

A

TARA CHAND AND OTHERS

v.

REGINAM

B [COURT OF APPEAL, 1968 (Gould V.P., Adams J.A., Marsack J.A.), 29th, 30th November, 1st December 1967, 6th May 1968]

Criminal Jurisdiction

C Criminal law—principles of criminal liability—mens rea—murder—three participants—attack on deceased followed by throwing of body into stream—cause of death not proved—possibility of death by drowning—indivisible course of conduct by accused—no necessity for pre-arranged plan—liability.

Criminal law—evidence and proof—investigation of crime by police—"mass" investigation—whether procedure unfair.

Criminal law—confession—police procedure—"confrontation" of persons interviewed by calling suspect to their presence—admissibility of confession—admission by judge—function of assessors—probative value—direction by judge to assessors—relevance of "fear" to admissibility.

D Criminal law—practice and procedure—confession—all facts relevant to admissibility at large for assessors in considering question of probative value.

The three appellants were found guilty of the murder of one Ram Kumar. The cause of the death of the deceased could not be established with certainty by the medical evidence but the case for the prosecution was that the deceased died as the result of an attack upon him to which the three accused were parties and that after the attack they threw his apparently dead body into a creek.

F Held: 1. The three appellants were guilty of murder if, with malice aforethought either in the form of an intent to kill or in the form of an intent to do grievous bodily harm, they inflicted grievous injuries on the deceased and then, mistakenly believing him to be dead, and in continuance of a course of conduct that may properly be regarded as indivisible, threw him into the water — whether in execution of a pre-arranged plan or merely on the spur of the moment — and thereby caused his death by drowning.

2. The question whether such a course of conduct should be regarded as an indivisible whole is one to be decided by the tribunal of fact.

G *Thabo Meli v. R.* [1954] 1 All E.R. 373; [1954] 1 W.L.R. 228, applied.

In the course of the investigation into the death of the deceased the police took over an empty school building to which, on a particular day, they brought twenty-two persons (including the appellants) whom they wished to interview. It was not known at that stage whether the death of the deceased resulted from accident or the commission of a crime.

H Meals were provided for the persons present.

After the first appellant had made a statement incriminating himself and implicating the other two, he was brought into the presence of the

other two appellants separately and repeated his statement in their presence. They then, or later, made statements amounting to confessions. The second and third appellants were not in custody at the time and, apart from the statement made by the first appellant, the police had no reason to suspect that they were concerned in a major crime.

Held: 1. In the circumstances of the case the general arrangements made by the police to pursue their inquiry were commendable.

2. The bringing of the first appellant into the presence of the others to repeat his statement was not improper: a desire on the part of the police to obtain a confession if a person is guilty, is not illegitimate, and their dominant purpose was to arrive at the truth.

Per curiam: (a) A confession will not be rejected simply on the ground that it was induced by fear; fear is relevant only if it is induced by improper means or if of such a nature or degree as to suggest that the will was overborne.

(b) Where a confession has been admitted in evidence the sole question for the assessors is its probative value or effect, though in considering that question every matter of fact that might be relevant to the judge's decision on admissibility is relevant for consideration by the assessors: it is proper for the judge to direct the assessors that if they think that a confession was obtained through some threat or promise, its value will be enormously weakened.

Chan Wei Keung v. R. [1967] 2 A.C. 160; [1967] 1 All E.R. 948 and *R. v. Murray* [1951] 1 K.B. 391; 66 T.L.R. (Pt. 2) 1007, applied.

Cases referred to: *R. v. Wendo* (1963) 37 A.L.J.R. 77; *Ibrahim v. R.* [1914] A.C. 599; 111 L.T. 20; *R. v. Bass* [1953] 1 Q.B. 680; [1953] 1 All E.R. 1064; *Sheikh Hassan v. Reginam* (1963) 9 F.L.R. 110; *Cornelius v. The King* (1936) 55 C.L.R. 235; *R. v. Lee* (1950) 82 C.L.R. 133; *Shoukatallie v. R.* [1962] A.C. 81; [1961] 3 All E.R. 996; *R. v. Church* [1966] 1 Q.B. 59; [1965] 2 All E.R. 72; *R. v. Ramsay* [1967] N.Z.L.R. 1005; *R. v. Shuter* [1966] Crim. L.R. 104; *R. v. Pilley* (1922) 16 Cr. App. R. 138; 127 L.T. 220.

Appeals from convictions of murder in the Supreme Court.

S. M. Koya for the appellants.

J. R. Reddy for the respondent.

The facts are stated in the judgment of the Court.

Judgment of the Court: [6th May, 1968]—

We have already given judgment dismissing all three appeals, and now proceed to state our reasons for that judgment.

These are appeals against conviction for murder entered on the 30th June, 1967. The appeals were heard together, although the facts, and the submissions based upon those facts, differ to some extent from one appellant to another; and while due allowances were made for these differences it seems convenient that there should be one judgment covering all three appeals.

A The three appellants were jointly charged before the Supreme Court sitting at Lautoka in a trial which began on the 24th April, 1967, and concluded on the 30th June, 1967. The trial took place before a Judge and five Assessors. All Assessors expressed the opinion that all three appellants were guilty of murder. The trial Judge accepted the unanimous opinion of the Assessors, entered a conviction for murder in each case and passed sentence of imprisonment for life.

B The evidence against the appellants consisted, in each case, almost entirely of confessions, oral and written, made to police officers at the Nadi Police Station and, in the case of the 1st appellant, also at the Momi Indian School, on the 23rd and 24th August, 1966.

C The facts may be shortly stated as follows. Deceased, Ram Kumar, lived with his mother in a house at Momi in the same compound as the house of the 1st appellant. Ram Kumar was the brother of the 1st appellant Tara Chand. The 2nd and 3rd appellants are brothers, and lived a little over a mile from the 1st appellant. Ram Kumar disappeared on the 24th July, 1966. Despite the efforts of search parties who scoured the surrounding countryside no trace of Ram Kumar was found until the 6th August, when his dead body was taken from the Sariyawa Creek. The body was in an advanced state of decomposition by reason of which the medical officers were unable to establish the cause of death with certainty. As preliminary police enquiries were fruitless the Deputy D Supt. of Police at Nadi held a conference of police officers at Lautoka and drew up a detailed plan of investigation. This involved interviews by police officers with all members of the deceased's family and all persons associated with that family. It was decided to take over the Momi Indian School, which was then closed for the holidays, and hold the interviews in the classrooms of that school. Police arrangements E were made for the provision of meals to persons present. The persons to be interviewed at the Momi School on the 23rd August were some 22 in number, and included all three appellants. Late in the afternoon, after a number of questions had been asked of the 1st appellant by a police officer Corporal Rameshwar Prasad, the 1st appellant made a statement to the effect that the three appellants had been responsible for killing Ram Kumar. Later the 2nd and 3rd appellants also were questioned by the F police, and all admitted being present at the time when Ram Kumar had been assaulted and thrown into the Sariyawa Creek, though each appellant placed the blame most heavily on the other two. The circumstances surrounding the interrogation of all three appellants were traversed at length in the submissions of counsel before this Court and it will be necessary to state the facts concerning those interrogations in more detail when the relevant grounds of appeal are being considered in this G judgment. There is no material variation in the grounds of appeal put forward on behalf of each of the appellants, and these grounds are expressed in the following terms:

- H (a) THAT the learned trial Judge erred in admitting in evidence the alleged oral and written confessions made by the Appellants to the Police Officers at the Nadi Police Station on the 23rd and 24th day of August, 1966.
- (b) THAT the learned trial Judge erred in acting on the said alleged confessions and erred in not treating that there was a grave

doubt both as to the voluntariness and the truth or correctness of the said confessions for the reasons inter alia :

- (i) that the Crown had failed to establish with any degree of certainty as to Ram Kumar's condition when he was allegedly thrown in the creek; A
 - (ii) that the Crown has failed to establish the cause of Ram Kumar's death;
 - (iii) that the contents of the alleged oral and written confessions differed in material respects; B
 - (iv) that the Police Officers who were concerned in taking the said confessions from the Appellant and those who were present at the Momi Indian School and at the Nadi Police Station at the material times gave inconsistent evidence both at the trial within a trial and at the trial proper and their evidence contained material discrepancies. C
- (c) THAT the verdict is unreasonable and cannot be supported having regard to all the circumstances of the case.

The greater part of the argument before this Court was devoted to the question of whether the confessions made by the appellants were properly admissible in evidence. Counsel for the appellants submitted two main grounds upon which the evidence as to the confessions should have been rejected : D

- (a) that the confessions were in each case obtained by unfair methods on the part of the police;
- (b) that the appellants in each case were induced by fear to make the confessions. E

We now proceed to consider this first ground of appeal.

Much criticism was directed by counsel for the appellants against what he referred to as the "mass enquiry" held at the Momi Indian School. In counsel's submission this method of holding the enquiry resulted in unfair pressure upon each of the appellants in turn, to such an extent that their statements could not be considered as voluntary in the accepted interpretation of that term. Before dealing with the particular actions on the part of the police in the course of that enquiry, to which exception is taken by counsel, this Court would express the opinion that in all the circumstances of the case the general arrangements made to hold such an enquiry at the Momi Indian School were commendable. It was not at that time known whether the death of Ram Kumar resulted from accident or the commission of a crime, and the method of investigation instituted by the police offered what appeared to be the most effective way of ascertaining the truth. F
G

In *Wendo* (1963) 37 A.L.J.R. 77, confessions of murder obtained by a Coroner in the course of what might well be described as a "mass enquiry" — and one of a far more stringent nature than the one in question here — were held by the High Court of Australia to be admissible, and to be sufficient to justify convictions even in the absence of other reliable evidence. H

A It now becomes necessary to refer to the course of interrogation followed in respect of each appellant individually. For the sake of clarity the appellants will each be referred to by name in this part of the judgment. According to the evidence the first inkling the police had of the possibility that the appellants were implicated in the death of Ram Kumar came from a statement made to Corporal Rameshwar Prasad by the 3rd appellant Ram Narayan at the Momi Indian School late in the afternoon of August 23rd. This statement was to the effect that a search of the creek in which the body was later found was carried out by all three appellants a day or two after the disappearance of Ram Kumar, when the search had been fruitless. The Corporal thereupon stated that as B Tara Chand and Ram Nath were both there he would go and ask them about the matter. He went to the room in which Tara Chand was sitting in the company of two other policemen. The time was about 5.50 p.m. The Corporal asked Tara Chand whether it was true that he, with Ram C Nath and Ram Narayan, had searched the creek above the road. Tara Chand answered in the affirmative. The Corporal asked for an explanation as to why they had been unable to find the body and Tara Chand replied that he did not know. The Corporal proceeded to interrogate D Tara Chand as to where he had been on the night of the 24th July, and when Tara Chand stated that he had been at home drew his attention to the inconsistency of this statement with statements made by two other persons, Salikram and Abhiram, respectively the wife and a young brother of Tara Chand. The Corporal then said: "You explain me who is telling lies. Tell the truth; where were you on that night?" Tara Chand did not reply to this question and the Corporal said: "Salikram and Abhiram are both here, if you want I can bring them both before you." Shortly after this Tara Chand said that it was true that he was not at home.

E According to the Corporal's evidence the following questions were then put and these answers given:

- "(q) Then where were you at that time?
(a) I was in the creek with Ram Narayan and Ram Nath.
(q) Why?
(a) Sir, I made a very big mistake. We people killed Ram Kumar."

F The Corporal thereupon cautioned Tara Chand that he was not obliged to say anything but whatever he did say would be taken down in writing and might be used in evidence. Questions and answers then followed as under:

- "(q) What do you mean by "we people"?
(a) Myself, Ram Narayan and Ram Nath killed.
G (q) How did you people kill him?
(a) I was standing beside, Ram Nath and Ram Narayan killed or hit.
(q) You tell me in full as to how you people made the plan and how and why hit or kill and did you throw him?"

H Tara Chand thereupon gave a detailed account as to what had taken place on the night of the 24th July, stating that the blows which had either killed or seriously injured Ram Kumar were inflicted by Ram Nath and Ram Narayan but that all three had then thrown his body into the stream. He first gave the explanation that they had left Ram Kumar's

body in the cane-field for six days before throwing him into the stream, but immediately afterwards said that this was not true; they had thrown the body in the stream immediately after the assault.

After this, at about 6.30 p.m., the Corporal asked Tara Chand to go with him to the place where the body was found. He went with a party of police in a police vehicle. Tara Chand was asked to describe exactly where each of the three had been waiting by the creek on the night of the 24th July and how Ram Kumar had come to them. By using police officers to represent the persons concerned Tara Chand carried out what might be described as a reconstruction of the crime. The party then returned to the Momi Indian School, stopping at Tara Chand's house on the way to pick up the clothes which Tara Chand said he had been wearing on the night Ram Kumar died,

Later that evening Tara Chand was taken to the Nadi Police Station and formally charged with murder. After being cautioned he gave a statement which was taken down in writing and signed by him. This implicated all three appellants in the murder of Ram Kumar.

Most of the submissions made by counsel for the appellants were directed to the point that none of the confessions could properly be regarded as voluntary, on grounds common to all three cases. As regards Tara Chand, however, one submission was made which is not relevant to the argument put forward on behalf of the other two appellants and it will be convenient to deal with that now. This argument was to the effect that Tara Chand had been induced to make the confessions by a promise, express or implied, that he would be called as a witness for the Crown. Counsel referred to the evidence of Corporal Rameshwar Prasad that Tara Chand was given a cigarette before he replied to the Corporal's question asking for details of how the crime was carried out. In his own evidence Tara Chand said: "Then after that they offered me cigarettes and induced me and said you try to implicate Ram Nath and Ram Narayan and we will make you a Crown witness". Later in his evidence Tara Chand said Muniappa (Sub-Inspector) told him that they were making him a Crown witness and he was to tell the J.P. whatever Muniappa said. This evidence followed hard upon a statement by Tara Chand that he had been seriously assaulted at the Police Station by being punched ten or twelve times in the stomach and on his side, and that Sub-Inspector Muniappa had pressed his testicles. However a doctor who examined Tara Chand that evening found no sign of injury on him whatever. It is perfectly clear that this evidence — both as to the ill-treatment and as to the inducement — was rejected by the learned trial Judge and in our opinion for good reason. We can find no substance whatever in the contention that Tara Chand's oral and written statements should have been rejected on the ground that they had either been induced by a promise that he would be called as a witness for the Crown, or brought about by ill-treatment inflicted on him by the Police.

With regard to the 2nd and 3rd appellants counsel laid great stress on what he referred to as the impropriety of the "confrontation" of each of these in turn by Tara Chand. In the case of the 2nd appellant Ram Nath it appears from the evidence that he was questioned by Corporal Rameshwar Prasad as to why the body had not been found in the course of the search by the three appellants. The answer was: "I do not know". Corporal Rameshwar Prasad thereupon said to Ram Nath: "Now I am

A telling you that Tara Chand is saying that you, Ram Narayan and he killed Ram Kumar and threw him in the pond". When Ram Nath denied this the Corporal brought Tara Chand in to the presence of Ram Nath. Tara Chand was cautioned in the usual form and asked: "How did it happen? Say all". Tara Chand then stated: "We people killed Ram Kumar and threw him. You were the one who fisted him first and broke his neck with foot". Tara Chand was then taken out of the room. Ram Nath was asked: "What do you have to say now?" but did not reply.

B Later that evening the questioning of Ram Nath was continued at the Nadi Police Station. Ram Nath denied all knowledge of the crime until he was asked the question: "Do you remember you and Tara Chand made a plan about this a week before in the cane-field?" Ram Nath, after an interval, replied: "Sir a mistake has been made somehow make me a witness". He then went on to say that Ram Narayan and Tara Chand had killed Ram Kumar while he was standing by. A proper
C caution was then administered, after which Ram Nath explained how Ram Kumar had been killed, his personal part in the matter being only to assist in throwing the body into the stream. He was then arrested and cautioned again, after which he made a statement which was taken down in writing and signed by Ram Nath.

D With regard to the 3rd appellant, Ram Narayan, the facts of the "confrontation" were somewhat similar. After an enquiry as to why the three appellants had not found the body of Ram Kumar in the creek Corporal Rameshwar Prasad said: "Tara Chand is saying that you three killed Ram Kumar and threw him in the creek". On Ram Narayan's denial Tara Chand was brought into the room, cautioned and asked to say how it happened. Tara Chand then said: "Ram Nath and Ram Narayan killed Ram Kumar by breaking his neck, and then we threw
E him in the pond". Tara Chand was then taken out. Ram Narayan still denied any part in the affair and the Corporal said to him: "You think it over properly and reply to me". Later at the Police Station Ram Narayan asked to see Corporal Rameshwar Prasad and told him that Ram Nath and Tara Chand had killed Ram Kumar in his presence, that they had made him lift the body and throw him in the creek. He was then cautioned and asked to explain what had taken place. His state-
F ment was taken down in writing and signed.

On the "confrontation" issue the learned trial Judge held, at the conclusion of the voir dire, that there was certainly no "confrontation" of two prisoners by a co-prisoner for the purpose of improperly eliciting confessions from one or other of them. He finds that Tara Chand was brought into the presence of the other appellants merely to let the latter
G know exactly what was being said about them by Tara Chand, and to give them the earliest opportunity of rejecting Tara Chand's accusation. The appellants were not then in custody; and in fact the police had no reason, apart from the unsupported statement of Tara Chand, to suspect that they had been concerned in a major crime. The learned trial Judge further pointed out that the statements by Ram Nath and Ram Narayan admitting complicity in the crime were not made until after a proper
H caution had been given.

It is perhaps of interest to note that in *Chan Wei Keung v. R.* [1967] 2 W.L.R. 552 — to which further reference will be made later in the

course of this judgment — an accused person made two written confessions after confrontation with four persons who had denied his statement as to his whereabouts at the time the alleged offence was committed. There is nothing in the report to indicate how the confrontations were brought about, but the procedure would presumably be the same as here. In that case, the confessions, upon which the case against the accused rested entirely (p.555 F), had been held admissible. This finding had not been challenged on the appeal, and was not discussed by their Lordships, who merely narrated the confrontations without comment. Other instances of confrontations passed over without comment may be found in *R. v. Shuter* [1966] Crim. L.R. 104, where a confessing suspected had asked to see the other suspect, and had been allowed to do so in the presence of a police officer, with the result that the second suspect made an incriminating statement which was held admissible; and in *R. Lee* (1950) 82 C.L.R. 133, 139 where the accused had confessed after being confronted at her own request with another suspect who had implicated her.

The judgment of the Court of Criminal Appeal in *Pilley* 16 Cr. App. R. 138, cited by counsel in support his argument, in our opinion does not help the appellants. At p.139 the Lord Chief Justice says :

"But, as was held by this Court in *Gardner and Hancox*, a practice on the part of the police of confronting one prisoner with another, and so obtaining a confession or admission from either, would be most reprehensible. It is contrary to the memorandum approved by the judges of the King's Bench Division in 1912, with reference to the statements of prisoners in the custody of the police."

In the present case the appellants were not in custody, and the learned trial Judge found that the purpose of the confrontation was not to obtain a confession or admission.

In our opinion, the learned Judge was amply justified in holding that the confrontations of the two other accused with Tara Chand did not render their subsequent confessions inadmissible, though we prefer to base our view not upon any inference as to the purpose of the confrontations, but rather on the proposition that there was nothing improper in what was done. We do not doubt that the police desired to obtain confessions if the two suspects were guilty; but this was not an illegitimate desire, and the dominant purpose, not improperly pursued, was to arrive at the truth.

We have given very careful consideration to the material evidence appearing in the Record, and to the arguments of counsel that the confessions made by each of the appellants were obtained by unfair methods or were induced by fear. We have already expressed our opinion that the procedure adopted by the police in the matter of the enquiry at the Momi Indian School was reasonable and, in all the circumstances of the case, offered the best chance of finding the way to the ultimate solution of what was then a mystery. We can find no evidence of unfair pressure being put upon the appellants or any of them; or of any considerations which should have led to the confession in any one case being held not to be voluntary in accordance with the principles laid down in the oft-quoted judgment of Lord Sumner in *Ibrahim v. R.* [1914] A.C. 599 at p.609 :

A "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority."

B We do not accept Mr. Koya's suggestion that a confession may be rejected on the simple ground that it was induced by fear, fear being in our opinion relevant only if induced by some use of improper means, or if of such nature or degree as to suggest that the will was overborne.

C Owing to some decisions of the Court of Criminal Appeal in England, there has recently been some confusion as to the respective roles of judge and jury with regard to confessions. But the situation has now been clarified, in countries where the Privy Council is the highest authority in the courts, by the judgment of their Lordships in *Chan Wei Keung v. R.* (supra). There it was held that, where the judge has admitted a confession as being voluntary, it is not incumbent on him to direct the jury to disregard it unless they in their turn are satisfied as to its voluntariness. The effect of the decision may be summarised by saying that the question of admissibility is for decision by the Judge, and by him alone; and that, if he admits the confession, the sole question for the jury is as to its probative value or effect (or in other words, its truth). D Their Lordships have unequivocally rejected the series of decisions of the English Court of Criminal Appeal, commencing with *R. v. Bass* [1953] 1 Q.B. 680, in which it has been held that the jury must be directed to disregard the confession altogether unless, applying the legal rules as to admissibility, they are satisfied that it was made voluntarily — a proposition which invites the jury to review the Judge's decision, and, if they disagree with him, to reject the confession no matter how fully E convinced they may be of its truth. The jury's duty is to accept the confession as being admissible, and to consider only its probative value, though, in considering that question, every matter of fact that might be relevant to the Judge's decision, is relevant for consideration by the jury in deciding as to probative value, and may be fully canvassed for that purpose both in evidence and in argument.

F As we have held, the learned trial Judge had ample grounds for holding these confessions admissible. As to the weight to be given to them, his summing-up to the Assessors was, if anything, more favourable to the appellants than was strictly necessary according to the principles expounded in *Chan Wei Keung's* case in the passage referred to in his summing up. Their Lordships there cited with approval the dictum of the Court of Appeal in *R. v. Murray* [1951] 1 K.B. 391 at p.393:

G "It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury."

H The trial Judge substituted the phrase "could possibly have been obtained" for the words "was obtained" thereby giving a construction which we have said to be more favourable to the appellants. In our

opinion it would have been better to adhere to the precise words of the passage from the judgment in *R. v. Murray*, which their Lordships accepted as a correct statement of the law.

Reference should perhaps be made to the judgment of this Court in *Sheikh Hassan* (1963) 9 F.L.R. 110 upon which counsel for the appellants heavily relied. In our opinion the facts in the present case are clearly distinguishable from those upon which the judgment in *Sheikh Hassan* is based. The objections to the admission of the confession in the latter case, as set out on page 6 of the judgment, show a course of conduct on the part of the police widely different from that disclosed by the evidence in the present case. In our view, therefore, it is not possible to hold the decision in *Sheikh Hassan* to be an authority supporting counsel's contention that the confession should be rejected in the circumstances obtaining here. We can find nothing in the facts of the present case resembling the conditions referred to in the passage, quoted in *Sheikh Hassan*, from the judgment of the High Court of Australia in *Cornelius v. The King* (1936) 55 C.L.R. 235 at p.252:

... "that interrogation may be made the means or occasion of imposing upon a suspected person such a mental and physical strain for so long a time that any statement he is thus caused to make should be attributed not to his own will, but to his inability further to endure the ordeal and his readiness to do anything to terminate it."

It must not be forgotten, as is stated in *R. v. Lee* 82 C.L.R. 133 at p.155, quoting an earlier judgment of Street C.J.:

"But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon, the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence."

In the result we can find no merits in the first ground of appeal.

The second ground of appeal also relates in form to the question of admissibility of the confessions but is based upon different considerations from those concerning the circumstances in which the incriminatory statements were made. The first of these has reference to the evidence that the cause of death could not be accurately ascertained from medical examination, and that it was not known whether or not Ram Kumar was still living when he was thrown into the Sariyawa Creek.

We assume this to import an argument that the appellants might have believed, when they put the deceased into the creek, that he was already dead, and that they could therefore not, at that moment, have had the necessary mens rea, even though the deceased might in fact have been alive. The onus of proving murder lay on the Crown. Without expressing any opinion on the relevant questions of fact, we shall discuss this question on the footing that, on the evidence, the Crown failed to negative the possibilities that, when Ram Kumar was thrown into the

A creek, he may have been alive, and the appellants may have believed him to be dead. How far, if at all, this argument was put forward by the accused in the lower Court does not appear. The only reference to it in the record is a brief and neutral passage in the summing up, repeated *verbatim* in the judgment, in which the learned Judge said :

"If he was not then dead but died upon being thrown in and left in the creek, then equally, the Crown maintains, the three accused jointly murdered him."

B In argument before us, Mr. Koya did no more than stress the undeniable fact that the cause of death was not established. In reply Mr. Reddy cited *Thabo Meli v. R.* [1954] 1 W.L.R. 228, [1954] 1 All E.R. 373, P.C., and *R. v. Church* [1966] 1 Q.B. 59, C.C.A.

C In our opinion, the answer is to be found in *Thabo Meli v. R.*, where a similar argument was rejected by the Privy Council. In that case there was, their Lordships said, "A preconceived plot on the part of the four accused to bring the deceased man to a hut and there kill him; and then to fake an accident, so that the accused should escape the penalty of their act." When they thought him dead, "The accused took out the body, rolled it over a low krantz or cliff, and dressed up the scene to make it look like an accident." The man died, not from the injuries inflicted on him, but from exposure at the foot of the cliff. In D rejecting the argument that the accused were not guilty of murder because the injuries did not kill and *mens rea* was absent from the fatal act, their Lordships said that it was impossible to divide up what was really one transaction in this way.

E The preconceived plot in that case did include the faking of an accident, but it is not clear that the accident was to be faked in the precise way that was adopted. While it was natural for their Lordships to stress the preconceived plot and the inclusion in it of the faking of an accident, we do not think it follows that their decision would have been different had there been no such inclusion.

F In *R. v. Church* (*supra*) the accused having quarrelled with and grievously injured a woman in his van by the bank of a river, threw her still living body into the river, thus causing her death by drowning. He claimed in his evidence that he thought she was dead. On an indictment for murder, he was convicted of manslaughter. As to the charge of murder, the Court of Criminal Appeal, in an obiter dictum, expressed the opinion that the jury should have been directed that they might convict of murder if they regarded his behaviour as "a series of acts designed to cause death or grievous bodily harm." As to manslaughter, it was held that the jury should have been told that, if they regarded G the appellant's conduct as a series of acts culminating in the woman's death, "it mattered not whether he believed her to be alive or dead when he threw her in the river." There was no evidence whatever of any preconceived plot.

H We think that *Shoukatallie v. R.* [1962] A.C. 81, P.C., is relevant in this connection, though *Thabo Meli's* case was not mentioned therein. Having held — though this was unnecessary to their actual decision — that a co-accused had been rightly acquitted because he might have thought the victim dead when thrown into the river, their Lordships upheld *Shoukatallie's* conviction and sentence of death, notwithstanding the

obvious fact that he had as much reason as his companion to believe the victim dead. The point was said not to be open to him, and the only reason for this that can be extracted from the judgment is that he was the one who had fired the shots which had reduced the victim to the state of being apparently dead. Clearly, this is the same doctrine as was applied in *Thabo Meli v. R.*, and there was in this case — as in *R. v. Church* (supra) — no suggestion of any preconceived plot.

In *R. v. Ramsay* [1967] N.Z.L.R. 1005, 1014, the New Zealand Court of Appeal appears to have regarded the absence of a preconceived plan as a fundamental distinction between that case and *Thabo Meli v. R.* But the facts of the two cases differed greatly. We need only say that, if it was intended to lay down a general proposition requiring a previous plan for the disposal of the body to justify a verdict of murder in a case such as the present one, we are, with all respect, unable to agree. Provided there is a sufficiently connected series of acts, we cannot see that it makes any difference whether the murderer disposes of the body in a manner previously planned or merely in such manner as may occur to him impromptu and on the spur of the moment.

We note also that, in *Ramsay's* case, it appears to have been considered that the *Thabo Meli* principle can be invoked only in cases of intent to kill. In the present case there was ample evidence from which an intent to kill might be inferred, but the learned Judge in fact limited his findings to an intention to do "at least grievous bodily harm." With regard to each of the three appellants, this finding was not directed to any specific act or acts, but followed upon a brief description of his whole course of conduct in lying in wait for Ram Kumar, remaining present throughout the attack on him, and then joining with the others in throwing him into the creek. The intent so found was, of course, sufficient for the charge of murder; and the learned Judge's summing up followed the same line. We do not think it necessary to consider whether we might ourselves infer the intent to kill not found in the Court below, and are content to treat the case as one of intent to do grievous bodily harm. It is not for us to consider whether a different view should prevail under the New Zealand legislation defining the crime of murder; but section 227(a) of the Penal Code of Fiji corresponds with English law (*Archbold's Criminal Practice*, 36th Ed., para. 2484) in defining malice aforethought as "an intention to cause the death of or to do grievous bodily harm to any person," and we see no reason whatever for holding that there is any difference for present purposes between intent to kill and intent to do grievous bodily harm. In *R. v. Church* (supra) p.67, the Court of Criminal Appeal expressed the opinion that the *Thabo Meli* principle would apply on a charge of murder by "a series of acts designed to cause death or grievous bodily harm."

We hold therefore that the three appellants were guilty of murder if, with malice aforethought either in the form of intent to kill or in the form of intent to do grievous bodily harm, they inflicted grievous injuries on Ram Kumar, and then, mistakenly believing him to be dead, and in continuance of a course of conduct that may properly be regarded as indivisible, threw him into the water — whether in execution of a pre-arranged plan or merely on the spur of the moment — and thereby caused his death by throwing.

But, as was held in *R. v. Ramsay* (supra) the question whether a course of conduct should be regarded as an indivisible whole so as to bring this rule into operation is one to be decided by the tribunal of fact.

A We respectfully accept this view, but desire to make it clear that in our opinion, where a person, believing himself to have committed culpable homicide, proceeds to dispose of the supposed corpse in order to conceal his guilt, the circumstances must be exceptional indeed in order to justify a negative answer to this question of fact; since the act of disposal flows as a natural sequence from the preceding act, and, even in point of time, must usually be closely related to it. We think that, in general, only an affirmative answer will be found to be reasonably open on the facts.

B In the present case, the question was not specifically left to the assessors by the learned Judge, nor was it considered by him in his judgment. If, however, there was irregularity in this connection, we are satisfied that it was not such as to occasion any miscarriage of justice, our view being that no assessors and no Judge, properly directed on the matter, could have reached any other conclusion on the facts of this case than that the attack on Ram Kumar and the throwing of him into the creek constituted one indivisible transaction so as to render it immaterial whether death resulted from the attack or from the immersion in the water. We hold accordingly that any such irregularity should be met by applying the wellknown proviso, and that the appellants are not entitled to succeed on this ground of appeal. The proviso was similarly applied by the Court of Criminal Appeal in *R. v. Church* (supra) in respect of non-direction by failing to leave to the jury the question whether the conduct of the accused should be regarded as constituting an indivisible series of acts.

C

D

For these reasons we find it unnecessary to consider the questions whether Ram Kumar was in fact alive, whether the appellants in fact believed him to be dead, or any questions as to the onus of proof in respect of those matters. We think it right to say, however, that in our opinion there is no evidence from which it could reasonably be inferred that he died by drowning.

E

We are aware that the Thabo Meli decision has been severely criticised in *Russell on Crime*, 12th Ed., pp. 55-60. But we respectfully prefer the view expressed in *Glanville Williams' Criminal Law*, General Part, 2nd Ed., para. 65, to the effect that "ordinary ideas of justice and commonsense require that such a case shall be treated as murder." The present case sufficiently illustrates the extent to which commonsense might be offended were a different rule applied.

F

We think it desirable to mention, though our view as expressed above renders it unnecessary for us to consider the point, an alternative approach to the Thabo Meli problem suggested by the author of a note in (1954) 70 Law Quarterly Review 146, and again by C.C. Turpin in "Manslaughter," (1965) Cambridge Law Journal 173. Applied to such cases as Thabo Meli or the present case, it offers the simple solution that the initial acts of violence continue to operate as concurrent causes of the death.

G

H But for the injuries already done to him, the victim in Thabo Meli's case would not have remained exposed to the inclement cold which killed him, and, in the present case, Ram Kumar, if alive, might well have escaped from the water but for the state of unconsciousness to which

he had been reduced. Thus, in both cases, the injuries were a real cause of the death, and we think that our decision might well be supportable on this alternative ground.

As to ground (b) (iii), we can find no merit in this argument. Although certain discrepancies do appear between the oral and the written confessions, these are of little moment and do not affect their broad general purport. The learned trial Judge has set out in his judgment a general analysis of the confessions made by each of the appellants, and we are of opinion that his findings under this head do not call for review by this Court.

As to ground (b) (iv) we can find nothing in the inconsistencies disclosed in the evidence of the police officers which would justify us in ruling that the evidence of those officers should have been rejected in toto. The inconsistencies carry little weight in the estimation of the value of their evidence, and did not affect the fundamental points to which their evidence was directed. Such discrepancies as did appear were brought to the notice of the learned trial Judge and he gave them consideration, both on the voir dire and in his judgment in the trial proper. In our opinion the evidence of the police officers was dealt with correctly by the learned trial Judge.

There remains the general ground that the verdict was unreasonable and cannot be supported having regard to the evidence. In our opinion there was sufficient evidence which if accepted by the learned trial Judge and the Assessors — and it was so accepted — inevitably led to the conclusion that the appellants were each guilty as charged.

In his ruling on the voir dire, the learned Judge excluded considerable portions of the evidence that had been tendered on behalf of the Crown. We wish to make it clear that we are concerned only with what he admitted, and that nothing is to be implied in our judgment as to the propriety or otherwise of his exclusion of any other evidence.

For these reasons we have dismissed the appeals of all three appellants.

Appeal dismissed.