small pen knife. He retaliated by striking the 2nd Appellant in the face with his fist

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and he suggested that he might have hit him with the bottle. He said that it was in this way that he received the injuries to his hands. He said that he knew the deceased and had known him in Pakistan. When shown the ring found near the scene of the crime, he said that he had never seen it before. He described the clothes he wore on the night in question including the shoes which he had on, but these shoes could not have made the prints found by the Police at the scene of the crime.

pp.591-594

In his statement the 2nd Appellant gave a similar version of his movements on the night in question. He said that he and the 1st Appellant went to a bar the name of which he could not remember. They left the bar at about 9 p.m. and the 1st Appellant took away with him a bottle of beer which he, the 2nd Appellant had purchased. They had an argument because he wanted the beer as he had paid for it. A fight began and he took out a knife and the 1st Appellant injured the fingers of his hand when he tried to grasp the knife. The bottle of beer fell on the ground and broke and the 2nd Appellant fell to the ground and while rolling he cut his little finger on the broken bottle. The 2nd Appellant also said that he knew the deceased who was a fellow villager, but when shown the ring found near the scene of the crime, he stated that he had never seen it before.

The case for the prosecution was that the alibi put forward in the statements made individually by both Appellants both to account for their presence elsewhere at the time of the incident and to account for the injuries found on their hands was deliberately false and intentionally fabricated. The prosecution sought to prove this by, firstly calling the staff of the Ocean Bar who deposed that no Pakistanis were customers in their bar on the night in question and, secondly, by referring to the contents of the statements themselves to show that the Appellants were lying.

6 Counsel for the Appellants at the trial, when making his final address to the jury,

pointed out to them that a statement made by one accused in the absence of another was only admissible as against the maker of the statement and not as against the other accused. However, he was stopped by the judge who indicated that he would direct the jury that the statements could be compared the one with the other, in order to decide whether there was evidence to support the contention of the Crown that the two accused had concocted a joint story.

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p.491

7. The learned judge in his summing up to the jury directed them as follows in regard to the statements made by the Appellants:-

pp.505-506

> "A statement which is made by an accused person in the absence of the other is not evidence against the other. It is evidence against the maker of the statement but against him only. The principle, of course, I think is obvious that the second man has no opportunity to deny what is said by the maker of the statement, if he is not there. If he is there and does not contradict that may be some evidence against him, but it is otherwise when he is not there, and consequently the stories which appear in the statements of these two accused persons are not evidence against the other. But my direction to you is this. The Crown's case here is not that these statements are true and that what one says ought to be considered as evidence of what actually happened. What the Crown say is that these statements have been shown to be a tissue of lies and that they disclose an attempt to fabricate a joint story. Now, Members of the Jury, if you come to that conclusion then the fabrication of a joint story would be evidence against both. It would be evidence that they had co-operated after the alleged crime".

And again:-

p.509

> "The allegation by the Crown is that these accused have lied. It is for you to decide whether you are satisfied that they have lied, but you must go further than that. You have to ask yourselves why did they lie?

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Learned counsel have suggested a variety of reasons why these men should have told lies. Among them was the possibility that they wished to shield others. Accused persons sometimes tell lies out of sheer panic. In either of these two cases, of course, the mere fact of lies is of no significance whatever. The question is, (if ....I assume that you are satisfied that they did lie) did they lie out of a sense of guilt? If, Members of the Jury, you are satisfied that they lied and that they lied out of a sense of guilt then that is a matter which you must properly take into account in coming to your conclusion in thise case. If that was not the reason that they lied (assuming always they did lie) then the lies are of no significance in this case."

Again:-

pp.520-521

"Finally, the Crown say there are statements before you which are false and that the making of these false statements indicates a sense of guilt by each of these accused persons. Very briefly let me recapitulate the points that were made which, it is suggested, show that these are false statements. First it is said that the accused .. the statements say the accused were drunk; but Counsel for the Crown says if they were drunk they appear to have remembered a remarkable amount of detail. As against that, Members of the Jury, don't overlook the fact that the first accused said that quite early in the proceedings they sobered up and realised the difficulties they were in with the No.1 at the Mandarin Hotel and that they then took certain precautions to hide the fight from him. It is for you to say whether you think the allegation that they were drunk and the detail which appears in the statements is of any significance. They both say in their statements that they themselves bought the bottle of

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beer. The 1st accused says he bought it: the 2nd accused says he bought it. There is a direct conflict. The 1st accused says that he hit the 2nd accused with his fist quite hard in the face. No sign of any injury was found when the doctor examined the 2nd accused. I have already referred to the boil which the 1st accused refers to and which the doctors say they did not see. The two accused in their statements do not agree as to the method of travel to Wanchai. One says they walked, the other says they went by tram. The 1st accused says there were many people in the bar ..... If the accused went to the Ocean Bar, do you accept the evidence of all the members of the staff, who were called one after another to say that business was slack and they did not see the accused or any Pakistani in the bar on that evening? They say that with unanimous voice. Do you accept it? Of course if there is a possibility that the accused made a mistake in the naming of the bar and that they went somewhere else and that their statement is true, then there is no question of lie."

And finally:-

"And finally, as to the statements, it was I think suggested that the suggestion that the accused would take out this tiny pen-knife which he had to attack the 1st accused in the manner which he suggest is improbable. I leave that to you." p.522

8. It is respectfully submitted that the direction of the learned trial judge that a statement which is made by an accused person in the absence of the other is not evidence against that other was nullified by the further direction and invitation to the jury that they were entitled to compare the statements and if they came to the conclusion that those two statements were false, then that would be evidence that they had co-operated after the alleged crime and jointly concocted the story out of a sense of guilt. It is respectfully submitted that this is a gross misdirection and

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the correct rule is that a statement made in the absence of an accused person by one of his co-accused is not and cannot be evidence against him.

9. The Appellant appealed to the Court of Appeal on several grounds, the principal ground being the learned judge's direction to the jury in regard to the statements made by them. The Court dismissed the appeal by a

pp.546-557 majority decision. Hogan C.J. held that since the statements were relevant to the charge against the Appellants and since they were not excluded by the "Hearsay" rule or the "Best Evidence" rule, they were admissible.

pp.557-570 Rigby J.A. took the view that whether a statement made by one accused in the absence of the other constituted evidence against that other, depended on whether that statement was "Hearsay" evidence. He held that since in this case the statements were not put in to prove the truth of their contents, they were not inadmissible, and the learned judge's direction to the jury as to the manner in which they could consider the statements was right and proper. In a

pp.570-584 dissenting judgment Briggs J.A. held that the general rule is that statements made by persons who are not called as witnesses are inadmissible, and whilst there were exceptions to that general rule, the present case did not fall within one of those exceptions.

He continued:-

pp.582-584 "If statements of this nature were allowed in evidence it will be difficult to know where to draw the line. For many statements are a mixture of truth and fiction; in such a case would the correct procedure be to separate the wheat from the tares and only permit the tares to be produced as evidence.

Again, if the first appellant in the present case had been tried alone and convicted, could his statement be given in evidence in the subsequent separate trial of the second appellant if he himself were

not called as a witness? I think not. But if I understood him rightly, Counsel for the Crown did not suggest that this would be possible, on the ground that it would be admitting hearsay evidence. It is difficult to see why if such evidence is not admissible against the second appellant in a separate trial, it is admissible against him in a joint trial. If such evidence is hearsay in one trial I should have thought it was hearsay in the other trial.

I do not think it can be doubted that the statement made by each appellant in this case implicated the other appellant. In my view the trial judge gave the correct direction to the jury when he warned them that the statements were only evidence against the actual person who made them and not evidence against the other appellant.

However, he negatived this warning when he invited the jury to examine the statements in the way that he did. It is unnecessary for me to repeat what he said. It is written above. In effect he said that the statements were admissible not to prove their contents but to show that the appellants were liars and perhaps lied from a sense of guilt.

In R. v. Rhodes a similar situation arose. There the correct warning was given to the jury but it was negatived by further directions from the judge. The facts of that case are not on all fours with the facts of this case but the manner of the summing-up is very like.

As I have said these statements played a great part in the trial and were very fully dealt with in the summing-up. They were an essential part of the case for the prosecution. I am of the opinion that they were wrongly admitted in the form in which they were admitted. Apart from the statements the other evidence is not very strong against the appellants. And I am unable to reach the conclusion that if the jury had been properly directed as to this matter they must have inevitably reached the conclusion they did."

10. It is respectfully submitted that this appeal should be allowed for the following

among other

REASONS

1. BECAUSE the learned trial judge misdirected the jury in telling them that they were entitled to compare the statements of the two accused made in the absence of each other for the purpose of ascertaining whether the two accused had concocted a joint story.

2. BECAUSE the general rule is that a statement made in the absence of an accused person by one of his co-accused is not and cannot be evidence against him.

3. BECAUSE this general rule applied to the statements made by the two accused in this case and did not form an exception to the general rule.

4. BECAUSE the admission of the statements in the form suggested by the learned trial judge was highly prejudicial and resulted in a miscarriage of justice.

5. BECAUSE the judgment of Hogan C.J., and Rigby J.A., are wrong and the judgment of Briggs J.A., is right for the reasons stated therein.

EUGENE COTRAN.

No. 4 of 1966

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BETWEEN:

1. MAWAZ KHAN alias
FAZAL KARIM

2. AMANAT KHAN

Petitioners

- and -

THE QUEEN

Respondent

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