

A **PREM CHAND SINGH AND ANOTHER**

v.

REGINAM

[COURT OF APPEAL, 1965 (Marsack V.P., Gould J.A., Knox-Mawer J.A.), 17th May, 16th June]

B

Criminal Jurisdiction

Criminal Law—aiding and abetting—common intention—knowledge of intention to assault but not of intention to use a lethal weapon.

C *Criminal law—evidence—previous inconsistent statements by witnesses—direction to assessors.*

Criminal law—defence—manslaughter—elements of—no evidence establishing reasonable possibility of presence of legal requirements—unnecessary to leave defence to assessors.

D Where witnesses have previously made statements inconsistent with their testimony in court it is necessary for the judge in summing up to draw the attention of the assessors to the need to scrutinize very carefully their evidence and to the duty of rejecting that evidence unless there was outside corroboration or an adequate explanation as to why the story had been changed.

E Where there is no evidence establishing a reasonable possibility of an act of provocation, loss of self control both actual and reasonable, and retaliation proportionate to the provocation, it is not necessary for the trial judge to leave the defence of provocation to the assessors.

The second appellant allowed his car to be used as a means of approach and escape by the first appellant and stayed in a position where he was able readily to come to the aid of the first appellant while the latter stabbed the deceased with a knife:

F *Held:* These findings did not necessarily establish that the second appellant was guilty of aiding and abetting the crime of murder. It was a proper inference from the evidence that the second appellant knew that the first appellant intended to assault the deceased but not that he intended to do so with a lethal weapon.

G Cases referred to: *R. v. Harris* (1927) 20 Cr.App.R.144: *Gyan Singh v. Reginam* (1963) 9 F.L.R. 105: *Ravi Nand v. Reginam* (1964) 10 F.L.R. 37: *R. v. Raymond* [1956] N.Z.L.R. 527: *Lee Chun-Chuen v. Reginam* [1963] A.C. 220; [1963] 1 All E.R. 73: *Mancini v. Director of Public Prosecutions* [1942] A.C.1; [1941] 3 All E.R. 272: *R. v. Murtagh & Kennedy* (1955) 39 Cr. App. R. 72: *Kwoku Mensah v. R.* [1956] A.C. 83; 174 L.T. 96.

H Appeal against conviction by the Supreme Court.

J. N. Falvey for the appellants.

G. N. Mishra for the Crown.

The facts appear sufficiently from the judgment.

Judgment of the Court : [16th June, 1965]—

These are appeals against conviction for murder entered in the Supreme Court of Fiji at Lautoka on the 22nd March, 1965. The appeals were, by consent, heard together. The trial of both appellants was held before a Judge and five Assessors. All five Assessors gave their opinion that each of the accused was guilty of murder. The trial Judge gave judgment in accordance with this unanimous opinion, convicted both accused of murder and pronounced sentence of death.

The evidence against the appellants may be shortly summarised as follows. On the 28th November, 1964, at about 1.30 p.m. a fight took place in the street near Ram Roop's store at Lautoka. Several persons participated in this fight, including Ram Kirpal, brother of the deceased Hari Prasad, and Mahendra, brother of the 1st Appellant. When the disturbance was broken up by the Police, Ram Kirpal and Mahendra started out for the Lautoka Police Station with Constable Posece.

Shortly afterwards the appellants learned of the trouble and set out in the 2nd appellant's car, which was driven by a third person, towards the Police Station. The appellants are cousins.

On their way to the station they overtook the deceased who was walking up Yawini Street some distance behind Constable Posece and those with him. The car stopped some 15 yards behind the deceased Hari Prasad. The 1st Appellant — or perhaps both appellants — left the car and ran quickly up to the deceased. A short altercation took place between the 1st appellant and the deceased, after which the 1st appellant returned to the car which moved away out of Yawini Street and down Mara Street. While they were going away the deceased called out that he had been struck by a dagger and the men concerned were running away in a car. The deceased was found to be suffering from a severe incised wound in the abdomen. The wound had obviously been caused by a knife or similar instrument. The deceased was taken to hospital where he died some two hours later. The cause of death was severe haemorrhage and shock resulting from the wound.

There can be no doubt that the wound was sustained by the deceased at the time the deceased and the 1st appellant, or both appellants, were together. The case for the Crown is that the 1st and 2nd Appellants had left the car and had run up to the deceased with the intention of killing him or inflicting grievous bodily harm upon him; that the 2nd appellant held the deceased while the 1st appellant stabbed him with a knife; and that when this had been done both appellants ran back to the car and were driven away.

The 1st appellant gave evidence that as the car was approaching the deceased he asked the driver to stop the vehicle and he then got out and went to speak to the deceased. He asked the deceased what was the cause of the trouble; the deceased threatened him and aimed

A a blow at the 1st appellant with a knife. In the ensuing struggle the 1st appellant received a slight wound in the left hand. The deceased and 1st appellant grappled and fell into a drain at the side of the street. As soon as he could get free the 1st appellant ran off to the car. He gave no explanation in his evidence as to how the injuries were caused to the deceased, and said that when he made off he did not know that deceased was hurt.

B The 2nd appellant denied ever having left the car and deposed that he was unaware of any intention on the part of the 1st appellant to attack the deceased. He further stated that he did not in fact see what took place.

C Issues were put to the Assessors and they, in answering the questions put to them, were unanimous that the deceased had received his wounds in the course of a deliberate attack upon him by the 1st appellant; and, furthermore, that the 2nd appellant did not hold the deceased at the time. The Assessors were not specifically asked what part, if any, the 2nd Appellant played in the attack upon the deceased, but in unanimously expressing the opinion that the 2nd appellant was guilty of murder they must be taken to have found it proved beyond reasonable doubt that the 2nd appellant had aided and abetted the commission of that crime by the 1st appellant.

D We propose to deal with the appeals separately. Two of the grounds are common to both appeals :—

1. That the verdict is unreasonable and cannot be supported having regard to the evidence;
2. That the learned trial Judge failed adequately to put to the Assessors the case for the defence.

E The other grounds put forward are different, in the case of the 1st appellant, from those of the 2nd appellant.

Turning now to the case for the 1st appellant. Three grounds in all form the basis of this appeal. Two have already been quoted. The third reads :—

F “That the learned trial Judge failed adequately to warn the assessors of the danger of convicting on the evidence of several Crown witnesses whose credibility was suspect.”

G In his submission before this Court, on behalf of the 1st appellant, counsel dealt with all the grounds together; and in fact introduced another which he suggested could be reasonably considered as forming part of the argument based on what he submitted was the trial Judge's failure adequately to put before the Assessors the case for the defence. This other ground was, in counsel's submission, a failure to direct the Assessors adequately on the issue of provocation. No objection was raised by counsel for the respondent to that portion of the appellant's argument. This Court has power to consider, under rule 5 of the Court of Appeal Rules, a ground of appeal which has not been specifically put forward but which appears, in the course of the proceedings, to have become relevant. In these circumstances H we propose to consider the question of non-direction on the issue of provocation in addition to the other grounds of which formal notice has been given.

There is no doubt that there is sufficient evidence if accepted — as it was by the learned trial Judge and by the Assessors — to establish the guilt of the 1st appellant of the crime of murder. In addition to the brief summary already given, there was evidence that some four or five weeks earlier there had been some trouble at the Ramlila Festival in the course of which the 1st appellant had said angrily: “I will rip up the guts of all members of Ram Kirpal’s family”. Since that date there had been bad blood between members of the 1st appellant’s family and the family of the deceased. The probative value of this evidence is perhaps slight, except as filling in the background to the events which resulted in the death of Hari Prasad. The action of the 1st appellant in running up to the deceased in Yawini Street conveys a strong inference that his intentions were unfriendly rather than, as he asserts in his own evidence, friendly. One witness, Yenkanna, whose evidence was accepted by the learned trial Judge, but strongly criticised by counsel for the appellants, deposed that the 1st appellant ran to the deceased and caught hold of him by the neck and shoulders; and that when the two appellants returned to the car he saw a dagger in the hand of the 1st appellant. A witness called for the defence, Bal Krishna, said that he saw one man on the ground trying to kick the man standing over him, and that the latter was bending over the other with his hand raised in what is described as a “stabbing action”. The man who was on his feet then ran to the car, identified as the car of the 2nd appellant, and was quite clearly the 1st appellant. Several witnesses gave evidence that within the hearing of the appellants the deceased called out that someone had struck him with a dagger. Alfred Masi Lal, whom counsel for the defence described as an independent witness, said that what the deceased called out was: “Look they are running away in a car and they have struck me with a dagger”. A Fijian named Vilikesa deposed that he had seen the whole of the incident on November 28th. He saw two Indians get out of a car and follow another Indian who was walking up the street towards the police station. One of the Indians then stabbed the latter; the witness saw the hand movement but not the knife. He saw the man fall while the other two men made off in the car. The evidence of Vilikesa was also accepted by the learned trial Judge, at least as to the actual stabbing of the deceased. It is not necessary to examine in detail the whole of the evidence given for the prosecution. All that is required is to say that there was ample evidence which, if accepted, established the guilt of the 1st appellant.

Consequently, the argument for the 1st appellant that the verdict was unreasonable must largely be based upon the submission that the Assessors were not adequately directed as to the danger of accepting the evidence of witnesses whose credibility was suspect, and that they therefore acted on evidence which should have been rejected or held to be of little probative value.

With regard to the question of credibility the argument of counsel for the appellants is founded almost entirely on the ground that they had made previously inconsistent statements, in some cases on oath, and that their evidence should properly have been rejected entirely.

The first witness whose evidence requires examination from this point of view is Yenkanna, whose inconsistency was strongly criticised by counsel for the appellants and who was referred to by the learned trial Judge as an excitable witness. In evidence at the trial he gave the evidence to which reference has already been made, the essential features of which are that he saw both appellants grappling with the deceased; that he heard the deceased call out: "Police I have been struck with a dagger"; and that he saw a dagger in the hand of the 1st appellant as the two appellants were going back to the car. In a statement made to the Police, however, on the 28th December, he said: "I did not see dagger or knife in Prem's hand, I did not see him stabbing anyone". In his sworn deposition before the Magistrate on the 28th November he refers to the stopping of the car and the stopping of the deceased by the two appellants. He also deposes that he heard the deceased call out: "They have hit me", but says nothing as to a knife in the hand of the 1st appellant. The only explanation given by this witness for the discrepancies was put forward in his re-examination when he said:

"When I told the Police that I did not see a dagger in Prem's hand or see him stab Hari Prasad, I was referring to the time he got out of the car and ran towards Hari Prasad before he stabbed him. I did not in fact see Prem actually stab Hari Prasad. That's the truth and that is what I told the Police."

The learned trial Judge refers on two or three occasions, in the course of his summing up, to the question of the credibility of witnesses generally and of Yenkanna in particular. He says, first, on the general issue :—

"Next there is the case of a witness who has given evidence, a part of which you either do not believe or believe to be a deliberate lie, or which contains discrepancies from what he said before. There is no rule of law that you must reject all his testimony *in toto*. It is possible and permissible in law to accept part of the evidence of a witness and to reject part of his evidence. What, however, you must do is submit the evidence of such a witness to the closest scrutiny and circumspection and even treat it with suspicion. You should look to see if you can find some corroboration thereof in the rest of the evidence which you believe before deciding to accept part of the evidence of a witness whose reliability as a truthful witness you consider to be suspect."

Later the learned trial Judge refers specifically to the evidence of Yenkanna, whom he describes as apparently an independent witness, with regard to the two points as to the presence of a knife in the hand of the 1st appellant and as to the manner in which the 2nd appellant held the deceased. Although the trial Judge draws attention to the statement by this witness that he saw a knife in 1st appellant's hand, yet when he speaks of the attack and the credibility of the witness, the learned Judge mentions only two discrepancies: first, as to the manner in which the 2nd appellant had taken hold of the deceased; and second, as to the words cried out by the deceased at the time of the attack. Counsel for the appellants points out with some force

that the most important discrepancy occurring in the evidence of Yenkanna concerned the carrying of a knife by the 1st appellant, and that the learned Judge does not comment on that discrepancy when dealing with the question of the credibility of this witness. We cannot, however, accept counsel's contention that the learned trial Judge's omission to refer specifically to this discrepancy must have had a profound effect on the Assessors. The trial Judge follows his reference to these discrepancies by directing the Assessors in these words :—

"On the matter of discrepancies I can only remind you of what I said before. They are warnings to us to treat the evidence of a witness with circumspection and to scrutinize it with care. You must then consider whether the discrepancies are of a major or minor character and are mistakes that you consider might well be made by any honest witness or indicate that the witness is deliberately giving false evidence, or is one whose manner is not sufficiently reliable. You have been addressed by the Defence at considerable length on this matter, and you have heard read out the statement of this witness to the Police, and his deposition before the Magistrate. You must consider whether, in the most material parts of his testimony, he has been substantially consistent or not and then decide what weight you feel should be attached to his evidence."

These directions must be read in conjunction with the warning he gave the Assessors early in his summing up that the onus lay on the prosecution to prove its case beyond reasonable doubt; and further that the Assessors must formulate their own conclusions on questions of fact, not being in any way bound by any expressions of opinion by the trial Judge as to matters of fact.

The objections to the evidence of the three Fijian witnesses, Vili-kesa, Viliame and Seremaia, were based more upon the fact that they were interviewed by the Police only on the 10th December, by which time several of the other witnesses, whose evidence was totally rejected by the learned trial Judge, had changed their statements from what they originally said.

Constable Posece, in a statement in writing made to Inspector Raj Deo on 15th December, said that he had seen two men running to the car. At the trial he deposed that he saw only one man get into the car after the deceased had fallen to the ground. When called upon to give an explanation he said: "I think there must be a mistake somewhere . . . Before I made this statement some witnesses said they saw two men get into the car . . . I saw only one man get into the car." In the course of his summing up the trial Judge, referring to the evidence of Constable Posece, said :—

"Ordinarilly I would say this is a completely unacceptable and unsatisfactory explanation or excuse. I would, however, invite you to consider this young man. He was a comparatively young and raw Policeman suddenly caught up in a major crime. As he gave his evidence he was clearly in a state of tension and was in an almost pathetic state of nervousness. I have no doubt that this was so when he gave evidence before and gave his original

A statement. This does not of course excuse his lapse in any way, but I think his independent position as a witness, coupled with his frank admission of what he says was a mistake, does entitle you, whilst disregarding entirely his evidence of how many men did attack the deceased, to consider the rest of his evidence where it is supported by or corroborated by that of other witnesses whom you believe. I think his evidence standing alone is of little probative value but you are entitled if you think fit, to decide what weight should be attached to the rest of his evidence."

B It is difficult to know upon what ground the learned trial Judge reached the conclusion that Constable Posece was in an almost pathetic state of nervousness when he gave evidence previously and made his original statement. There is no evidence to that effect. The Assessors however had been fully and properly directed that they were in no way bound by any opinion of the trial Judge on matters of fact.

C There were substantial discrepancies between the evidence given at the trial and previous statements in the case of three witnesses, Shiu Dayal, Ami Chand and Chandra Hass. The Crown did not lead any evidence from these witnesses, but merely made them available for cross-examination by the defence. The trial Judge directed the Assessors that it would be unsafe to place any reliance at all on their evidence, and he himself rejected it in preparing his own judgment. D It is accordingly not necessary to examine this further.

In our view the attention of the Assessors was adequately drawn to the necessity of scrutinizing very carefully evidence of witnesses who had made previously inconsistent statements, and the duty of rejecting that evidence unless there was outside corroboration or an adequate explanation as to why the story had been changed. Counsel E for the defence addressed the Assessors at some length on this point and reference is made in the summing up to what had been urged by counsel. In our view the Assessors had been adequately apprised of the danger of accepting the evidence of these witnesses. We cannot accept the submission of counsel for the appellants that the use of the word "circumspection" by the learned trial Judge would confuse rather than clarify. F The trial Judge in his judgment makes it clear that he directed himself in accordance with the principles set out in his summing up and that he had scrutinized the whole of the evidence with care. We are satisfied that after giving full weight to the principle of the general unreliability of evidence given by witnesses who had made previously inconsistent statements, there still was ample evidence upon which the 1st appellant could properly be convicted of the crime with which he was charged. G We accept as an accurate statement of the law the extract quoted by counsel for the appellants from *Leonard Harris* (1927) 20 Cr.App.R. 144 at 147 :—

H "If, therefore, it appears, that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury, and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility."

At the same time it is still a matter for the Assessors in their advice to the Judge, and for the learned trial Judge in his judgment, to determine just what credence can be given to the evidence of the witnesses concerned and just what weight can be placed upon it. This aspect of the matter was examined by this Court in *Gyan Singh v. Reginam* (1963) 9 F.L.R. 105. In the course of that judgment it is stated :—

“It is the duty of the trial Judge to warn the Assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the Assessors, and of the Judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in Court at the trial is worthy of credence and, if so, what weight should be attached to it.”

In the present case we are satisfied that the Assessors were left in no doubt as to the suspicion with which they should regard the evidence given by witnesses who had made previously inconsistent statements and that the Judge himself applied the correct principles when assessing the value of that evidence. Consequently we are unable to find that the principles explained to the Assessors in the course of the summing up and applied by the learned trial Judge in his judgment were not correct in law. Even if, with due regard to these principles, we were inclined to consider that the learned trial Judge might have taken rather too favourable a view of the value of the evidence of the witness Yenkanna, yet we should still find ample evidence apart from that, sufficient to support the conviction for murder. Accordingly we can find no substance in this ground of appeal.

It is not necessary to examine in detail the argument based upon the ground of appeal that the trial Judge failed adequately to put to the Assessors the case for the defence. It has more than once been pointed out in judgments of this Court that the trial Judge is under no obligation to explain in detail the case for the defence provided that his summing up as a whole is fair. This ground of appeal was carefully considered by this Court in *Ravi Nand v. Reginam* (1964) 10 F.L.R. 37 and respectful approval was expressed of the statement of the law given by the New Zealand Court of Appeal in *R. v. Raymond* [1956] N.Z.L.R. 527 at p.531. We do not find it necessary to repeat what was said in that judgment. Applying the principles there set out we conclude that the summing up as a whole was in the present case fair and not open to objection.

There remains for consideration the ground which was argued without objection from counsel for the Crown, although it was not set out in the formal notice of appeal: that is that the learned trial Judge had failed adequately to direct the Assessors on the issue of provocation.

The only references to this issue in the summing up are the following —

A “In a murder case where the evidence raises questions of provocation or self-defence, there is no burden of proof upon the defence to prove such defences — it is for the Crown to prove beyond reasonable doubt that the killing was done by the accused and also to prove beyond reasonable doubt that the accused was not firstly acting under such provocation as does in law reduce the offence of murder to manslaughter . . .”

B This passage occurred near the beginning of the summing up. A little later on the learned trial Judge says :—

“If, however, you hold that the 1st accused, under the provocation of a sudden and unprovoked attack on him by the deceased, retaliated with the knife the deceased wielded, then you should express the view that the 1st accused is guilty of manslaughter only.”

C Towards the end, when putting issues to the Assessors, the learned Judge said :—

D “Please consider the evidence in this case as a whole bearing in mind my directions on the law, especially that on the onus and standard of proof, but forming your own opinions on matters of fact.

I wish to have your individual opinions on certain specific matters and when you return the following questions will be put to you:

(1) Did the deceased receive his wound by

(a) Accident?

E (b) At the hand of the 1st accused acting in self-defence or under provocation?

or (c) In the course of a deliberate attack on him by the 1st accused?”

F It is true that the learned trial Judge did not specifically direct the minds of the Assessors to any evidence, or to any inferences which might properly be drawn from the evidence, tending to show upon what basis the issue of provocation could properly be raised. But after a careful consideration of the evidence as it appears from the record we are unable to say that there was such evidence of provocation as required examination by the learned trial Judge in the course of his summing up. The law is clearly stated by Lord Devlin in *Lee Chun-Chuen v. Reginam* [1963] 1 All E.R. 73 at p.79 :—

G “Provocation in law consists mainly of three elements — the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other — particularly in point of time, whether there was time for passion to cool — is of the first

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importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements."

It is significant that the 1st appellant at no time claims that he was provoked to the extent of loss of his self-control. He goes further and denies that he had ever held the knife or that he had struck the blow which caused the death of the deceased. He says that he did not know that the deceased had been seriously injured until some time later, at the Police Station, when he was so informed by one of the constables.

Failure by the accused to testify to loss of self-control is, of course, not fatal to his case: *Lee Chun-Chuen v. Reginam* (supra). As is said by Lord Devlin at pp.79-80 :—

"The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence."

It is, however, still necessary that there should be evidence suggesting the presence of three elements — the act of provocation, the loss of self-control and the retaliation proportionate to the provocation. In this case we can find no evidence establishing even a reasonable possibility of the presence of all three legal requirements of the issue of provocation. In particular there is no evidence which, in our opinion, would, if accepted, show that the fatal blow had been struck by the accused following a provocative act by the deceased which might reasonably have led to the action taken by the 1st appellant. In our opinion there is no room for any legitimate inference which would justify a finding of provocation in accordance with the principles expressed in *Lee Chun-Chuen v. Reginam* (supra). If the 1st appellant had the knife throughout, the words allegedly spoken by the deceased, "We have just sent your brother to hospital and very shortly we'll send you there too", could not constitute provocation in law. If, on the other hand, the deceased had the knife throughout, the defence of accident must have prevailed. If the 2nd appellant had wrested the knife from the deceased in a struggle and then used it, a verdict of manslaughter might be justified, but there is no evidence and, we think, no inference that that happened. To accept that as a possibility would be mere speculation and not legitimate inference; and, as is pointed out by Simon L.C. in *Mancini v. D.P.P.* [1941] 3 All E.R. 272 at p.279 :—

"Taking, for example, a case in which no evidence which would raise the issue of provocation has been given, it is not the duty of the judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence."

The 1st appellant, in his sworn evidence, deposed that he had approached the deceased in a friendly manner and that at no time had he struck any blow at the deceased. He merely tried to protect himself from an onslaught by the deceased, and had caught the latter's

right wrist in his efforts. He gave no explanation as to how the deceased could have come by his fatal wound. It was accordingly necessary for the trial Judge to put to the Assessors, as he did, the issues of accident and of self-defence. He thought it proper to leave to them also the issue of provocation, after reminding the Assessors that they must remember what he had previously told them as to the onus of proof and the responsibility on the Crown to prove beyond reasonable doubt that the 1st appellant was not acting under such provocation as in law reduced the offence of murder to manslaughter. It would, no doubt, have been better when he had decided to refer the matter of manslaughter to the Assessors if he had explained to them just what elements are necessary in law to establish such provocation as would reduce the offence to manslaughter. But as, in our opinion, the evidence was insufficient even to raise a reasonable doubt that the 1st appellant may have acted under such provocation as is recognised by the law, then we can find no reason for disturbing the verdict of the learned trial Judge.

For these reasons the appeal of the 1st appellant will be dismissed.

Turning now to the appeal of the 2nd appellant. This was argued largely on the ground that there was no proof of common purpose between 1st and 2nd appellants, and that the evidence did not establish beyond reasonable doubt that the 2nd appellant had such foreknowledge of the intention of the 1st appellant to kill the deceased or to inflict grievous bodily harm upon him as would be sufficient to make the 2nd appellant guilty of aiding and abetting the crime of murder.

The case against the 2nd appellant must be examined in the light of the finding of the learned trial Judge, accepting the opinions of the Assessors, that there was no proof beyond reasonable doubt that the 2nd appellant had left the car and accompanied the 1st appellant to the deceased. The finding of the learned Judge that the 2nd appellant was present on the scene deliberately not by mere accident cannot, in our opinion, be challenged. We are also satisfied that the evidence was sufficient to establish the further finding of the learned Judge :—

“... that the 2nd accused allowed his car to be stopped just behind the deceased and so that 1st accused could alight and attack the deceased and kept the car in readiness to facilitate his escape immediately afterwards. He himself stayed there in a position where he was able readily to come to the assistance of his cousin, the 1st accused, the knowledge of which must have given additional confidence to the 1st accused and was so intended ...”

These findings in themselves do not, however, necessarily establish that the 2nd appellant was guilty of aiding and abetting in the crime of murder. For this it would be necessary to prove knowledge of the intention of the person aided to kill or to inflict grievous bodily harm. This conclusion would have been inescapable if the Assessors and the learned Judge had accepted the case for the prosecution that the 2nd appellant had left the car and had actively assisted the 1st appellant in carrying out his lethal assault on the deceased. But, as it has

been stated, the appeal falls to be determined upon the basis that the 2nd appellant had not actually left the car. That being so, cogent evidence would be necessary to prove knowledge on the part of the 2nd appellant of the intention to kill or inflict grievous bodily harm. We cannot find such cogent evidence.

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We consider that the learned Judge was entitled to infer, as he did infer, from the evidence, that the 2nd appellant must have known that the 1st appellant was going after the deceased with the intention of assaulting him. We can see no other inference that could reasonably be drawn from the evidence on this aspect of the case. Any suggestion that the 2nd appellant might merely have thought that the 1st appellant, when he sprang out of the car, intended only to speak to the deceased, is in our view, ruled out by the evidence of the defence witness Bal Krishna, which was accepted by the trial Judge. This witness stated :—

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“I saw the left hand side door of the car fly open — I cannot say if it was the front or rear door. I saw a person get out and run forward about 15 yards.

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Car No. H796 still moved forward slowly.”

The object of the 2nd appellant in keeping his car moving in this way can only have been to facilitate a quick escape by the 1st appellant after his encounter with the deceased. That the car's movements at this point of time were directed by the 2nd appellant is an equally inescapable inference upon the whole of the evidence. Had the 2nd appellant thought that the intended encounter by the 1st appellant with the deceased was to be nothing more than an exchange of words, a perfectly lawful act, then there could be no logical reason for keeping the car moving in order to facilitate, as he did facilitate, the subsequent escape.

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We further consider that the learned Judge was entitled to find, as he did, that the 2nd appellant aided and abetted the 1st appellant in the carrying out of his intention to assault the deceased. We do not, however, think that there is evidence upon which he was entitled to find that the 2nd appellant consciously aided and abetted the 1st appellant to murder the deceased or to cause him grievous bodily harm. There is no evidence that the 2nd appellant knew, in time to take any steps to prevent it, that the assault intended by the 1st appellant was an assault with a lethal weapon such as a knife. All that we think the learned Judge was entitled to find on the evidence was that the 2nd appellant aided and abetted the 1st appellant to commit an assault on the deceased. We do not think it proved that the 2nd appellant contemplated that the deceased would be killed or so seriously injured that death might follow.

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The question then arises as to what offence, if any, the 2nd appellant has committed. According to our view the evidence shows the 2nd appellant aided and abetted the 1st appellant to commit an unlawful act, to wit an assault on the deceased. Under section 223 of the Penal Code any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. Under section 21(c) of the Penal Code every person who

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aids or abets another person in committing an offence is guilty of the offence committed. In this case the offence to which the 2nd appellant was a party was that of causing death by an unlawful act, i.e. manslaughter. In our opinion, therefore, the 2nd appellant should have been convicted of manslaughter but not of murder.

A A similar verdict of murder against the principal and manslaughter against the abettor was entered in the case of *Murtagh and Kennedy* 39 Cr.App.R. 72. In *Williams on Criminal Law*, 2nd Ed., para. 130 Note 1 Hilbery J. is reported as having said at the hearing of the appeal :—

B “The judge pointed out that if Kennedy thought that the intention of Murtagh was to terrorise, his only intention was to terrorise, and therefore he would be guilty of manslaughter.”

C The appeal succeeded on a different point and the statement quoted was not challenged. The fact that one of the accused persons is found guilty of manslaughter only cannot affect the verdict of murder against the principal offender: *Kwaku Mensah v. R.* [1946] A.C. 83 at p.91.

D For these reasons the appeal of the 1st appellant is dismissed. The appeal of the 2nd appellant is allowed; the conviction for murder is quashed and a conviction for manslaughter substituted. On this substituted conviction for manslaughter we pass sentence of 7 years' imprisonment.

Appeal of first appellant dismissed. Appeal of second appellant allowed, conviction of murder quashed and conviction of manslaughter substituted.