

A

VEER MATI AND OTHERS

v.

B

REGINAM

[COURT OF APPEAL, 1970 (Gould V.P., Marsack J.A., Tompkins J.A.), 15th, 27th July]

Criminal Jurisdiction

C *Criminal law—evidence and proof—homicide—evidence against boy of fourteen years confined to his statements to the police—interpretation of statements—whether inference of malice justified—Court of Appeal Ordinance (Cap. 8) ss. 23 (1), 36—Penal Code (Cap. 11) ss. 21,233—Children and Young Persons Ordinance (Cap. 15) ss. 12, 13—East African Court of Appeal Rules 1954, r. 41.*

D The three appellants were convicted in the Supreme Court of the murder of Shiu Chand. The first appellant, Veer Mati, was the wife of the deceased, and the third appellant, Mahendra Prasad, (at the time fourteen years of age) was their son. At the relevant time there was a love affair between Veer Mati and the second appellant, Dharendra Prasad.

E The appellants had all made statements to the police and these constituted the vital evidence against each, though there was a body of general evidence tending to corroborate the statements, particularly those of the first and second appellants, in relevant details. None of the appellants gave evidence. On appeal—

Held: 1. All the statements of the appellants were considered by the trial Judge at a trial within a trial and found to be admissible in evidence as having been voluntarily made. There were no grounds for disturbing that ruling.

F 2. There was no ground for disturbing the finding of the assessors and the trial Judge that Veer Mati and Dharendra Prasad were guilty of murder; their appeals accordingly failed.

3. (Per TOMPKINS and MARSACK J. A.—GOULD V. P. dissenting)—

G (1) Though on the statements made by Mahendra Prasad it was proved beyond reasonable doubt that he took part in the acts which led to the death of his father, that portion of his statement in which he said that all three appellants pressed the deceased's throat, could not, in view of evidence from a medical witness, be accepted literally.

(2) Passages in two other statements where Mahendra Prasad said that all three appellants killed the deceased, when spoken by a boy of fourteen years, did not necessarily import an intent on his part to kill or cause grievous harm.

H (3) It was a possible inference that Mahendra Prasad merely intended to help Dharendra Prasad and did not know his father was likely to be killed until after his death.

- (4) The inferences that ought to be drawn from Mahendra Prasad's statements did not demonstrate beyond doubt that he was guilty of murder; the appropriate conviction was one of manslaughter and Mahendra Prasad's appeal would therefore be allowed, his conviction of murder set aside and a conviction of manslaughter substituted. A

Cases referred to:

R. v. Mareo (No. 3) [1946] N.Z.L.R. 660.

R. v. Dent [1943] 2 All E.R. 596; 29 Cr. App. R. 120.

R. v. Sharmal Singh [1962] A.C. 188. B

R. v. Ball [1911] A.C. 47; 6 Cr. App. R. 31.

R. v. Munn [1930] N.Z.G.L.R. 430.

R. v. Smith (1909) 3 Cr. App. R. 87; 74 J.P. 54.

R. v. Plummer (1701) Kel. (J) 109; 84 E.R. 1103.

Appeals from convictions of murder in the Supreme Court.

M. V. Pillai for the appellants. C

D. I. Jones for the respondent.

The facts sufficiently appear from the judgment of Tompkins J.A.

The following judgments were read: [27th July, 1970]

(TOMPKINS J.A.):

Appeal against conviction on a charge that the three accused on 13th September, 1969, at Vunikavikaloa, Ra, murdered Shiu Chand. The three accused were jointly charged and jointly tried at Lautoka by a Judge, assisted by four assessors. The assessors each expressed the opinion that each accused was guilty of murder, and the learned trial Judge agreed with their opinions and they were all convicted of murder. All have appealed against their conviction. D

For the sake of clarity I will, in the course of this judgment, call the 1st accused and 2nd appellant Dhirendra Prasad s/o Moti Lal by the name of Dhirendra; the 2nd accused and 1st appellant Veer Mati d/o Raghubar Singh by the name of Veer Mati; the 3rd accused and 3rd appellant Mahendra Prasad alias Munna s/o Shiu Chand alias Narad by the name of Mahendra. E

The grounds of appeal argued by Mr. Pillai, Counsel for all three appellants, may be summarised as follows:—

1. that both the oral and written statements made by each of the appellants should have been held inadmissible; F
2. that the evidence was inconclusive as to which appellant choked the deceased and the verdict against each appellant should in all the circumstances be reduced to one of manslaughter;
3. alternatively, that each appellant was not equally guilty, and that there was insufficient proof of guilty intention on the part of Mahendra to justify his conviction for murder; G
4. that the learned trial Judge did not give sufficient assistance to the assessors on the evidence relevant to the charge against each appellant.

I deal first with the question of admissibility of the statements of the three appellants. After hearing the argument of Counsel for appellants, Counsel for the Crown was not called upon to reply. In regard to all three appellants, the trial Judge properly conducted a trial within a trial to hear evidence and argument upon the admissibility of these statements. All three appellants alleged that force and other unfair and improper methods were used by the police to compel them to make H

A their statements. The learned trial Judge found that none of these allegations were sustained and that the police had throughout the inquiry acted properly and fairly; that all the statements made were made voluntarily in the sense that they were not obtained from any of the appellants by fear of prejudice, or hope of advantage or promise held out by persons in authority, or by oppression. All the statements made by the appellants, whether orally or in writing, were held to be admissible. I do not think that the appellants have shown any grounds for disturbing that ruling.

B The learned trial Judge has summarised the general facts proved by the prosecution, as follows:—

1. that Shiu Chand alias Narad s/o Ram Rattan was a cane farmer residing at Vunikavikaloo, Ra;
2. that the second accused was his wife;
3. that the third accused was his son;
- C 4. that there was a love affair between the first accused and the second accused and that this was known and connived at by the third accused;
5. that the first accused had in the past from time to time worked on the deceased's farm as an employee;
- D 6. that on the evening of 13th of September, 1969, the deceased went to attend a wedding on his tractor and returned home on foot between 9 and 10 p.m. in the company, for part of the way, of the witness, Surend Chand;
7. that the deceased, Shiu Chand, was thereafter not seen until his body was found in his grown up sugar cane plantation some ten chains away from his house on the morning of the 15th September, 1969;
8. that the dead body was removed and taken to C.W.M. Hospital where a post mortem was carried out by Dr. Frederick Wilson, the Government Pathologist, on the 17th of September, 1969;
- E 9. that the immediate cause of death was asphyxia by strangulation;
10. that apart from some minor bruises and injuries, some of which appeared to have been gnawed by rats, Dr. Wilson found the following injuries on the deceased:—
 - (i) the left horn of the hyoid bone had been fractured and the right bone had been dislocated;
 - F (ii) a lacerated wound running vertically from the left ear to the left jaw, the jaw being exposed and the ear completely missing.There were signs that this wound had been gnawed by rats.
11. that all three accused persons were examined by Dr. Yadram Sadhu on the morning of 16th September, 1969, between 10 a.m. and 11 a.m.;
- G 12. that Mr. Sant Raj Rai, a Justice of the Peace, interviewed each of the three accused separately after 11 a.m. on 16th September, 1969, giving each an opportunity to make any complaint but none of the accused had any complaints to make.

H The above summary, of course, does not include any of the statements made by any of the three appellants to which I will refer later in considering the appeal of each appellant. However, I think it necessary to refer to the general principles upon which an appeal against conviction should be determined.

Section 23 (1) of the Court of Appeal Ordinance, Chapter 8, 1967 which is included in Part IV dealing with appeals in criminal cases, provides as follows:—

“ 23.(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: A

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.” B

In *The King v. Mareo* (No. 3) [1946] N.Z.L.R. 660 Myers C.J. in delivering the judgment of the Court of Appeal and referring to a similar provision in New Zealand, said, at p. 670:— C

“ With great respect, while we agree that the question whether the trial or the verdict was satisfactory or unsatisfactory is a sound working test, we should have thought that the expression is perhaps more appropriate to the words ‘ or that on any ground there was a miscarriage of justice ’ than to the previous words ‘ or cannot be supported having regard to the evidence ’. But in truth it would seem that the test is applicable to either case. In applying the test it has always been laid down that a verdict is not to be regarded as unsatisfactory merely because the trial Judge or the Judges of the Appellate Court would not have come to the same conclusion as the jury. There must be something more than that before a verdict may be set aside. Whether the test of being satisfactory or unsatisfactory is applied to the words ‘ or cannot be supported having regard to the evidence ’, or the words ‘ that on any ground there was a miscarriage of justice ’, or whether the test be as is expressed in some of the cases—e.g. *R. v. Dent* (1943) 29 Cr. App. R. 120— D whether the conviction can safely be allowed to stand, it seems to us that a miscarriage of justice must be apparent before the Court sets aside a conviction.” E

In *The Queen v. Sharmal Singh* [1962] A.C. 188 the Privy Council considered the position which arises where there is a trial by judge with the aid of assessors, as is the case here. Lord Morris of Borth-y-Gest in delivering the judgment of the Privy Council said at p. 195:— F

“ Before considering these rival submissions, their Lordships will make some observations about the powers and duty of an appellate court on an appeal from the result of a trial by judge with the aid of assessors, as to which there was no disagreement at the Bar. If it had been a trial by jury, the failure of the trial judge to direct the jury to consider manslaughter as an alternative verdict of guilt and accident as an alternative ground for acquittal would have been fatal; an appellate court would have to quash the conviction and either discharge the prisoner or order a new trial. . . . The powers of the Court of Appeal are contained in the Eastern Africa Court of Appeal Rules, 1954, and provide by rule 41 that the court “ may confirm, reverse or vary the decision of the trial court ”. It is agreed that the Court of Appeal in a case such as the present one is entitled and bound to consider whether the inferences that ought to be drawn from the facts proved demonstrate beyond reasonable doubt that the accused was guilty.” G H

A While the provisions relating to the Fiji Court of Appeal are somewhat different, I think that where a case is tried by a judge with the assistance of assessors the Court of Appeal is entitled, on an appeal such as this, to consider whether the inferences which ought to be drawn from the facts proved demonstrate beyond reasonable doubt that each of these appellants were guilty of murder.

B I now consider the appeal of Dhirendra. The case against him, as in the case of the other two appellants, depends mainly upon his own statements. Shortly after his arrest Dhirendra made a long oral statement to the police. The relevant part of this statement, at p. 390 of the record, is:—

C “We knew that Shiu Chand will return with the tractor and when we will hear the sound then I will escape. But as the radio closed down, within a short while Shiu Chand arrived quietly and shook the front door lock. Veer Mati hid me under the bed and opened the door. Shiu Chand came inside the house and smoked hemp, then said to Veer Mati ‘Give me some water to wash my feet’. Veer Mati said ‘The water is there, wash it’. As Shiu Chand went out I came out and wanted to escape from the front door. In the meanwhile Shiu Chand came and held me from behind. I saw Veer Mati snatched off the knife from the hand of Shiu Chand. Shiu Chand got hold of my right hand finger with his teeth. Then myself, Veer Mati and Mahendra held Shiu Chand and put him down. Shiu Chand then pressed me down. I then bit off his ear with my teeth. In the meanwhile Veer Mati and Mahendra turned him down and pressed him. And then we three of us pressed him by his neck and killed him.”

D After killing him we three of us picked him up and threw him in sugar cane field. When we returned home then Veer Mati wiped all the blood with cloth and water. Then the boy went away in another bed and I was lying down with Veer Mati. At about 4 or 5 o'clock I went away home. We have done wrong. We all three have killed Shiu Chand. This is all my statement.”

E At page 514 of the record, after he had been arrested on a charge of murder and cautioned, he said:—

“I did not kill alone. Narad’s wife and son also pressed the throat together.” In the written statement made by him shortly after his arrest he said at p. 568:—

F “At 10 o'clock Narad returned. Veer Mati hid me under a bed and put boxes on the sides. Narad went out of the house to wash his feet. At that time Veer Mati tried to take me out from under the bed. She took me in another room by hiding me with her skirt. Then Narad saw. Narad asked who is it, Veer Mati said I am meaning herself. Narad came in the same room. Saw me and punched me. I fell. Narad pressed my neck then Mahendra put him down by pulling. I came up. Then Veer Mati, Mahendra and I pressed Narad’s throat (neck). Narad freed himself and caught hold of my arm by his teeth. I also bit him somewhere with my teeth. Then Veer Mati freed me. Then I, Veer Mati and Mahendra killed him by pressing his throat. We three dragged Narad in the cane. If Narad had not assaulted me then I would have gone away from the house and Narad would not have met his death.”

G There is ample corroboration of many of the details set out in this statement. The knife referred to was found. The evidence showed that Dhirendra was bitten on his right finger. The right ear of the deceased was missing. Blood was found in clothing belonging to the deceased found in the lavatory pit and on sacks which had apparently been washed. It seems to me that it is clear from these statements that H Dhirendra was at first attacked by Shiu Chand with a knife. When, however, the

knife was taken from him by Veer Mati the two fought together and that Mahendra and Veer Mati assisted him in overcoming Shiu Chand and that the deceased was then choked to death. The Crown case was that Dhirendra had done this while the other two assisted him in doing so. The learned trial Judge said in his judgment, at page 563, that while he could not find with certainty that Dhirendra's act of choking was the direct cause of death, he held as a fact that Dhirendra intended to kill the deceased and was a party to his death.

I do not think that there are any grounds for disturbing the verdict of the assessors and of the trial Judge that Dhirendra was guilty of murder. On the evidence it was clearly open to the court to find that the Crown had negatived beyond reasonable doubt that Dhirendra was, at the time he had choked the deceased to death, acting in self-defence, or that he was entitled to a verdict of manslaughter on the ground that in acting in self-defence he had merely used a disproportionate degree of force. The court might well think on the facts disclosed in his statement that Dhirendra had a strong motive for wishing to be rid of the deceased so that he could gratify his illicit passion for Veer Mati.

I would dismiss his appeal.

I now turn to the appeal of Veer Mati. The evidence against her also mainly consists of her own statements. At page 384 she said to Sgt. Rameshwar Prasad:—

"All right I will tell everything. Look I had a love affair with Dhirendra Prasad s/o Moti Chand from one year. He was with me on Saturday night and my husband caught him inside the house, then Dhirendra, my son Mahendra and myself killed my husband."

A little later, at page 385, she said:—

"I am telling the truth Babu leave Surend and Ganesh, they did not kill. We three of us killed and picked him up and threw him in the sugar cane field. After wiping the blood we also threw the cloth into the toilet pit. My husband had picked up a knife on Dhirendra. I snatched the knife and threw it away. That was the knife the police brought. This is my true story. Ask my son."

After her arrest by Corporal Khan she said at p. 515:—

"My husband caught Dhirend inside the house. He assaulted us. Then we three of us pressed his neck together. When he died then we three of us took him and threw him in the sugar cane."

Shortly afterwards she made a written statement, the latter part of which, at p. 542, is as follows:—

"It was getting to 10 o'clock the Radio was going to be over then my husband came. He knocked the door and said Munna, Munna. My son opened the door. In the meanwhile I had hid Dhirendra under the bed. My husband came and sat in the bedroom. Smoked hemp. He went out to wash his feet then I took out Dhirendra and took him in another room by hiding him with my skirt. My husband saw it and said "Who is it?" I said, No one. He came running, brighten the lamp. He recognised Dhirendra and began to assault. Dhirendra fell on the bed then Mahendra pulled by shirt. My husband fell. Hit the son. Hit me. Then Dhirendra got hold of my husband's neck and he fell.

He became unconscious. We all three took him out. He died. We three of us picked him and took him and put in cane. Dhirendra went away. On Sunday (14/9/69) my husband's brother Gyan Chand came to station and made a report that my husband did not return home from invitation."

A Veer Mati also had a strong motive for wishing to get rid of her husband. She had been assaulted before by her husband over her relations with Dhirendra and now she had been discovered hiding him in the house in circumstances which pointed to adultery having been committed. While it is never necessary to show a motive for participation in a crime it was said by Lord Atkinson in *R. v. Ball* [1911] A.C. 47 at 68:—

“Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his “malice aforethought”, inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.”

(See also *R. v. Munn* (1930) N.Z.G.L.R. 430 at 432).

There must, of course, be proof of an intention on her part to kill or to cause grievous bodily harm, or, alternatively, that she assisted or encouraged Dhirendra with the knowledge that he intended to kill or cause grievous bodily harm. The only physical act of assistance in killing the deceased to which she refers in her statements is when she says:—

“Then we three of us pressed his neck together.”

D In view of what Dr. Wilson said at page 25, that three people cannot choke a man simultaneously, this statement cannot be taken literally. But she was the first to confess her part in the killing, immediately after being driven to the police station with her son, when she said: “This is my true story. Ask my son”, the inference being that she knew what her son would say, although she also knew that he had up to then maintained that he knew nothing of his father’s death. When Dhirendra was brought in later the same night, she said to him: “I have told everything. You tell all the truth. At the most we will be sent to gaol”. She seems to have taken a leading part, at first in endeavouring to hide their part in her husband’s death, and later in deciding to disclose it.

E I think that the assessors and the Judge, in the circumstances, properly accepted her statements as proof that she, either with knowledge that what Dhirendra was doing was likely to cause death, encouraged him to go on or actually assisted him in killing the deceased and intended that he should be killed, and therefore was guilty of murder.

I would dismiss her appeal.

F I now turn to consider the appeal of Mahendra. Again here the evidence of guilty intent rests entirely on his own statements. At p. 386 he said to Sgt. Rameshwar Prasad:—

“Dhirendra, my mother and myself killed my father and then picked him up and took him and threw him in the sugar cane.”

In answer to a further question—“Why did you people kill?”—he said:—

G “He used to very much assault my mother and that is why we killed him and I will not say anything else. This is all my statement and it is absolutely true statement.”

To Corporal Khan he said at p. 517:—

“We three of us together killed. When he died then we took him up and threw him in the sugar cane.”

H At page 572, in his written statement, he said:—

“It was approximately 10 o’clock then my father came. Knocked the door and called—“Munna Munna”. Then my mother told Dhirendra to go under the bed and he went. I opened the door. Father came in. Sat on the

floor. Smoked hemp. Then said I am going to wash feet and went out. Then mother took him out and was taking Dhirendra in another room then father saw him. Father ran to Dhirendra with knife and mother held. I ran and pushed father and he fell. In the meanwhile Dhirendra rushed and pressed my father's throat (neck) and mother and I also pressed and he could not say anything. His breath stopped and he died. Then we three of us brought him in the porch and from there at about 12 o'clock we took him and threw him in the cane. Dhirendra went away to his house. I and mother remained at home. Dhirendra and mother said let us not tell anyone. At one time my father had made false allegation to my mother about being with Dhirendra then my mother did love him. I knew but did not say anything."

Mahendra is a boy of 14 years of age attending primary school. On his statements I think it is proved beyond reasonable doubt that he took part in the acts which led to the death of his father. But did he have the guilty mind necessary to convict him of being a party to the crime of murder? *Archbold*, 37th Edn., para. 4128, says:—

"A mere participation in the act, without a criminal participation in the design, will not be sufficient: 1 East P.C. 258; *R. v. Plummer* (1701) Kel. J. 109; Fost. 352. Thus, if a master assaults another with malice prepense, and the servant, ignorant of his master's criminal design, takes part with him and kills the other, it is only manslaughter in the servant, though it is murder in the master: 1 Hale 446."

The first statement by Mahendra, at page 386,—

"Dhirendra, my mother and myself killed my father"

does not, I think, necessarily infer an intent to kill or cause grievous bodily harm. "Malice aforethought" is defined in section 233 of the Penal Code as follows:—

- "(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

I think that the first statement by Mahendra as well as the later statement to Corporal Khan that "We three of us killed" may well mean, when spoken by a boy of 14, that he was there and had assisted in the actions which resulted in death. The only other evidence from which "malice aforethought" might be inferred is the part of his written statement which says:—

"In the meanwhile Dhirendra rushed and pressed my father's throat (neck) and mother and I also pressed and he could not say anything. His breath stopped and he died."

If this statement, that he pressed his father's throat, could be accepted, then I think the only proper inference is that he intended to kill. But this statement cannot be taken literally, in view of Dr. Wilson's evidence that three people could not choke him simultaneously.

The learned trial Judge in his judgment held that each accused physically aided and abetted the other in attacking the deceased and pressing his neck, though not necessarily simultaneously. But it would hardly seem credible that one pressed it after the other. I do not think, therefore, that the boy's statement that all

- A three pressed together can be accepted literally; so that if Mahendra physically assisted in the killing it must have been in some other way. It was common ground that there was no pre-arranged plan between the three accused to kill the deceased. The fact that Mahendra pushed his father away from his original attack on Dhirendra could not, I think, involve him criminally; but his assisting in over-powering his father after that time does involve him in criminal responsibility; and I think that he did take some part in the events which led to his father's death. Here Mahendra was present and assisting when the deceased was seized by the throat by Dhirendra. Dhirendra might well have ceased pressing the throat at any time and not gone so far as to kill the deceased. Dhirendra and deceased had had a bitter struggle, in which both had received injuries. I think it is at least a possible inference that Mahendra had merely intended to help Dhirendra, as he had done before, and that he did not know his father was likely to be killed until after he was dead.
- B

- C Mahendra in his first oral statement gave as his motive for the killing, his father's assaults on his mother. In the facts here set out in his statement; the sudden discovery by his father that Dhirendra was with his wife; the struggle which followed; this motive does not seem to be borne out by the facts. Certainly Mahendra did not have any motive to kill, such as may have been engendered in the other two by their illicit passion for each other.

- D In this case no question of credibility of witnesses arises, because none of the three accused persons gave evidence. In the case of each accused it is a question simply and solely of drawing proper inferences from what each one has said. It has been held that in such a case, when the jury's finding does not depend on the credibility of witnesses, the Court of Appeal might more readily grant an appeal: *R. v. Smith*, 3 Cr. App. R. 87 per Goddard L.C.J., at p. 90.

- E The trial Judge gave a very thorough and comprehensive summing-up and correctly stated the law applicable to this case to the assessors assisting him. He does not, however, appear to have considered the possibility of there being a conviction for murder in respect of the principal offender and a conviction for manslaughter in the case of those aiding and abetting. The learned Judge has very carefully explained to the assessors that in order to be guilty of murder any person who assists and encourages another must have either the intention that the deceased should be killed or should receive grievous harm, or the knowledge that what the principal offender was doing would probably cause death or grievous harm to the deceased. But then he went on to say:—
- F

- G “Gentlemen, if the prosecution has satisfied you beyond any reasonable doubt that Shiu Chand met his death at his house on the night of the 13th September, 1969, during an incident involving himself on the one hand and the three accused on the other and that the three accused are parties to killing Shiu Chand within the meaning of section 21 of the Penal Code, then you must give consideration to the following possibilities—

- (a) is it a case of manslaughter,
- (b) is it a case of killing in self-defence,
- (c) is it a case of excessive self-defence,
- (d) is it a case of murder.”

- H After dealing fully and correctly with those defences he reminded them that they were to express an opinion in respect of each accused separately. He said that before any accused can be convicted either of murder or manslaughter the prosecution must prove beyond reasonable doubt—

- (a) that that accused was a party to the killing;

- (b) that either such accused person killed the deceased or aided and abetted in the killing of the deceased with the intention of either killing him or doing him grievous harm or with the knowledge that what was being done would probably cause death or grievous harm to Shiu Chand. A

But he did not, either in his summing-up or in his judgment, advert to the possibility of finding one accused guilty of murder and another, who aided and assisted him but without malice aforethought, guilty at the same time of manslaughter only. I think the assessors might well have thought that if they considered one party was guilty of murder that those charged as being parties to the offence must either be acquitted or found guilty of the same offence. I think also that the position might have been made plainer to the assessors had the learned Judge dealt more fully with the evidence against each accused separately. *Garrow and Spence's Criminal Law*, 4th Edn., page 365, says:— B

“Where several charges or several accused are involved it is frequently necessary not only to explain the nature and ingredients of each charge but to separate the evidence applicable to each count and each accused and direct the jury to consider them separately.” C

I think this is particularly desirable here, where one counsel represented all three accused, and where the evidence as to guilty intent against this accused consisted only of the statements made by him.

It may be thought that many of the above considerations may be relevant also to the case of Veer Mati. But I think the case of her son is very different from hers. He is only 14 years of age. The only evidence against him is statements made immediately after his mother had made her statement, under circumstances which suggest that he may well have made it because she had done so, and perhaps at her direction. Mahendra's statement is far more definite that it was Dhirendra who rushed and pressed his father's throat than his mother's account in her statement. The statement that “We three of us together killed” cannot, I think, be given the same inference as to “malice aforethought” when made by a boy of 14 as it should when made by an adult woman. D E

In all the circumstances, I do not think that the inferences that ought to be drawn from his statements demonstrate beyond reasonable doubt that Mahendra was guilty of murder. In several respects his trial was unsatisfactory. I think that in his case there was a strong possibility that there was a miscarriage of justice. F

I would accordingly allow the appeal of Mahendra and set aside his conviction for murder. However, pursuant to the powers given to the Court of Appeal under section 24 (2), I think that on the findings of the Judge it appears to this Court that he must have been satisfied of facts which proved him guilty of manslaughter, and I would substitute for the verdict found by the Judge a verdict of guilty of manslaughter. In respect of that conviction I would order, pursuant to sections 12 and 13 of the Children and Young Persons Ordinance (Cap. 15) that he be detained in the Approved School at Nasinu until he attains the age of eighteen years which he will do on the 4th June, 1973. G

MARSACK J. A.:

I have had the advantage of reading the careful judgment of Mr. Justice Tompkins and agree, for the reasons he has stated, that the appeals of the 1st and 2nd appellants should be dismissed. I also agree that the appeal of the 3rd appellant should be allowed, with the consequences set out in his judgment. While I concur generally with the reasons which he has given, I desire to add some observations of my own. H

A When, as here, virtually the sole evidence upon which a conviction is based is that of an incriminatory statement by the accused person, it is in my view important to examine that statement carefully for the purpose of deciding exactly what the accused meant when he made it. When the statement in question is made by a boy of 14 years of age, and the charge against him is one of murder, then the examination of that statement should be carried out with particular care.

B The statements relied on for the conviction of the 3rd appellant are two in number. The first is the verbal statement made at the Police Station, two days after the killing of the boy's father, and is in the following terms:—

"Dhirendra, my mother and myself killed my father and then picked him up, took him and threw him in the sugar cane . . . He used to very much assault my mother and that is why we killed him. I will not say anything else. This is all my statement and it is absolutely true statement."

C With great respect to the opinion of the learned trial Judge and the assessors, I cannot agree that the only reasonable interpretation to be put upon the statement is that it is a confession that the boy was a party to the crime of murder. Although, according to the law in force in Fiji, a boy of 14 years of age is invested with full responsibility for his acts and is to be treated if he had a full knowledge of the law, yet I think it still lies with this Court to draw the inference which the Court thinks appropriate from the terms of the incriminatory statements upon the strength of which he has been convicted.

D It seems perfectly clear that he took part in the concerted action by all three appellants which led to the death of the boy's father. It would therefore, in my view, be natural for him to say that the three of them had killed his father, without necessarily meaning to acknowledge, by that statement, that he acted with the intent to kill his father or cause him grievous bodily harm, or realised that such consequences might ensue. Moreover, I feel that the Court cannot be entirely satisfied, for the reasons set out in the judgment of my brother Tompkins, that this statement was not rehearsed, in the sense that the terms of it may have been agreed upon with his mother and the 1st appellant before it was made.

E Be that as it may, greater weight, in my opinion, can be placed on the written statement made to the Police the following day. The correct procedure was followed when it was taken, and the appropriate warning had been given. The relevant portion of this statement reads:

F "Father ran to Dhirendra with knife and mother held. I ran and pushed father and he fell. In the meanwhile Dhirendra rushed and pressed my father's throat (neck) and mother and I also pressed and he could not say anything. His breath stopped and he died."

G All that is established beyond reasonable doubt by this statement is that when the deceased ran to attack the 1st appellant with a knife the boy's mother hurried to restrain him and the boy went at once to his mother's assistance; and the boy was still holding his father when the 1st appellant throttled him to death. Even the statement "mother and I also pressed", cannot be read, in view of the medical evidence, as necessarily meaning that he actually took part in the deliberate choking of his father.

H It is with the greatest diffidence that I find myself forced to a conclusion contrary to the unanimous opinion of the assessors and the learned trial Judge. But I still feel that, upon a detailed examination of the surrounding circumstances and the actual text of the verbal and written statements made by the 3rd appellant, there is no inescapable inference that the 3rd appellant's confession contained all the ingredients necessary to support a conviction for murder. It is I think reasonably

possible to interpret the statements in the sense that he was involved in the assaults which led to his father's death, without however forming the conscious intention of assisting to kill his father or to cause him such harm as might result in his death. If I am right in my opinion that this is a possible interpretation of his statements, then in my view the Court below was not justified in convicting him of murder on the strength of those statements alone; and the proper verdict should be one of manslaughter. On a conviction for manslaughter I agree with the sentence proposed by Mr. Justice Tompkins.

GOULD V.P.:

In this case, in which three appeals are involved, it has been found convenient for the members of the Court to deliver separate judgments under the provisions of section 36 of the Court of Appeal Ordinance (Cap. 8).

So far as the cases of Veer Mati and Dharendra Prasad are concerned I am entirely in agreement with the judgment of Tompkins J.A. and, all members of the Court being of the same opinion their appeals are dismissed.

It is with diffidence that I have arrived at a view of the appeal by Mahendra Prasad which differs from that of the other members of the Court (and in view of his youth I am glad that my own judgment is a minority one).

I need not repeat his statements in full but if the self accusatory words were limited to the words "We three of us killed . . .", I would agree that they might mean no more than that he was present and had assisted others in actions which resulted in death. But I am unable to accept that the assessors and the learned Judge were not fully justified in finding that his second statement, made after charge and caution and read with the first, showed knowledge that the concerted actions of the participants would probably cause grievous bodily harm or death. The words "he could not say anything. His breath stopped and he died", after his admission of "pressing" to my mind fully justified the assessors and court in coming to that conclusion.

As to the summing up, though it might have been put more clearly, I am not able to agree that the various possibilities were not left to the assessors. He said—

"Before concluding the summing up Gentlemen, I must remind you that you are to express an opinion in respect of each accused separately. In other words, if you find one accused guilty of an offence it is not necessary that you must find in your opinion that the others are also guilty; similarly if you find any accused not guilty of an offence, it does not necessarily follow that you must express the opinion that the others are also not guilty of an offence; likewise if you are to express the opinion that a particular accused is guilty of a particular offence then it does not follow that the others must be guilty of that offence only or not guilty at all. You must bear in mind throughout that it is for the prosecution to prove beyond any reasonable doubt that the accused persons or any one of them are guilty of the offence with which they are charged; that if you entertain any reasonable doubt then you must express the opinion that he is not guilty at all or guilty only of manslaughter if the evidence justifies if either on the basis of killing by an unlawful act or killing upon provocation or killing in excessive self defence."

I also take the view that the learned Judge did deal with the evidence against each accused separately to a sufficient degree. He dealt first with Veer Mati's three statements by reading two of them and calling attention to the third which the assessors had available. He adopted the same procedure with Dharendra. Then he did the same with the two statements of Mahendra.

A He made no separate comment on the cases of the appellants at that time but he had already, in dealing with the weight to be attached to the statements, read in full the submissions of defence Counsel as to each. Having dealt with Dharendra and Veer Mati he said in relation to Mahendra—

“ A juvenile—

Had no motive—

B There is evidence that he said his father used to beat his mother—but only isolation incident—forgotten later after the hospital incident. His bold statement that we killed should not be taken as admission that he took part in killing. He admits pressing but what part. Did from any intention.”

(It is not quite clear from the original handwritten note whether the word “ from ” in the last sentence should or should not be “ form ”.)

C It can be assumed that the learned Judge in addressing the assessors put these notes into fuller English, but the point is that there is the reference to Mahendra's youth, his possible motive, the boldness of his first statement and the implication therefrom, and his possible intention. These arguments were put before the assessors and it cannot be a matter of criticism of the learned Judge that he added no comment of his own: particularly if his opinion was adverse, his fairest course was to put the defence before the assessors and leave it at that.

D The case of *Sharmal Singh v. R.* [1962] A.C. 188 which has already been referred to, was one depending entirely on circumstantial evidence of a factual kind. It resembles the present case only in that it was a case of inference, though from facts proved and not, as here, from admissions made. Yet I think there is some relevance to the present case in the words used by their Lordships (at p. 198)—

“ This is the sort of case in which a not incredible explanation given by the accused in the witness box might have raised a reasonable doubt.”

E But no such explanation was given in the present case and the learned Judge and the assessors were left to draw such inferences as arose from the unsworn statements of the appellant and such few other circumstances as were proved.

F The assessors were people of the locality, had seen Mahendra and heard the points in his defence urged by his Counsel and repeated by the learned Judge. I do not, therefore, think this Court justified in interfering with the judgment of the Supreme Court and would dismiss the appeal of Mahendra Prasad as well as those of the other appellants. However, the majority of the Court being in favour of allowing the appeal of Mahendra Prasad it is accordingly allowed, his conviction for murder is set aside and a conviction for manslaughter substituted. He is sentenced to detention in the manner and for the period suggested in the judgment of Tompkins, J.A.

Appeals of first and second appellants dismissed.

G *Appeal of third appellant allowed : conviction of manslaughter substituted.*

H