

16, 1959

UNIVERSITY OF LONDON  
INS.  
- 9 MAR 1960  
25 RUSSELL SQUARE  
LONDON, W.C.1.

ON APPEAL FROM THE FIJI COURT OF APPEAL

E T W E E N :

BHARAT SON OF DORSAMY

Appellant

-- and --

THE QUEEN

Respondent

55516

C A S E   F O R   T H E   R E S P O N D E N T

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10 1. This is an appeal in forma pauperis by Special Leave from an Order of the Fiji Court of Appeal (Sir George Finlay, Acting President, and Sir Joseph Stanton, Judge of the Appeal) dated the 16th day of February 1959 dismissing the Appellant's appeal against his conviction on the 18th day of October 1958 in the Supreme Court of Fiji (Mr. Justice Lowe Chief Justice sitting with five assessors) of murder wherefor the Appellant was sentenced to death.

20 2. On the 30th day of May 1958 the Appellant was charged in the Magistrates Court at Ba in the Western District of Fiji with two offences. The first offence was the murder of Chanan Singh on the 29th day of May 1958, and the second offence was the murder of Govindappa on the same date. On the 9th day of July 1958 the Appellant was committed by the said Magistrates Court to the said Supreme Court for trial for both the said offences. On the 7th day of October 1958 the trial of the Appellant commenced in the said Supreme Court for the first offence, namely, the murder of Chanan Singh.

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30 3. On the night of the 29th May 1958 the dead body of Chanan Singh had been found on or near a road leading to and not far from the Tavua Hotel. At the same time the dead body of Govindappa had been found lying near Chanan Singh's body. In the Committal Proceedings before the Magistrates Court evidence had been taken on depositions about the injuries found on Govindappa's body. At the trial during the opening address by Counsel for the Prosecution the learned Chief Justice indicated that

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in his view it would be undesirable that evidence should be given of Govindappa's body or injuries. As a result Prosecuting Counsel did not lead any such evidence. Counsel for the Appellant who was, of course, aware of the evidence on the depositions raised no objection to the view expressed by the learned Chief Justice and took no steps to bring out any of this evidence in the course of his cross-examination. In view of the complaints later made on behalf of the Appellant that he was prejudiced by the alleged exclusion of this evidence, the Respondent submits that the learned Chief Justice clearly took the step described above in what he considered to be the interests of the Appellant as he thought that the evidence relating to Govindappa's injuries might be prejudicial to the Appellant. There was nothing in the action of the learned Chief Justice to prevent the Counsel for the Appellant asking that any or all such evidence should be put before the Court or from leading any part of such evidence in cross-examination. There is no reason to suppose that the learned Chief Justice would have excluded any of this evidence if Counsel for the Appellant had indicated that he wished it to be given.

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4. The evidence called by the Prosecution at the trial is summarised in paragraphs 5 to 12 below.

5. At the material time the Appellant was employed as a Barman at the aforesaid Tavua Hotel. Between 8 p.m. and 9 p.m. on the 29th May 1958 the Appellant was on duty in the bar of the Hotel. During this period Govindappa and Chanan Singh were together drinking in the bar and there was evidence of some slight altercation during this period between them and the Appellant. When the Appellant left the bar at about 9 p.m. Chanan Singh and Govindappa remained in the bar and then left at about 9.25 p.m. Neither of them was ever thereafter seen alive. Sometime between 9.30 and 10.15 p.m. on the same evening Peniana Nai a housegirl at the Hotel found the bodies of two men and reported this to the Police at Tavua Police Station.

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6. When the police arrived at the scene they found Chanan Singh's body on the road and another body on the grass verge. For reasons given above no evidence was given about the other body except that the man was dead, but the evidence was that Chanan Singh was found dead lying on his back with

p.76

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stab wounds in the front of his neck and blood on the back of his neck and on the ground directly under his neck. There was no sign of any blood scattered around the area. There was also found near the bodies an envelope with a Suva postmark addressed to the Appellant containing three photographs a piece of cream coloured nylon cloth which appeared to be the pocket of a shirt, and two shirt buttons. A black stick broken in two pieces was found near the other body.

p.59.1.40

p.41.1.23

p.41.1.30

p.51.1.3

p.59.1.28

7. These objects, particularly the envelope, led the police to start their enquiries by questioning the Appellant. He was first seen by the police in his room at the Hotel. He was asked to show the police the clothes he was wearing. (One of the police officers who was called to the scene had noticed that the Appellant earlier in the evening was wearing trousers and a cream coloured nylon shirt). The Appellant pointed out a blue shirt and a pair of shorts. He was then asked to show the police the grey trousers which he sometimes wore in the bar. He produced a pair of khaki trousers. The police officer said that these were not the ones he wanted and the Appellant said they were the only ones he had. The Appellant was asked to produce his shoes and these were taken by the police. The Appellant was then taken to the Police Station.

p.41.1.9

p.55.1.20

p.55.1.25

p.55.1.26

p.51.1.8

8. At the Police Station the Appellant was seen by Inspector Raj Deo. Among other things, the Appellant told the Inspector that he had not left the compound of the Hotel all night, that he did not know who killed Govindappa and Chanan Singh, that he had never before seen the stick found at the scene of the crime. When asked whether he had received a letter from Suva, he said that he had and that he had burnt the envelope. He was taken to his room and the Inspector found three negatives which appeared to be negatives of the photographs found in the envelope. Back at the Police Station these negatives were shown to the Appellant and he admitted that one of the photographs was his, but did not give any explanation of how it came to be found near the bodies. The Inspector noticed some scratches on the Appellant and asked him how they were caused. The Appellant then said "I did it". He was cautioned and then said "That photo has probably been in my pocket. I did it in mistake". He said the knife was in his room and he produced it to the police. It was on the lintel over the bathroom door. He was arrested and charged with

p.59.1.43

p.60.1.40

p.60.1.38

p.61.1.5

p.61.1.48

p.69.1.34

p.70.1.2

p.70.1.4

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70.1.20

murder and said "I know that". The Appellant then pointed out to the police a cream coloured nylon shirt and grey trousers which had been hidden under a corner of the hotel building. Back again at the Police Station the Appellant was asked if he wished to say anything further and after caution he said "I have said everything".

p.81.1.16

9. A Police Officer also gave evidence to the effect that on the morning after the crime the Appellant said "I did it and I have told the truth and I do not want a lawyer to defend myself". On the same morning the Appellant

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p.11.1.40

was seen by the Manager of the Hotel and told him that he did not want any legal advice as he had already made a statement.

pp.46-50

10. Evidence was given by the Prosecution connecting the Appellant with the shirt pocket and photographs found near the bodies, and showing that the envelope also found in the same place was sent to the Appellant. The Government Pathologist gave evidence that human blood was found on the Appellant's knife, cream coloured nylon shirt, and grey trousers. There was also blood on the toe of the left shoe but the shoes were found to be very clean.

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p.82.1.35

11. Dr. Hawley who had carried out a post-mortem on the body of Chanan Singh said in evidence that there were 3 wounds in his neck. The first was a stab wound on the right side of the neck which had cut the carotid artery. This would have caused death almost certainly did so. The second wound was an incised wound 2½ inches long across the midline. It went right across the front of the neck cutting both the windpipe and the gullet and exposing the 5th vertabrae. This wound would also have caused death. The third wound was also an incised wound and ran down from the corner of the jaw under the chin to the midline. This wound might also have been fatal. It could not have been inflicted with one cut. It was done with a sawing movement. The deceased would have become unconscious very rapidly, after receiving either of the first two wounds within a very few seconds and death would have resulted within a minute. The Doctor said he could not imagine these three wounds being received in a struggle: two of them were far too disabling for that. The doctor further said that if the deceased were found with his head in a pool of blood and blood on and under

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p.85.1.21

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his neck and there was no other blood round about then he thought that there could be no doubt that the deceased was in that position particularly when he got the stab wound and that there would have been a spurt of blood immediately. The Doctor also said that the Appellant had a withered left leg which would affect his movement only to a very little extent but would affect his stamina. Further the doctor said that from the alcohol found in the deceased's body his reaction and his alertness would almost certainly have been impaired but not grossly so. Finally the Doctor said that on the 30th May he examined the Appellant and noticed no injuries. On the 3rd June he examined him again and noticed the scratches seen by the Police.

p.84.1.46

p.84.1.15

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12. The Appellant gave evidence. He described the quarrel between himself and the two deceased men in the Bar. He said that after he had gone off-duty he went for a walk in the course of the walk he met Chanan Singh and Govindappa. Govindappa said to him "You were showing a lot of cunning in the hotel. I will fix you up now" and then attacked him with a stick. The Appellant said that he got hold of the stick as Govindappa tried to deliver the first blow. A struggle ensued and the stick fell to the ground. He said he wanted to run away but Chanan Singh got hold of him and then Govindappa got hold of his throat. He struggled to free himself. He was helpless and his state of mind was upset. He took out his pocket knife and attacked. He was so excited that he did not know what he was doing. He could not say how often he struck with the knife or whom he hit. But after a while he found himself free and he got up and ran towards the hotel. In the course of cross-examination he said he did not fall down and then that he did not remember and he might have fallen down.

p.86.1.20

p.87.1.8

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89.1.33

13. Under section 306 of the Criminal Procedure Code the Judge at a criminal trial "may sum up the evidence for the prosecution and the defence to the assessors and shall then require each of them to state his opinion orally". In this case the learned Chief Justice summed up the case to the Assessors.

pp.93-101

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14. In the course of his summing up the learned Chief Justice told the Assessors that "Before self-defence can be established it must be shown that the accused retreated as far as humanly possible

p.96.1.15

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- p.96.1.20 before he has justification in saving his life by killing another". He told the Assessors that in this case there was no such evidence. In effect self-defence was left by the learned Chief Justice to the Assessors for their consideration but the learned Chief Justice said that they would "probably think it wise to discard any question of that".
15. On the question of manslaughter the learned Chief Justice said : 10
- p.99.1.44-  
p.100.1.6 "It has been suggested that you might think the accused guilty of manslaughter. Before you could be justified in thinking that you would have to come to the conclusion that the accused's story in that particular respect is true. You would have to be satisfied beyond reasonable doubt that it might be that the Crown were wrong as to that aspect, and you would have to believe that the accused received such provocation that he was justified in resisting force by using force. I think you might find it difficult to believe that such was the case" 20
16. The learned Chief Justice then referred to some matters on the evidence which he suggested might indicate that the Appellant's evidence was untrue and then added :
- p.100.1.9 "Briefly I think those are the facts which will influence you in making up your minds, but it is true that you must always be careful to give the benefit of every reasonable doubt to the accused. Reasonable doubt has been properly explained by Counsel" 30
- p.101.1.26 Finally, before asking the Assessors to retire the learned Chief Justice told them to "remember that the Accused was charged with having killed Chanan Singh intentionally deliberately with malice aforethought"
- p.93.1.15 17. Each of the five assessors gave his opinion that the Appellant was guilty of murder. The learned Chief Justice who was not bound to conform with the opinion of the Assessors then gave judgment. 40
- p.105.1.20 18. In the course of his judgment the learned Chief Justice said "from the manner in which the Accused gave evidence I was satisfied that he was not telling

10 the truth". The learned Chief Justice then referred to the lies told by the Appellant to the police and his other actions in covering up all traces showing his connection with the crime, for example, the hiding of his clothes and of his knife and the cleaning of his shoes. He held that the nature of the wounds did not suggest a blind slashing or stabbing and he accepted the Doctor's evidence that Chanan Singh was lying on his back when he was stabbed. He said that he thought the Crown's case was conclusive and that "the actions and statements of the accused on the fatal night were so indicative of guilt (that) the whole trial points in one direction quite clearly". He further held that "the attack was carried out silently". Finally he said "I am satisfied without any doubt whatever that the opinions of the Assessors were correct".

p.105.1.20  
p.105.1.37  
p.106.1.27  
p.106.1.48  
p.107.1.2

20 19. The Respondent submits that from the judgment of the learned Chief Justice it is clear that he accepted without any reasonable doubt that the case for the Prosecution against the Appellant was the truth and rejected altogether the Appellant's evidence.

30 20. The Appellant appealed against his conviction to the Fiji Court of Appeal. The learned Chief Justice is by virtue of section 4 of the Court of Appeal Ordinance (Cap. 3 of the Laws of Fiji) President of the Court of Appeal. The other members of the Court of Appeal were for reasons which are immaterial to this appeal unable to sit to hear the Appeal. Therefore under sections 1(i) 4(1) and 6(i) of the Court of Appeal Ordinance, Sir George Finlay and Sir Joseph Stanton both of whom had held high Judicial Office in New Zealand and were retired were summoned as Judges of the Court of Appeal. Further it being impracticable in the opinion of the Chief Justice to summon a Court of three members the two judges referred to above constituted the Court of Appeal for the purpose of hearing this Appeal under section 6(2) of the Court of Appeal Ordinance.

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21. The learned Judges of the Court having heard arguments on behalf of the Appellant and the Crown were divided in opinion on the question raised by the Appeal, namely, whether the appeal against conviction should be allowed, Sir George Finlay who acted as President of the Court, being of opinion that the Appeal against conviction should be allowed but that a new trial should be ordered, and Sir Joseph

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Stanton being of the opinion that the appeal should be dismissed.

22. Section 6 (3) of the Court of Appeal Ordinance provides :

"In all appeals and applications brought before the Court of Appeal the determination shall be according to the opinion of the majority. If on the hearing of an appeal or application the Court of Appeal is equally divided the appeal or application as the case may be shall be dismissed".

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In the premises the Court of Appeal being equally divided in opinion on the question whether the appeal should be allowed made no determination on that question and by operation of section 6 (3) the appeal was dismissed.

23. The learned judges of Appeal left Fiji without communicating to the parties in open Court the fact that they were divided in opinion. This was communicated to the parties in the following manner. Two documents each one giving the opinion of one of the Judges and being signed by him, were read out by the Registrar of the Court in open Court and in the presence of Counsel for both parties, and copies thereof were made available to the parties. Before reading the said documents the Registrar asked Counsel whether they had any objection to this course. Both Counsel stated they did not wish to object but referred to the provisions of section 30 of the Court of Appeal Ordinance and stated it might be that the proposed procedure did not comply with that section and that, if so, it might not be open to them to consent to a failure to comply with the section. The Registrar then read the opinion of both the Judges.

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24. Section 30 of the Court of Appeal Ordinance provides :

"In an Appeal under this part of the Ordinance" (that is Part 3 which deals with criminal appeals) "the judgment of the Court of Appeal shall be pronounced by the senior judge present at such appeal, or by such other judge present as the senior judge may direct, and no judgment with respect to the determination of any question shall be separately pronounced by any other judge of such Court:

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Provided that when in the opinion of such Court the appeal involves a question of law on which it is convenient that separate judgments be pronounced separate judgments shall be pronounced by the judges present at the appeal".

10 25. The Respondent submits that it is clear from the wording of the above section that it applies only to a judgment with respect to the determination of the question raised by the appeal. In this case the Court of Appeal being equally divided did not determine the question raised by the appeal, namely, whether the appeal should be allowed and the conviction quashed and therefore gave no judgment on that question and the appeal was by operation of law dismissed. The provisions of section 30 did not therefore apply to the procedure.

20 26. If, contrary to the Respondent's submission above, the provisions of section 30 apply to this case the Respondent will submit that the provisions of the said section were complied with. The judgment of the senior judge of appeal namely, Sir George Finlay, was pronounced within the meaning of the said section when the same was set down in writing in a document headed "Judgment" signed by the learned Judge. Alternatively the said judgment was pronounced when the contents of the said judgment were communicated to the parties by the Registrar on behalf of the learned Judge by reading the said judgment in open Court in the presence of the parties, alternatively by making available  
30 copies thereof to the parties. In the further alternative if this were a case on which it was convenient that separate judgments were prepared (and the Respondent will submit that from the contents of the said judgments that it was) the judgments of both the learned Judges were pronounced in the like manner as set out above.

40 27. In the further alternative the Respondent will submit that if there was an infringement of the provisions of section 30 of the Court of Appeal Ordinance such infringement did not invalidate the proceedings before the Court of Appeal nor the result thereof. Further and in the alternative the Respondent will submit that by reason of the alleged infringement the Appellant has not suffered such a grave miscarriage of justice to warrant interference with his conviction by Her Majesty in Council.

28. Further the Respondent will refer to the following

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passage in the opinion or judgment of Sir Joseph Stanton:

"There was another matter to which our attention was called but which was not expressly raised by appellant. In the Chief Justice's summing up to the Assessors he said :

p.117.1.17

"It has been suggested that you might think the accused guilty of manslaughter. Before you could be justified in thinking that you would have to come to the conclusion that the accused's 10 story in that particular respect is true. You would have to be satisfied beyond reasonable doubt that it might be that the Crown were wrong as to that aspect, and you would have to believe that the accused received such provocation that he was justified in resisting force by using force".

"It was admitted by Counsel for the Crown that this was a misdirection (or rather that in a charge to the jury it would be so). A jury in 20 such a case as this should be told that they must find in favour of the accused unless satisfied beyond reasonable doubt that the defence is untrue. The Chief Justice had previously correctly stated the onus that was on the Crown namely that it had to prove that the appellant "killed Chanan Singh .... and that he did so deliberately and with malice aforethought". That the Chief Justice did not misdirect himself on the question of 30 appellant's defence is shown by his judgment wherein he said that he found appellant's defence to be "completely untenable and unbelievable". He has therefore shown that he was satisfied beyond reasonable doubt that the defence was untrue. "There is a material difference between a "summing up" to assessors and a direction to a jury on matters of law. Section 306 of the Criminal Procedure Code provides that in a trial with assessors "the 40 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". The judge must then give judgment but is not bound to conform to the opinion of the assessors.

"Under section 295 when the trial is before a jury it is provided that the judge "shall if

10 necessary sum up the law and evidence in the case". Under section 297 it is the duty of the jury "to decide which view of the facts is true and then to return the verdict which, under such view, ought; according to the direction of the judge, to be returned". It will be seen that the judge is not bound to direct the assessors at all on matters of law although if he does so it is obviously important that he should do so correctly.

20 "The opinions of the assessors are rightly regarded as being most valuable and every precaution should be taken to ensure that they are properly instructed. In criminal appeals the Court of Appeal is to allow the appeal if they think that on any ground there was a miscarriage of justice. It may well be that the terms in which a trial judge frames his address to the assessors could cause a miscarriage of justice but to treat it as if it were a summing up to a jury is to ignore the provisions of the legislation which places the final responsibility for decision on the Judge and not on the assessors. This does not imply any diminution of the value and responsibility of the assessors but only that the Judge's address to them must be read with his own judgment.

30 "The Chief Justice has held, as he was entitled to do, that the account of the incident given by appellant, was untrue beyond all reasonable doubt, and as there was no other evidence which could reasonably be held to support a defence of provocation, self defence or "chance medley", those defences were properly rejected and in my view there was no miscarriage of justice.

I would dismiss the appeal".

29. The Respondent will submit that for the reasons given by Sir Joseph Stanton set out above the Appellant has suffered no miscarriage of justice at his trial.

40 30. In the alternative the Respondent will submit that on a proper reading of the entire direction by the learned Chief Justice to the Assessors there was no misdirection as to the onus of proof.

31. In the further alternative the Respondent will submit that on the evidence at the Trial no Assessor

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or Court properly directed could have returned a verdict either of not guilty by reason of the fact that the Appellant in killing Chanan Singh was acting in self defence or of manslaughter by reason of the fact that the Appellant in killing Chanan Singh was acting under provocation.

32. Further the Respondent will submit that there was no wrongful exclusion of material evidence by the learned Chief Justice. Alternatively if any such evidence was wrongly excluded such exclusion did not cause such a serious miscarriage of justice that the appeal should be allowed. The Respondent will ask that in considering this question the depositions containing the evidence which was not given at the trial should be examined.

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33. The Respondent will therefore submit that the appeal should be dismissed for the following (among other)

REASONS

- (1) BECAUSE the Appellant was guilty of the murder of Chanan Singh 20
- (2) BECAUSE the learned Chief Justice did not misdirect the Assessors as to the defence of self defence or of provocation.
- (3) BECAUSE the learned Chief Justice rejected the Appellant's evidence on which the defences of self defence and provocation were founded.
- (4) BECAUSE on the evidence at the trial no Court properly directed would have reasonably found the Appellant not guilty on the ground that he killed Chanan Singh in self defence. 30
- (5) BECAUSE on the evidence at the trial no Court properly directed could have reasonably found the Appellant not guilty of murder but guilty of manslaughter of Chanan Singh
- (6) BECAUSE at the trial the learned Chief Justice did not wrongfully exclude any material evidence
- (7) BECAUSE if there was any misdirection or wrongful exclusion of evidence, such a misdirection or exclusion of evidence whether considered separately or together did not cause any such a grave miscarriage of justice to warrant interference with the Appellant's conviction 40

- (8) BECAUSE the procedure adopted by the Court of Appeal was not an infringement of the provisions of Section 30 of the Court of Appeal Ordinance
- (9) BECAUSE the opinions of the Judges of the Court of Appeal were not by reason of the provisions of section 6 (3) of the said Ordinance judgments within the provisions of the said section 30.
- 10 (10) BECAUSE if the said opinions were judgments they were pronounced by the Judge or Judges of the Court of Appeal within the provisions of section 30.
- (11) BECAUSE if the said procedure infringed the provisions of the said section 30 the Appellant has not thereby suffered such a grave miscarriage of justice to warrant interference with his conviction
- (12) FOR the reasons contained in the Opinion or Judgment of Sir Joseph Stanton.

20 34. If, contrary to the Respondent's above submissions the appeal is allowed the Respondent will ask that a retrial should be ordered, alternatively that the case be remitted to the Fiji Court of Appeal for the pronouncement of judgment or for re-hearing, in the further alternative that the Appellant should be convicted of manslaughter.

D. A. GRANT.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FIJI COURT OF  
APPEAL

B E T W E E N :

BHARAT SON OF DORSAMY Appellant

-- and --

THE QUEEN Respondent

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C A S E

FOR THE RESPONDENT

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