Privy Council Appeal No. 4 of 1966

Mawaz Khan alias Fazal Karim and Amanat Khan – – – *Appellants*

v.

The Queen – – – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER 1966.

Present at the Hearing:

LORD HODSON

LORD PEARCE

LORD PEARSON

[*Delivered by* LORD HODSON]

This is an appeal from a judgment of the Supreme Court of Hong Kong (Hogan C. J., Rigby A. J. and Briggs A. J.) dated the 23rd August 1965, dismissing the appeals of both appellants against their conviction for murder by the Supreme Court sitting in its criminal jurisdiction with a jury, on the 5th May 1965. Both were sentenced to death: each made statements, but neither gave evidence in the witness-box.

The main ground of appeal is that the learned trial judge 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. To admit such a statement would, it is said, violate the "hearsay" rule.

Before considering the facts of this case it is convenient to state what is meant by the "hearsay" rule for contravention of the rule makes evidence inadmissible.

The accepted text books on the Law of evidence are at one in saying that such statements are inadmissible to prove truth of the matters stated. Wigmore on evidence 3rd edition Vol. 6 page 178 puts the matter clearly in this way:—

> "The prohibition of the hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted."

The Rule has been stated to the same effect by their Lordships in the case of *Subramanian v. Public Prosecutor* [1956] 1 W.L.R. 965 at page 970:—

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

The appellants were charged with the murder of one Said Afzal on the 10th February 1965. He was a Pakistani watchman and his body was found on the following morning with no less than 49 wounds in it,

pointing to the fact that he had been savagely stabbed and hacked to death.

The case for the prosecution rested on circumstantial evidence which may be summarised as follows:—

(*a*) One 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 a time when the appellants were living in the same village. The deceased had served a term of imprisonment before coming to Hong Kong and among the possessions of the 2nd Appellant was found a photograph of a girl on the back of which was written the name "Wassal Khan" and the words "West Pakistan". A possible motive for the killing of the deceased was revenge for his having killed Wassal Khan.

(*b*) Some evidence of bloodstains on the clothing and shoes of the 2nd Appellant: this was of Group B and Group O; the blood group of the deceased was Group B, that of the 1st Appellant Group O. These stains could not be accounted for by the statements of the two appellants that they sustained injuries in a fight with one another which would account for the blood.

(*c*) A small ring was found at the scene of the crime; a photograph of the 2nd Appellant taken about a month before the incident shows him wearing a small ring on his signet finger, although he was not wearing that ring when interviewing the police after the incident.

(*d*) At the scene of the crime the police found a number of shoe impressions three of which were clear enough to be photographed. One impression corresponded with the rubber heel of the shoes the deceased was wearing. Among the belongings of the 2nd Appellant was found a pair of rubber heeled shoes. A comparison of a heel impression found at the scene of the crime showed six similar points of comparison with one of this pair of shoes. The heels of these shoes were identical with one another.

In the same way five points of similarity were to be seen by comparing a third heel impression found at the scene of the crime with the right heel impression of shoes taken from the 1st Appellant. Of particular significance was an impression on the floor corresponding with a nail hammered into the right heel of the pair of shoes belonging to the 1st Appellant. In that the shoes of two persons were involved there was thus a double coincidence.

This circumstantial evidence connected both appellants with the scene of the crime, but the Crown relied strongly upon the fact that each of the appellants had in their respective statements sought to set up a joint alibi which was demonstrated to be false.

Each of the appellants separately told the police that they were at a place called the Ocean Club on the night in question and endeavoured to explain their injuries as having been sustained in a fight between them and as having no connection with the killing of the deceased. Many of the details of their statements were contradicted by the evidence of witnesses. The statement of each appellant was used against him, the judge directing the jury:—

> "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."

No complaint was made of this direction, but the learned judge went on to say:—

> "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."

It was submitted that the direction of the learned judge that a statement made by one accused person in the absence of the other is not evidence against that other was nullified by the further direction that the jury were entitled to compare the statements and if they came to the conclusion that they were false that would be evidence that they had co-operated after the alleged crime and jointly concocted the story out of a sense of guilt.

Their Lordships are of opinion that this submission, which appealed to one member of the Court of Appeal and no doubt impressed the Chief Justice and Rigby A. J., when they made reference to the importance of the question involved, ought not to be sustained.

Their Lordships agree with Hogan C. J. and Rigby A. J. in accepting the generality of the proposition maintained by the text writers and to be found in *Subramaniam's* case that a statement is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made. Not only therefore can the statements of each appellant be used against each appellant individually, as the learned judge directed, but they can without any breach of the hearsay rule, be used, not for the purpose of establishing the truth of the assertions contained therein but for the purpose of asking the jury to hold the assertions false and to draw inferences from their falsity.

The statements were relevant as tending to show that the makers were acting in concert and that such action indicated a common guilt. This is a factor to be taken into account in conjunction with the circumstantial evidence to which reference has been made in determining the guilt or innocence of the accused persons. Telling lies to the police when enquiries are being made about a crime is of great significance but as Oliver J. pointed out in *Haydon Wattam's* case, 36 Cr. App. R. page 72 at page 76:—

> "There must be something more than the telling of lies to the police before a man is convicted of any crime, let alone murder."

It was contended before your Lordships that even if the statements were admissible to show the concoction of a false story by the appellants, there was insufficient weight in the circumstantial evidence to call for an answer, hence the telling of lies carried no weight. Their Lordshps do not accept this contention. There was weight in the circumstantial evidence which called for an explanation. The concerted attempt to give a false explanation by way of alibi was evidence of guilt to be taken into consideration with the other evidence given in the case. It is an additional factor to be taken into consideration with all other relevant evidence. It is in their Lordships opinion immaterial that the appellants were not charged with conspiracy. No such charge would be likely to be added to the charge of murder. What is found against the appellants is that the statements were concocted for the purpose of escaping from the consequences of their crime and if false are admissible to show guilt. As has been said:

> "The recourse to falsehood leads fairly to an inference of guilt."

The misapprehension which arose in the case and caused Briggs, A. J. to take the view that the statement could not be put to the use which the Crown proposed was based on the judgment of Humphreys J. in *R. v. Rudd* 32 Cr. App. R. page 138 when he said at page 140:—

> "Ever since this Court was established it has been the invariable rule to state the law in the same way—that, while a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant."

The question there was whether the evidence given by an accused person in the witness-box was admissible against his co-accused. The answer was in the affirmative and the statement made by the learned judge about statements outside the trial was only made to show the distinction between this and sworn evidence. The sweeping statement about statements made outside the trial is of course generally true but there are exceptions to it as for example if the statements are part of the *res gestae* or made by a combination in furtherance of a common design. The conclusion in the case however lends no support to the contention put forward by the appellants.

Their Lordships are of opinion that there was no misdirection of the jury and will accordingly humbly advise Her Majesty that the Appeal be dismissed.

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In the Privy Council

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AND AMANAT KHAN

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DELIVERED BY
LORD HODSON

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