Privy Council Appeal No. 21 *of* 1948

Noor Mohamed - - - - - - - - - - - *Appellant*

v.

The King - - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF BRITISH GUIANA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH NOVEMBER, 1948

Present at the Hearing:

LORD UTHWATT
LORD DU PARCQ
LORD OAKSEY
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD DU PARCQ]

After hearing the arguments of counsel for the appellant and for the Crown, their Lordships announced that they would humbly advise His Majesty that this appeal should be allowed and the conviction of the appellant quashed, and would state their reasons for tendering this advice at a later date. Those reasons are set out in this judgment.

The appellant was tried before the Supreme Court of British Guiana on a charge of murdering a woman commonly known, and referred to during the trial, as Ayesha. The jury found him guilty, and he was sentenced to death. Evidence was admitted at the trial to which objection was taken by the appellant's counsel on the ground that it tended to show that the appellant had murdered another woman, his wife Gooriah. It was said on behalf of the appellant that the evidence ought to be excluded as being prejudicial to him and irrelevant. For the Crown it was contended, on grounds which it will be necessary to state later in this judgment, that the circumstances attending the two deaths made evidence concerning the earlier of them relevant to the charge. It was properly conceded at their Lordships' Board on behalf of the Crown that, if the evidence were found to have been wrongly admitted, it would follow, according to the settled principles by which their Lordships are guided in criminal cases, that the appeal must be allowed.

The evidence which related directly to the charge of murdering Ayesha may be summarised as follows. The appellant's wife Gooriah died on the 17th May, 1944. At some time in that year Ayesha had left her husband and gone to live with him. They lived together as man and wife, and there was evidence that in the year 1945 they went through a ceremony of marriage according to the rites of the Mohammedan religion, although Ayesha's husband was still living. After the first few weeks of their union, their life together had not been happy. It was

said that the appellant had often beaten Ayesha, and had sometimes driven her from his house. On one occasion she had lived apart from him for two weeks, though she seems to have continued to feel affection for him, and to have been anxious to return to him. The earlier quarrels were due to the fact that the appellant suspected and accused her of infidelity. Later, he made a different charge against her. On a day in August, 1946, a neighbour named Mildred James, who employed Ayesha to do some dress-making, witnessed an assault on her by the appellant. She tried to rescue Ayesha, whereupon the appellant said, according to the witness, "Through this woman people got to say I kill my first wife. She must go away." Ayesha refused to go, and the appellant was alleged to have threatened her with the words, "If you can't go alive you got to go dead." There was also evidence of a quarrel and a threat by the appellant to kill Ayesha on the night of the 16th September, 1946. On the morning of the following day, Ayesha died of poisoning by potassium cyanide.

It must here be stated that the appellant is a goldsmith by trade and used a solution of potassium cyanide in the ordinary course of his business. He kept it in a press or cupboard. This cupboard was usually locked, but the padlock in use was defective, and it was not difficult to force the cupboard door. Potassium cyanide is a poison which acts quickly ; and causes loss of consciousness in a few seconds.

Ayesha was said to have been seen alive at or after 9 o'clock in the morning of the 17th September. A witness called for the Crown swore that he had then seen her go with the appellant into the house in which they lived. This evidence was inconsistent with statements made by the appellant. According to him, his daughter, a child of fourteen, had awakened him shortly before 9.30 a.m. from a sleep which followed a drinking bout, and had told him that Ayesha "was frothing". He said that he had found the woman unconscious. After some delay, he had reported this to a chemist in the neighbourhood. It appeared that he had told this chemist that he had gone to fetch a doctor, but had not found him at home. He was advised to take his "wife" to hospital and did so between 9 and 10 a.m. The appellant, at the request of the assistant dispenser there, had produced a sheet on which Ayesha had vomited. There was a stain on it which the appellant said smelled like gold solution. The assistant dispenser said he could smell nothing. Ayesha was given a stimulant by the assistant dispenser, and the appellant was advised to take her to the doctor. At 11 o'clock the appellant arrived at a doctor's surgery, bringing with him what the doctor found to be the dead body of Ayesha.

A post-mortem examination showed without doubt that death was due to cyanide poisoning. It also indicated that there had been exaggeration in some of the evidence as to the more recent assaults on Ayesha by the appellant, since, although some "bruise blood" was found near the right kidney, there were no external signs of violence.

This evidence having been given, the question was argued, in the absence of the jury, whether evidence tendered as to the death of Gooriah should be admitted. The learned Judge, after an elaborate argument, decided to admit it. At this stage the defence had put forward no theory as to the manner in which the poison had been taken by, or administered to, Ayesha. Later, in his final address to the jury, counsel for the defence suggested that the facts were consistent with suicide.

Counsel for the appellant at their Lordships' bar laid stress on the fact that, at the trial, counsel for the Crown in the course of his submission that the evidence complained of was admissible, stated, according to the note of his submission, that the appellant had said to Ayesha, "I will get rid of you as I got rid of my first wife." This sentence certainly occurs in the notes, but their Lordships think that it must have been intended and understood as a gloss or comment on the facts proved rather than an allegation of fact. If it had been intended as a quotation from a statement made by the appellant it would have been easy for

the appellant's counsel to point out, what indeed the learned Judge would himself have observed, that there was no evidence that he had used the words imputed to him.

Their Lordships do not find it necessary to set out in any detail the evidence relating to Gooriah's death. It is sufficient to quote in full paragraph 7 of the respondent's case which is as follows :—

"The prosecution then called a great deal of evidence relating to Gooriah's death, including evidence of the following facts :

(1) The appellant believed Gooriah to be unfaithful and used to beat her.

(2) The appellant had said of Gooriah to Ayesha's husband 'Buddy ah got a mind to poison this bitch.'

(3) Gooriah on the day of her death, the 17th May, 1944, went to the nearby house of the appellant's brother-in-law, carrying a piece of folded white paper wrapped in her hand. She had had toothache and the appellant was overheard to say to her 'You must drink this it will do you good.'

(4) Shortly after a boy ran for the appellant shouting 'Pawah Gooriah dead.' The appellant went to the house and summoned Dr. Besson, who was passing.

(5) The accused went to the window and called a boy to bring him a paper, similar to that which Gooriah had had in her hand, from the yard. The boy brought the paper which the appellant handed to Dr. Besson saying it smelt of cyanide. The doctor found that the paper had no substance on it and had no smell. A little later the appellant brought the doctor an enamel cup saying 'This cup smells of cyanide.' The cup was empty and had no smell.

(6) Gooriah died, and Dr. Besson's examination showed her death to be consistent with potassium cyanide poisoning. On analysis 2 grains of potassium cyanide were found in Gooriah's stomach. Dr. Besson stated that her death was caused by cyanide poisoning."

Their Lordships now turn to the important question of law raised by this appeal. By the terms of the Criminal Law (Procedure) Ordinance in force in British Guiana the practice and procedure there are in general the same as the practice and procedure in force in criminal causes in the High Court of Justice and Courts of Assize in England. There are no special provisions in the Ordinance to which their Lordships find it necessary to refer.

The first comment to be made on the evidence under review is that it plainly tended to show that the appellant had been guilty of a criminal act which was not the act with which he was charged. In *Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57, 65, Lord Herschell, then Lord Chancellor, delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." In 1934 this principle was said by Lord Sankey, then Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country." (*Maxwell* v. *The Director of Public Prosecutions* [1935] A.C. 309, at pp. 317, 320.)

The second principle stated in *Makin's* case was that "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the

jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The statement of this latter principle has given rise to some discussion. A plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged, and if the Crown were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied and perhaps could not be the subject of rational dispute, to adduce evidence of a previous crime, it is manifest that the protection afforded by the " jealously guarded " principle first enunciated would be gravely impaired.

This aspect of the matter was considered by the House of Lords in *Thompson* v. *The King* [1918] A.C. 221. Their Lordships need not allude to the facts of that case. It is enough to say that the evidence there admitted was held to be relevant as one of the indicia by which the accused man's identity with the person who had committed the crime could be established. (See per Lord Parker of Waddington, at p. 231.) In the words of Lord Atkinson it rebutted the defence of an alibi which otherwise would have been open (pp. 230-1). Nothing of the kind can be suggested in the present case. The value of the case for the present purpose is that Lord Sumner dealt particularly with the difficulty to which their Lordships have referred, and stated his conclusion as follows: " Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Their Lordships respectfully agree with what they conceive to be the spirit and intention of Lord Sumner's words, and wish to say nothing to detract from their value. On principle, however, and with due regard to subsequent authority, their Lordships think that one qualification of the rule laid down by Lord Sumner must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying " Let the prosecution prove its case, if it can ", and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be " crediting the accused with a fancy defence " if they sought to adduce such evidence. It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

Their Lordships have considered with care the question whether the evidence now in question can be said to be relevant to any issue in the case. They have asked themselves, adopting the language of Lord Sumner in *Thompson's* case, at p. 236, " What exactly does this purport

to prove? ". At the trial the learned counsel for the Crown, when submitting that the evidence should be admitted, referred to the possible defences of accident and suicide. In his address to the jury he said, according to the note, that the evidence was led " to meet the defence of suicide ", and pointed out that the circumstances surrounding the deaths of the two women " followed a similar pattern." At their Lordships' bar it was submitted that this similarity of circumstances would lead to the inference that the appellant administered poison to Ayesha with felonious intent.

There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell in *Makin's* case, " that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried ", and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground. Assuming that it is consistent with the evidence relating to the death of Ayesha that she took her own life, or that she took poison accidentally (one of which assumptions must be made for the purposes of the Crown's argument at the trial) there is nothing in the circumstances of Gooriah's death to negative these possible views. Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide. As to the argument from similarity of circumstances, it seems on analysis to amount to no more than this, that if the appellant murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason. If the appellant were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah in similar circumstances might well have been admissible. There was, however, no direct evidence in either case that the appellant had administered the poison. It is true that in the case of Gooriah there was evidence from which it might be inferred that he persuaded her to take the poison by a trick, but this evidence cannot properly be used to found an inference that a similar trick was used to deceive Ayesha, and so to fill a gap in the available evidence. The evidence which was properly adduced as to Ayesha shows her to have been acquainted, as were, it may be supposed, most of the inhabitants of the village in which the appellant lived, with the fact that suspicion rested on him in respect of Gooriah's death, and the theory that Ayesha was deceived into taking poison by a similar ruse to that which is supposed to have succeeded with Gooriah seems to their Lordships to rest on an improbable surmise. The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha. In these circumstances the verdict cannot stand, notwithstanding the care with which the learned Judge summed up the case, and the fairness with which the trial was conducted in all other respects.

Their Lordships are aware that their statement of the principles to be applied to such a case as this, and of the right way of applying them, may not accord with some at least of the dicta contained in a recent decision of the Court of Criminal Appeal in England, to which counsel rightly directed their attention. In *Rex* v. *Sims* [1946] 1 K.B. 531 the

Lord Chief Justice, delivering judgment, expressed the opinion of the Court as to the proper method of approaching a question concerning the admissibility of evidence of other offences than that charged in these words:—

> "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view."

With all due deference to the Court of Criminal Appeal, their Lordships feel bound to say that they are not convinced that the method of approach which it thus approved has any advantage over that which it rejects as incorrect. The expression "logically probative" may be understood to include much evidence which English law deems to be irrelevant. Logicians are not bound by the rules of evidence which guide English courts, and theories of probability sometimes cause a clash of philosophic opinion. It would no doubt be wrong to interpret the observations of the Court of Criminal Appeal as meaning that evidence can sometimes be admitted merely for the reason that it shows a propensity in the accused to commit crimes of the nature of that with which he is charged. It cannot be supposed that the Court intended to lay down a proposition which would conflict with principles which have been laid down, or approved, by the House of Lords. It may be assumed that it is still true to say, as Lord Sumner said thirty years ago: "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime." (*Thompson* v. *The King*, at p. 232.) If all that the Court meant to say was that evidence of the kind specified in the first of the principles stated in *Makin's* case may be admitted if it is relevant for other reasons, then the dictum has no novelty. It does seem, however, that the passage quoted was intended at least to bear the meaning that evidence ought to be admitted which is in any way relevant to a matter which can be said to be in issue, however technically, between the Crown and the accused, because a little later in the judgment the following passage occurs:—

> "In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent."

The Court of Criminal Appeal would thus appear to have rejected altogether the opinion of Lord Sumner which, although, as their Lordships have said, they believe that it must in one respect be somewhat qualified, has hitherto been generally accepted as a governing principle. Recent dicta of the Court of Criminal Appeal, though carrying great weight, do not necessarily out-weigh earlier dicta in the House of Lords or the Court of Crown Cases Reserved, or in the Court of Criminal Appeal itself, and if their Lordships have correctly understood those which they have quoted, they can only regard them as in some degree inconsistent with settled principle. Their Lordships think that a passage from the judgment of Kennedy, J. (as he then was) in the well-known case of *R.* v. *Bond* [1906] 2 K.B. 389, at p. 398, may well be quoted in this connection:—

> "If, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the

> credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions."

Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in *Maxwell's* case (*ubi sup.*, at p. 320) when he said " It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions. They must add, however, that though they have been unwilling to adopt the approach to the problem which the Court of Criminal Appeal has recommended, they of course refrain from expressing any opinion as to the propriety of the actual decision in *Sims's* case. It is unnecessary, and therefore undesirable, that they should do so.

(63564) Wt. 8062—31 110 2/49 D.L. G338

In the Privy Council

NOOR MOHAMED

v.

THE KING

DELIVERED BY LORD DU PARCQ

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1949