~~P.C.~~
~~GM6.G.2~~

Judgment
26, 1966

IN THE PRIVY COUNCIL 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 and

(2) AMANAT KHAN Appellants

- and -

THE QUEEN Respondent

C A S E FOR THE RESPONDENT

Record

1. This is an appeal from a judgment of the Supreme Court of Hong Kong in its appellate jurisdiction (Hogan, C.J. and Rigby, J., Briggs, J. dissenting) dated the 23rd August, 1965, dismissing the appeals of both Appellants against their conviction by the Supreme Court in its criminal jurisdiction (Huggins, J. and a jury) on the 5th May, 1965, for the offence of murder, in respect of which they were sentenced to death. p.546 pp.557 & 570 pp.529 & 530

2. The indictment charged both Appellants with the murder of Said Afzal on the 10th February, 1965. Their trial occupied seven days between the 26th April and the 5th May, 1965. p.1 pp.2-530

3. Evidence given for the Crown included the following:

(a) On the morning of the 11th February, 1965, the body of Said Afzal, a Pakistani nightwatchman, was found lying in a pool of blood in a room on the fourth floor of a partially completed block of flats situated at 36B, Kennedy Road, Hong Kong. The deceased had sustained no less than 49 p.42 p.278

Record

p.277 cut and stab wounds, clearly indicating that he had been savagely stabbed to death and his body mutilated. The time of death was about 10.00 p.m. on the 10th February.

pp.280, 281 282 & 283 (b) Human blood stains were found at the scene of the crime belonging to group 'B' and group 'O' respectively.

p.277 pp.294 & 296 (c) The deceased was of blood group 'B', the first Appellant is of group 'O' and the second Appellant of group 'A'.

pp.48 & 63 (d) The first Appellant when arrested on the 12th February, 1965 was found to have extensive recent cut wounds on his hands and a recent cut wound over his left eye.

(e) The second Appellant when arrested on the 12th February, 1965 was found to have a recent cut wound on his left little finger and recent minor cuts on the ball of his right thumb.

p.48 (f) Three heel impressions were found in pools of blood at the scene of the crime.

p.592 p.368 (g) The heel patterns of a pair of shoes admitted by the second Appellant in a written statement made by him to the police to have been his only pair of shoes which he wore on the night of the crime, bore six and three points of similarity respectively to two of the heel impressions found at the scene of the crime. One of the points of similarity in each case was the trade mark 'Biltrite'.

p.586 pp.369 & 370 (h) The heel pattern of one of a pair of shoes, admitted by the first Appellant in a written statement made by him to the police to be one of the only two pairs of shoes he owned at the time, bore five points of similarity with a heel impression found at the scene of the crime.

p.285 (i) The left shoe of the second Appellant bore spots and smears of group 'B' human blood.

pp.285 & 286 (j) The right and left shoes of the pair belonging to the first Appellant of which one

Record

bore five points of similarity to a heel impression found at the scene of the crime, although the first Appellant in his written statement denied wearing them on the night of the crime, were stained with group 'O' human blood.

(k) A pair of trousers and a jacket owned by the second Appellant bore group 'B' and group 'O' human blood. p.287

(l) The second Appellant visited Dr. Kong Sau-yui on the 11th February 1965 with a cut on his left little finger, and stated that he had sustained the injury whilst cutting meat. p.396 l.13 & 14

(m) The first Appellant visited Dr. Kenneth Charles Searle on the 9th February, 1965 for treatment of conjunctivitis of the lefteye. Dr. Searle could not recall seeing any cut over the first Appellant's left eye when he attended him, nor did he see a boil over his left eye at that time. The first Appellant in his written statement to the police alleged that he had, at the time of the making thereof, a boil over his left eye. p.395 l.8

(n) A finger ring was found at the scene of the crime. A photograph of the second Appellant taken on the 27th November, 1964 shows him wearing what appears to be the same ring. At the time of his arrest the second Appellant was not wearing a ring, nor was any ring found amongst his possessions after a careful search thereof by the police. p.42

(o) Two knives were found under a box in a technical room of the Mandarin Hotel on the 7th April, 1965. Both Appellants at the time of their arrest were employed as security guards at the Mandarin Hotel. pp.227 & 228

(p) A photograph was found in the belongings of the second Appellant which depicts on its reverse side a drawing resembling a man in a coffin-like shape, accompanied by the words "Wassal Khan West Pakistan". p.252

(q) Farid Khan testified that the deceased p.414

Record

stabbed Wassal Khan to death at a well outside the village of Haider in West Pakistan in 1958. The deceased was tried and found guilty of the murder of Wassal Khan and was sentenced to five years' imprisonment. At the time of the murder Wassal Khan both Appellants were in the village of Haider, West Pakistan.

pp.52, 53, 54, 55, 56 & 586

(r) The first Appellant made a written statement to the police on the 12th February, 1965. He said that on the 10th February, 1965 he had left the Mandarin Hotel with the second Appellant at about 7 p.m.. They had travelled by tram to a spot near the Southern Playground, and then had walked to the Ocean bar, entering the bar at about 7.30. He did not know how long they had stayed there, but their bill had amounted to $25, for whisky. Before leaving the bar he had bought a small bottle of beer, which he had carried when they left. They had set out to walk back to the Hotel, and at a point opposite the dockyard the second Appellant had asked for the bottle of beer to drink. He had refused, whereupon the second Appellant had attacked him with a knife and tried to take the bottle by force. The first Appellant had received injuries to his hands. He had struck the second Appellant on the right side of his face, and had tried to hit him with the bottle. The bottle had hit a wall and got broken, so he had thrown it away. They had both been drunk, but at this point had sobered up, and realized that they had better settle the matter between themselves, for fear of getting into trouble at the hotel for drinking and fighting. They had returned to the hotel, he (the first Appellant) had gone to bed, and the second Appellant had gone on duty. He (the first Appellant) and the deceased had come from neighbouring villages in Pakistan; they had gone to school together. He had last seen the deceased on the 5th February, 1965, when they had shaken hands and exchanged greetings. He had never been to 36B, Kennedy Road.

pp 134, 135 & 592

(s) The second Appellant also made a written statement to the police on the 12th February, 1965. He said that on the 10th February, 1965 he

Record

had left the Mandarin Hotel with the first Appellant at 8 p.m.. They had walked to a bar, the name of which he did not remember, in Lockhart Road and had a few drinks. They had left the bar at about 9 p.m.. He had bought a bottle of beer, and the first Appellant had taken it with him. When, on their way back, they had walked as far as a spot near the Fire Brigade Building, he had wanted the bottle of beer back, but the first Appellant had refused to give it to him. They had started to fight, he had taken out a knife, and the first Appellant had received injuries on the palms of his hands. The bottle of beer had fallen on the ground and broken. A piece of the broken glass had injured his left little finger, as they were both rolling on the ground. They had made up the quarrel and returned to the hotel, arriving there at about 10 p.m.. He had then changed his clothes, and gone on duty at midnight. On the 11th February, at about 1.30 p.m., he had gone to see a Chinese doctor near the Hotel, to get his finger treated. He and the deceased had belonged to the same village. He had known the deceased fairly well, as a casual friend.

(t) Five persons employed at the Ocean Bar testified that on the night of the crime business had been slack, and they had not seen either of the Appellants, nor any Pakistanis or Indians. — pp.405, 406, 407, 408, 409, 410, 411 & 412

(u) Both Appellants showed the police the scene of their alleged fight. Each Appellant pointed out a different place. The police could not find any pieces of broken bottle at either of the places indicated by the Appellants, nor in the vicinity thereof. The road did not appear to have been recently swept. — pp.191, 192, 247 & 248

(v) The penknife alleged by both Appellants in their written statements to have been used by the Second Appellant in their fight was examined and no blood stains were found thereon. — p.287

(w) Both Appellants received treatment for the cuts on their hands from the nurse at the Mandarin Hotel surgery on the 11th February, 1965. — pp.401 & 402

Record

4. No evidence was given on behalf of either of the Appellants.

p.505 1.43-47

5. In the course of his charge to the jury, Huggins, J. said that a statement made by an accused person in the absence of another accused person was not evidence against the other, but only against the maker of the statement. If, however, the jury came to the conclusion that the statements of the two Appellants were a

p.506 1.14-16

tissue of lies and disclosed an attempt to fabricate a joint story, that fabrication would

p.509 1.4-7

be evidence against both. The learned Judge also told the jury that they would have to consider whether the Appellants had lied, and,

p.509 1.16-19

if so, why they had lied. If they were satisfied that the Appellants had lied out of a sense of guilt, it would be proper for them to take that into account in coming to their conclusion. In another passage, Huggins, J. said the Crown's

p.520 1.10-14

case was that the statements were false, and the making of these false statements indicated a sense of guilt on the part of each Appellant.

pp.520, 521 & 522

He pointed out certain inconsistencies between the two statements and between the statements and other pieces of evidence. The Crown, he said,

p.523 1.4-9

asked the jury to find that after the deceased's death both Appellants told lies of a similar nature, which suggested that they cooked up a common story to cover their common guilt.

pp.529 & 530

6. The jury found both Appellants guilty of murder, and they were sentenced to death.

pp.531-546
p.533 1.21-27 and p.541 1.4-11

7. Both the Appellants applied for leave to appeal against their convictions. They did so on a number of grounds, one of which was that the learned Judge had erred in ruling that a statement made by one accused person in the absence of another could be used for any purpose, or in any way, against the other.

pp.546-584

8. The applications came before the Supreme Court sitting in its appellate jurisdiction, and judgment was delivered on the 23rd August, 1965. The appeals were dismissed by a majority (Hogan, C.J. and Rigby, J., Briggs, J. dissenting).

9. Hogan, C.J. said it had been argued that the statement of each Appellant should have been ruled out as evidence against the other by virtue of the hearsay rule, or the best evidence rule, or a further rule allegedly established by R. v. Rudd (1948), 32 Cr. App. R. 138, 140. The learned Chief Justice first considered R. v. Rudd and held that the judgment in that case did not establish any separate rule, but merely described the result following, in the great majority of cases, from the application of the hearsay rule. The hearsay rule prohibited evidence of a statement made to a witness by another person, if the object of the evidence was to establish the truth of what was contained in the statement. If, however, the object of the evidence was to establish, not the truth of the statement, but the fact that the statement was made, evidence of the statement was not hearsay and was admissible. The object of the Crown in introducing the statements of the Appellants had not been to establish the truth of the statements, but to ask the jury to hold that the assertions in the statements were false and to draw certain inferences from the fact that those false statements had been made. Evidence of the statements, therefore, had not been inadmissible as hearsay.

Record
p.547 l.40-47 and p.548 l.1
p.549 l.34-38
p.551 l.1-11
p.551 l.20-29

10. The suggestion that the statements should have been excluded by virtue of the best evidence rule was, Hogan, C.J. said, untenable. There could be no better evidence of a statement than the testimony of someone who heard it or the production of the original document containing it. The Crown had also contended that the statements were admissible as declarations of co-conspirators in furtherance of a common design, and the authorities gave a considerable measure of support to the view that evidence could be admissible on that ground even if the indictment contained no conspiracy count. The making of the two statements, and their falsity, had been relevant to the charge against each Appellant, and they were not excluded by the hearsay rule or the best evidence rule or any other principle. The learned Chief Justice then dealt with certain other grounds, which are

p.551 l.43-45
p.552 l.1-3
p.552 l.31-46
p.553 l.19-24
pp.553 l.27 to p.556 l.42 & 43

Record

not now put forward, and concluded that there was no reason for interfering with the decisions of the jury.

p.557 l.26 to p.565 l.21 — 11. Rigby, J. summarized the evidence and the submissions made on behalf of the Appellants about the admissibility of the two statements. The term 'hearsay', he said, was properly confined to unsworn statements used to prove the truth of the facts declared. The statements of the Appellants had each consisted of an alibi, and the Crown had sought to shew that each, individually made, was untrue. If the jury were satisfied that each statement was false, it was proper that they should be invited to compare the contents of the two, in order to consider whether the two Appellants had put their heads together to provide a false alibi. If they thought the statements had been jointly fabricated, they were entitled to ask themselves why the Appellants should have wished to make false statements. There had been no question of the statement of one Appellant being put in against the other to prove the truth of its contents. The direction to the jury about the manner in which they should consider the two statements had accordingly been correct. Rigby, J. referred to the other grounds then put forward, and concluded that the appeal should be dismissed.

p.565 l.43-45
p.568 l.27-33
p.569 l.6-40

p.571 l.1 to p.579 l.15 — 12. Briggs, J. dissented. He summarized the evidence, and the grounds upon which Huggins, J.'s direction about the two statements had been supported by the Crown. He did not think the statement of each Appellant could be admitted against the other as having been made in furtherance of a common design; because the common design, if such there had been, had been a design to commit murder, and the statements, in his view, could not be said to be in furtherance of that. Apart from indictments charging conspiracy, the correct principle, Briggs, J. thought, was laid down in R. v Rudd. The general rule, in his view, was that statements made by persons not called as witnesses were inadmissible; but there were certain exceptions, one being the case in which it was proposed to establish

p.581 l.2-6
p.581 l.14
p.582 l.20

Record

the fact that the statement had been made. In the present case, the learned Judge said, the statements had not been admitted for that purpose, but to negative an alibi and prove that the Appellants had lied to the police. If the first Appellant had been tried separately, his statement could not, Briggs, J. thought, have been given in evidence in the subsequent trial of the second Appellant if the first Appellant had not himself been called as a witness; so it was difficult to see why that statement should be admissible against the second Appellant in a joint trial. The learned Judge thought it could not be doubted that each Appellant's statement implicated the other. In his view, Huggins, J. had correctly warned the jury that each statement was evidence only against the person who made it, but had negatived this warning by inviting the jury to examine the statements in the way he did. Briggs, J. thought, therefore, that the appeal should be allowed.

p.582 l.34
p.582 l.35
p.583 l.4-9
p.583 l.13-16
p.583 l.20-22
p.583 l.22-30
p.584 l.12 & 13

13. The Respondent respectfully submits that Huggins, J.'s direction to the jury about the use which they might make of the statements was perfectly correct. He told them that the story appearing in the statement of each Appellant was not evidence against the other; but, if they thought the statements were false and shewed an attempt to fabricate a joint story, 'then the fabrication of a joint story would be evidence against both'. The jury were thus invited to consider the evidence of one Appellant's statement against the other simply as evidence that the statement had been made, and to infer from the fact that both statements had been made that the Appellants had tried jointly to fabricate false evidence. Thus used, the evidence of both statements was relevant to the case against each Appellant, and the admission of both statements against each Appellant did not offend against any rule of law.

14. Briggs, J., in the respectful submission of the Respondent, misapprehended both the effect of the two statements and the purpose for which the Crown relied upon them. In particular,

Record

that the learned Judge was mistaken in saying that 'the statement made by each Appellant in this case implicated the other Appellant'; and 'those statements were not received in evidence to establish the fact that the statements were made,' but 'for the purpose of negativing an alibi'.

15. The Respondent respectfully submits that the decision of the Supreme Court of Hong Kong in its appellate jurisdiction was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (among other)

R E A S O N S

1. BECAUSE the admissibility against each Appellant of evidence of a statement made in his absence by the other depended upon the purpose for which it was sought to use the evidence:

2. BECAUSE evidence of each Appellant's statement was admissible against the other to shew that the statement had been made:

3. BECAUSE evidence of each Appellant's statement was admissible against the other to shew joint fabrication by the Appellants of false evidence:

4. BECAUSE evidence of each Appellant's statement was admissible against the other as having been made in furtherance of a common design:

5. BECAUSE there was no misdirection of the jury:

6. BECAUSE of the other reasons given by Hogan, C.J. and Rigby, J.:

7. BECAUSE no reasonable jury properly directed could have arrived at a verdict different from that actually returned.

J.G. LE QUESNE
N. MACDOUGALL

No. 4 of 1966

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF HONG KONG

B E T W E E N :

(1) MAWAZ KHAN alias FAZAL KARIM and

(2) AMANAT KHAN

Appellants

- and -

THE QUEEN Respondent

C A S E FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand,
London, W.C.2.

Solicitors for the Respondent.

58728
Fos. 60