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NAREND PRASAD AND ANOTHER

v.

REGINAM

B

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Spring J.A.),
2nd, 6th, 15th December]

Criminal Jurisdiction

Criminal law—practice and procedure—application for separate trials—interests of justice to be considered—on appeal question is whether the exercise of trial judge's discretion resulted in miscarriage of justice—Penal Code (Cap. 11) ss. 16, 22—Court of Appeal Ordinance (Cap. 8) s. 23(1)—Court of Appeal Rules (Cap. 8) r. 39(1):

C

Criminal law—practice and procedure—framing of grounds of appeal—avoidance of diffuse and overlapping grounds.

Criminal law—trial—joint trial—discretion of court to order separate trials—interests of justice.

D

Appeal—criminal appeal—refusal of application for separate trials—basic question whether exercise of trial judge's discretion resulted in miscarriage of justice.

Criminal law—evidence and proof—lies told to police—relevance of identical lies by accused persons to question of acting in concert—inference of common guilt.

Criminal law—evidence and proof—self-incriminatory statement of accused person—contradicted by other statements by same person—evidential value—position where sole evidence is confession of accused.

E

Criminal law—assessors—conviction of accused by judge against unanimous advice of—reasons of judge for differing.

Where application for separate trials is made to the trial judge on behalf of accused persons jointly charged, the judge must consider the interests of justice as well as the interests of the prisoners, and where it is sought to review on appeal a decision of the trial judge on such an application the real question for the Court of Appeal will be whether the exercise of the judge's discretion has resulted in a miscarriage of justice. In the case under appeal the cases against the two appellants were so closely interwoven that an exercise of the judge's discretion in favour of separate trials would have been contrary to the interests of justice.

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R. v. Grondkowski [1946] K.B. 369; [1946] 1 All E.R. 559, *R. v. Ross* [1948] N.Z.L.R. 167 and *R. v. Hoggins* [1967] 3 All E.R. 334; 51 Cr. App. R. 444, applied.

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The trial judge treated identical lies told by the appellants to the police as relevant to the question whether they were acting in concert to the extent that an inference of common guilt might be drawn; but he also held that there was sufficient evidence against each appellant individually without having to rely on such an inference.

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Held: The judge treated the matter in accordance with recognised principles and did not give undue weight to the question of lies.

- A** *Mawaz Khan v. R.* [1967] 1 A.C. 454; [1967] 1 All E.R. 80, *Broadhurst v. R.* [1964] A.C. 441; [1964] 1 All E.R. 111, and *R. v. Dehar* [1969] N.Z.L.R. 763; applied.

There is no rule of law that a self-incriminatory statement made by an accused person may not be used as evidence of his guilt because he had made other statements to the opposite effect. If, on full consideration of the incriminatory statement and the circumstances in which it was made, the court holds it to be voluntary and credible, the court is entitled to accept it. While it is established law that a man can be convicted when the sole evidence against him is his own confession, that had not occurred (as contended on appeal by the first appellant) in the present case, as there was evidence outside and confirmatory of his confession.

- B** *R. v. Sykes* (1913) 8 Cr. App. R. 233, referred to.
- C** The trial judge was fully conscious of the need for cogent reasons for convicting the first appellant against the unanimous advice of the assessors and his major reason was that the evidence, as he saw it, was so cogent that the assessors must have misdirected themselves in some manner upon it, and that to accept their opinions would result in a miscarriage of justice.

- D** *Held*: Proper consideration had been given to all the factors involved and ample reasons did exist for his differing from the opinions of the assessors.

Ram Bali v. R. (1961) Privy Council Ap. No. 18 of 1961 — unreported *

Observations on the undesirability of framing numerous, diffuse and overlapping grounds of appeal.

- E** Other cases referred to:

Bharat v. R. [1959] A.C. 533; [1959] 3 All E.R. 292

Walli Mohammed v. R. (1967) Privy Council Ap. No. 16 of 1967 — unreported.

- F** *R. v. Clynes* (1960) 44 Cr. App. R. 158.

Eade v. The King (1924) 34 C.L.R. 154.

R. v. Vallance [1955] N.Z.L.R. 811.

Appeals from convictions of murder by the Supreme Court.

- G** *M. S. Sahu Khan* for the first appellant.

M. V. Pillai for the second appellant.

G. P. Mishra for the respondent.

The facts sufficiently appear from the judgment of the court.

- H** 15th December 1971

Judgment of the Court (read by Marsack J.A.):

* The report of this case in the Fiji Court of Appeal is at 7 F.L.R. 80.

These are appeals against convictions for murder entered in the Supreme Court sitting at Lautoka on the 30th June 1971. Appellants were tried together. The trial Judge sat with five assessors, who expressed the unanimous opinion that the first appellant was not guilty and the second appellant was guilty of murder. The trial Judge concurred with their opinion as to the second appellant but differed from that opinion as to the first appellant. He convicted both appellants of murder and passed the mandatory sentence of life imprisonment.

The basic facts may be shortly stated. On the morning of Friday 8th January 1971 the body of Lum Chee Ming was found under the bed in the room which he occupied on the first floor of Fong Lee's Building in Ba. The body showed signs of a violent assault; there were three scalp wounds about one inch deep and three bruises on the chest and abdomen. The medical evidence was to the effect that death probably occurred between 10.30 p.m. 7th January and 10.10 a.m. 8th January and was caused by reason of ventricle haemorrhage arising from the injuries to the head. The injuries, in the Doctor's opinion, had been caused by severe blows with some hard instrument. It was clear that the deceased had been murdered.

The evidence against the appellants consisted almost entirely of incriminatory statements made by each of them to the Police. In relation to these it will be helpful to record the events which preceded their making. The first appellant was interviewed by Police Corporal Salik Ram late on the night of the 8th January. He told the Corporal that he had at about 5.30 p.m. on the previous day gone to the second appellant's shop for cigarettes, and had seen the second appellant. He returned to his home, but at about 7.30 p.m. he went by car with his brother to the town; they waited at a picture theatre for a while and returned home about 9 p.m. He did not go out again, and denied that he had been seen with the second appellant that night. He denied going to the room of the deceased and said he did not know where it was.

Before turning to the interview with the second appellant it is necessary to mention the evidence given at the trial by a taxi-driver, Jawahir Lal, and a cafe proprietor, Wong Ching Bor. The former testified that he was in company with a telephone boy named Anthony at about 10 p.m. on the night of the 7th January when he saw the two appellants, who were both known to him, walking towards the Fong Lee Building. The evidence of Wong Bor, who also lived in the Fong Lee Building, was that he saw the second appellant some time after 10 p.m. on the 7th January near the entrance to the Fong Lee Building; they spoke together. The second appellant was then wearing shorts and a red sports shirt. Wong Bor further deposed that on the 9th January the second appellant came to the witness's shop at about 8 a.m. and said that he had made a mistake in his statement to the Police; that he had said he was wearing long trousers, whereas he had in fact been in shorts. He asked Wong Bor if he would tell the Police he was wearing long trousers.

We come now to an interview between the second appellant and A.S.P. Chandar Deo which commenced at 10.40 a.m. on the 10th January. The second appellant admitted that he knew the deceased; they were friends and frequently gambled together. He said he had played cards with the deceased on the 7th January, leaving about 10 p.m. He admitted

A speaking with Wong Ching Bor, though their versions of what was said differ appreciably, and said that he was wearing long trousers. He was confronted with Wong Ching Bor who gave his version of the meeting. The second accused then admitted that Wong Ching Bor's version of the conversation at their meeting was correct, and that he had lied to Wong Ching Bor when he said he was going to see his sister-in-law. He maintained, however, that he was wearing long trousers. The second appellant went on to say that Jawahir Lal and Anthony were telling lies if they

B said they saw him with the first appellant that night. He was confronted with Anthony, Jawahir, and Manilal, another taxi-driver who claimed to have seen him, but maintained his denials. Wong Ching Bor was brought in again, whereupon the appellant admitted that he had been wearing short trousers and said that it had been his wife's suggestion to say otherwise. The second appellant's wife confirmed this in his presence, saying that she had thought he might be blamed for the killing.

C At this stage the second appellant pointed to a Fijian Police Officer Inspector Jone Sawau, and said "You come, you come I tell everything". It transpired that the second appellant wished to be driven to Naidrodro, where he lived. This was done; and the police party went first to the second appellant's house and then to the house of the first appellant, which was 12 or 15 chains distant. There the two appellants spoke together, out of the hearing of the police officers. Both appellants then got into the police vehicle and the party returned to the police station. On the way the second appellant said to the first appellant — "Narend, that night three drivers saw us." The first appellant made no reply. It should be noted that the learned trial Judge did not construe his silence as an admission on his part.

E It was after the party reached the police station that the appellants made the incriminatory statements upon which the prosecution relied. In the presence of police officers the second appellant pointed to the first and said, "Ask, ask this boy will tell everything". At that, the first appellant was cautioned and was then asked what he knew about the Chinese murder. He replied, "I and Lum Sik murdered Ming." The first appellant was then charged with the murder and made a statement in some detail.

F The salient features are that on the night in question he went to the room of the deceased and watched the second appellant and the deceased playing cards; the second appellant whispered to him that they would kill the deceased, that Lum Hing would give them \$400 and that another boy would come; later there came an Indian whom he recognised as Lum Hing's cook. The statement then continues —

G "At the same time Lum Sik switched off the light. By then that boy struck Lum Ming with an iron bar and Lum Ming fell on the floor, then Lum Sik got hold of Lum Ming and took the iron bar from the Indian boy and struck Lum Ming. Then Lum Sik said to me "you take the iron bar and strike or else you will be beaten up" (killed). Then I took the iron bar and struck at him. One landed on his hand and another on an unknown place. Then Lum Sik put on the light

H and we all together pushed Lum Ming under the bed and then Lum Sik wiped the floor with cloth, pick all cigarette butts and the dirt, packed in a small tin and placed it inside the lavatory and squeezed some of the playing cards and threw them towards the lavatory. Then Lum Sik took out money and keys from his pocket and kept

them with him. Then we came out of the room. I followed the front steps and came in front alone, and went away home alone. Those two went away I do not know where. On Friday during the day Lum Sik told me and gave the key saying to keep it somewhere. I put the keys into a tin and placed it near his shop in bamboo roots."

There are one or two matters which should be noted at this point. One Lum Hing and his cook Sami Nadan gave evidence at the trial, and emphatically denied any connection with the matter. There was also evidence that the first appellant took the police to a bamboo tree near the first accused's shop and dug up a tin containing keys, one of which fitted the safe of the deceased. The fact that the keys were found in a tin is significant in view of the first appellant's statement, above quoted, that he had so hidden them. There was also evidence from the police as to the state of affairs in the room of the deceased the following morning, in the light of which it is manifest that the description of the various details given by the first appellant was that of an eye-witness.

We return now to the second appellant. He also made a detailed statement. He described how he was approached by Lum Hing to kill the deceased for the sum of \$400. The second appellant was to provide one helper and Lum Hing would send his cook. He approached the first appellant, who agreed. He then described how he and the deceased played cards; the first appellant and Lum Hing's cook came. The final part of the statement reads :

"Same time Narend "maro loha Ming ke mud" (same time Narend struck on Ming's head with an iron) aur Ming fall down (and Ming fell down) hum ankhe band karo (I closed my eyes), hum open ankhe, see blood Ming's head (I opened my eyes, see blood Ming's head). Ming finish. We push Ming khatia ke niche (under the bed). Narend uske jeb me paisa — jabhi nikalo (Narend took the money and keys from his pocket. Hum kapra se khun safa karo (I wiped the blood with a cloth). Sub rubbis batoro (pick all the rubbish) and put in Glaxo tin. We come out "hu log piche wala rusta bhag jao (they ran away by the rear track) and I come home and sleep."

It will be observed that the statement contains no admission of active participation. Finally, when the second appellant was charged with the murder he made the following cautioned statement :

"I am like a dog. Lum Hing told me to kill Lum Chee Ming. I kill him."

It is pertinent to note that neither of the appellants made any reference to Lum Hing or his cook prior to the private discussion which took place at the instance of the second appellant. The appellants did not persist in this accusation when they made unsworn statements at their trial. The first appellant then denied that he had gone to the room of the deceased at all; as to his knowledge of the whereabouts of the keys, he said he had found the second appellant hiding them the following day. The first appellant's statement admitted his presence at the scene of the crime but described how the first appellant and his elder brother had entered the room and beaten the deceased to death.

A One piece of evidence, to which we have not yet referred, carries the matter no further except that it may give some idea of the time of the incident. The witness Bhupendra Chimanbhai Patel said that he heard cries of "No, no, no", and a sound as of blows, coming from the direction of a flat at the back of the Fong Lee building at some time between 11 p.m. and 11.30 p.m. on the 7th January.

B The appeals were heard together; but it will perhaps be more convenient if they are dealt with separately in the course of this judgment. There is however one ground of appeal which was common to both appellants though before us it was argued on behalf of the second appellant only. As it raises the question of the legality of the whole trial it seems proper that that point should be decided before attention is given to the other grounds of appeal.

C That ground may be set out in the following terms :
that the learned trial Judge erred in refusing to order separate trials of the two accused persons and that there was thereby caused a miscarriage of justice.

D At the trial, counsel for each of the accused made application for an order for separate trials. This application was opposed by Crown Counsel. The learned trial Judge after consideration made an order refusing the application.

E At the hearing of the appeal it was argued by Mr. Pillai that the case was one of great complexity; that the hearing covered fourteen sitting days over a period of slightly more than three weeks; and that it would be very difficult for the assessors, despite a proper direction from the trial Judge, to consider the evidence against each of the accused separately. This was particularly so in that one accused, in his statement to the Police, implicated the other accused in the crime which had been committed. Accordingly, in counsel's submission, the accused persons were definitely prejudiced by being tried jointly.

F The application for separate trials must be made at the outset of the trial, and the Judge can act only on the material then before him, usually the depositions and the exhibits. The basis upon which the trial Judge should exercise his discretion has been authoritatively set out by the Lord Chief Justice Lord Goddard in *R. v. Grondkowski* [1946] 1 All E.R. 559 at p. 561 :

G "The law is and always has been that this is a matter of discretion for the Judge at the trial . . . The discretion no doubt must be exercised judicially that is not capriciously. The Judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. If once it were taken as settled that every time it appears that the prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it."

H This case was referred to by the Court of Appeal in New Zealand in *R. v. Ross* [1948] N.Z.L.R. 167 wherein Smith J. in referring to the English cases said :

"The Court pointed out that "interests of justice" did not mean only "the interests of the prisoner" and said prima facie where the evidence of the case was that prisoners were engaged in a common enterprise it was obviously right and proper that they should be jointly indicted and jointly tried."

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In *R. v. Hoggins and others* [1967] 3 All E.R. 334 Mr. Justice Lawton in delivering the judgment of the Court of Appeal, Criminal Division said :

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"The factor of the public and interests of the public in the proper administration of justice is a very powerful factor indeed, and in the majority of the cases where men are charged jointly, it is clearly in the interests of justice and the ascertainment of truth that all the men so charged should be tried together."

Where it is sought to review the trial Judge's decision as to a joint trial the real question for the Court of Appeal will be whether the exercise of his discretion has resulted in a miscarriage of justice :

C

"The real test, after all, which must be applied by a Court of Criminal Appeal on a matter which is essentially one of discretion is, has the exercise of that discretion resulted in a miscarriage of justice?" (*R. v. Grondkowski*, supra at p. 562).

D

In our view there was nothing in the evidence or the conduct of the trial which could be said to have led to a miscarriage of justice. The trial Judge accepted the evidence of A.S.P. Chandar Deo that he said to second appellant, "You were present when Narend said he and you murdered Lum Chee Ming" and the second appellant replied, "I was there." In the same statement he said, "We push Ming under the bed . . . I wiped the blood with a cloth, pick all the rubbish and put in Glaxo tin."

E

In his unsworn statement second appellant recounts at length what took place in the room of Lum Chee Ming when he was killed. He says inter alia that, "In that final of cards the deceased and I each paid \$1.50 that explains the \$3.00 which was put into a box." Inspector Jone Waisele who went to Lum Chee Ming's room on the morning of 8th January 1971 found a Glaxo tin which contained inter alia an empty card packet with \$3.00 inside it. As we indicate elsewhere in this judgment there was in our view overwhelming evidence that second appellant was present at the scene of the murder, and that the first appellant Narend Prasad was also present at the same time.

F

Counsel argued that the second appellant would be prejudiced because of the statements of the first appellant which were admitted in the trial and which implicated him, as the assessors would find difficulty in separating the evidence against one from that against the other.

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The learned trial Judge in his summing-up to the assessors was particularly careful to warn the assessors and he did so warn them more than once that the evidence of one appellant was not evidence against the other. He said :

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"I have already directed you that in a joint trial you must consider the case against each accused independently and separately being

A careful to distinguish evidence admissible against one accused from that admissible against the other. If you consider the case against one accused to be weaker than the case against the other, you are not entitled to bolster up the weaker evidence properly admissible against the accused against whom you consider the case to be stronger.

B In our view the case against the first appellant and the case against the second appellant are so closely interwoven that it would have been contrary to the interests of justice had the learned trial Judge exercised his discretion otherwise than as he did. On a consideration of the whole of the evidence we conclude that no miscarriage of justice took place by reason of the learned trial Judge's refusal to separate the trials. For these reasons we disallow this ground of appeal.

C We now turn to the case for the first appellant. The original grounds of appeal, put forward by the appellant himself, were abandoned at the hearing and the appeal was argued on the additional grounds filed by counsel. These were some thirty or more in number, were diffuse, and overlapped to a considerable degree. This Court has in previous cases commented adversely on this method of setting out the grounds of appeal.

D What the Court wants is a concise and accurate statement of the grounds on which the appeal is based, and of the reasons for submitting that a miscarriage of justice has been caused. It does not help the Court if counsel files a lengthy verbose document from which the Court has to try to spell out the relevant points which will be argued for the appellant.

E In this present case several of the grounds of appeal were abandoned at the hearing and others were argued together. Some, in the opinion of this Court, were entirely without merit. Those grounds which required consideration, and in respect of which Crown Counsel was called upon to reply, may be shortly summarised as under :

F 1. That the learned trial Judge erred when considering the evidence against the first appellant in giving undue weight to the fact that the appellant had told lies to the Police, and insufficiently directed the assessors and himself on the question;

2. That the learned trial Judge did not adequately direct the assessors and himself on the issues of

G (a) common design,

(b) compulsion;

3. That the learned trial Judge erred in law and in fact in accepting as true certain portions of the contradictory statements made by the first appellant and rejecting the balance as false;

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4. That the evidence against the first appellant consisting solely of his self-incriminatory statements and these were insufficient of themselves to support a conviction for murder, and the learned Judge wrongly directed the assessors and himself on the question:

5. That the learned trial Judge did not put forward sufficient reasons for differing from the unanimous opinion of the five assessors; A
6. That the verdict is unreasonable and cannot be supported having regard to the evidence.

Before considering these grounds in detail we think it necessary to point out that there is little substance in any argument based on an alleged misdirection of the learned trial Judge to the assessors in respect of the case against the first appellant. It has been made clear in a number of cases, such as *Bharat* [1959] 3 All E.R. 292 that the purpose of a proper direction to the assessors is to enable the assessors to give the trial Judge the aid of their opinions with regard to the guilt or otherwise of the accused. In this case the assessors unanimously expressed their opinion that the first appellant was not guilty. It is obvious that no further or different directions given by the learned trial Judge could have produced an opinion or opinions more favourable to the first appellant. B C

It is true that in the course of his judgment the learned trial Judge states that he has directed himself in accordance with his directions to the assessors; but it is in the main to his judgment that we must look for the reasoning he adopted, and the legal principles he applied, in reaching the conclusion that, notwithstanding the opinion of the assessors, the first appellant was guilty of murder. D

We now turn to the first of the grounds of appeal put forward on behalf of the first appellant. The direction given to the assessors by the learned trial Judge on this aspect of the case was in these words :

"As regards telling lies to the police when enquiries are being made about a crime, it is equally true that if it is established that the accused deliberately told lies on matters relevant to the enquiry then such lies are of great significance, but it must always be borne in mind that there must be something more than the mere telling of lies to the police before a man is convicted of any crime, let alone murder." E F

In counsel's submission this direction was in itself insufficient, and the learned trial Judge should have explained fully what he meant by the phrase "There must be something more." In his judgment the trial Judge refers to the decision of the Privy Council in *Mawaz Khan v. R.* [1967] 1 A.C. 544 where it was laid down that the statements of each appellant could, without any breach of the hearsay rule, but used, not for the purpose of establishing the truth of the assertions contained therein, but for the purpose of asking the jury to hold the assertions false and to draw inference from their falsity. The trial Judge then proceeds : G

"The statements in this case to the extent proved false were relevant as tending to show that the makers were acting in concert and that such action tended to indicate a common guilt. This is a factor to be taken into account upon proof of and in conjunction with other incriminating evidence in determining the guilt or innocence of the accused persons. Lies in themselves would not be sufficient to constitute evidence of guilt." H

A There is no doubt that the fact that the accused person has told lies in the course of his statements to the Police is a factor which may be taken into consideration by the jury in deciding whether or not to accept the accused's explanation of what had taken place. In *Broadhurst* (P.C.) [1964] A.C. 441 at p. 457 the principle is stated in these words :

B "But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt."

In *R. v. Dehar* [1969] N.Z.L.R. 763 Turner J. in delivering the judgment of the Court of Appeal says at p. 764 :

C "The cases which deal with the interesting question as to how far evidence of lies told by an accused person as to his movements can be called in aid as proof of the substantive offence charged are for the most part corroboration cases, of which *R. v. Clynes* (1960) 44 Cr. App. R. 158, 163, in England, *Eade v. The King* (1924) 34 C.L.R. 154 in Australia, and *R. v. Vallance* [1955] N.Z.L.R. 811, 815, in this Court may be instanced as authorities. In all these cases it had been recognised that if a jury comes to the conclusion that an accused has deliberately lied as to his movements, they may on a proper direction conclude that he told the lies because he is unable to account for the facts to which the other witnesses have testified, in any way consistently with his own innocence."

E The learned trial Judge, in the course of his judgment, treats the identical lies told by the two appellants as relevant to the question of whether they were acting in concert to the extent that an inference of common guilt might be drawn; but he holds that there is sufficient evidence against each accused individually without having to rely on any such inference.

F In our view the trial Judge has not given undue weight to the fact that the first appellant had told lies to the Police, but has treated the matter in accordance with the recognised legal principles. This ground of appeal must fail.

G Ground two is based on the submission that the learned trial Judge did not adequately direct the assessors and himself on the issues of common design and compulsion. The record shows that the relevant sections in the Penal Code, sections 22 and 16 respectively, were read out to the assessors by the trial Judge and were obviously in his mind. He then proceeds, in his judgment, to examine the evidence on both these points, and expresses himself as satisfied on that evidence that the appellant voluntarily participated in the murderous attack on the deceased and that he had twice struck the deceased with an iron piece. He also states that the evidence in his view negatives any suggestion that the first appellant acted under compulsion within the meaning of section 16 of the Penal Code. In our opinion it cannot therefore be said that the learned trial Judge failed to direct himself adequately on the issues of common design and compulsion. We further find that there was ample evidence to justify his findings that the two appellants had acted in concert. This evidence is referred to in more detail elsewhere in this judgment, and in particular when we come to consider the general

ground argued for the second appellant that the verdict could not be supported on the evidence. Briefly, there is the fact that both appellants were seen together at material times walking towards Fong Lee's Building; that in the Police van second appellant said to first appellant, "Narend, three drivers saw us that night," and first appellant did not reply; that first appellant produced the keys of deceased's room and safe which he said had been given to him the previous night by second appellant; and that in his charge statement he said, "I and Lum Sik murdered Ming". The only evidence in support of first appellant's claim that he acted under compulsion is contained in his charge statement when he says, "Lum Sik said to me, you take the iron bar and strike or else you will be beaten up. Then I took the iron bar and struck at him." This statement was totally unsupported and is in any event inconsistent with other evidence accepted by the Court. Accordingly we find that the evidence that the first appellant acted under compulsion was insufficient either to establish that fact or to raise a reasonable doubt that he might not have done so.

We now turn to the third ground of the first appellant's appeal. The statements made by this appellant to the Police were mutually inconsistent and at times contradictory, and his unsworn statement made at the trial retracted much of what he had said previously, and in particular in his cautioned statement to Detective Sergeant Jai Raj. He concluded his unsworn statement in Court by saying:

"The statement that Jai Raj took down from me is absolutely false.

I do not know anything about this murder and that is all my statement.

There is no rule of law that a self-incriminatory statement made by an accused person may not be used as evidence of his guilt if he had made other statements to the opposite effect. It is perfectly true that the prosecution is not entitled to pick out from a statement one or two sentences, divorced from their context, which could be read as an admission of guilt, but would have a different significance if read together with other parts of the statement. On the other hand a jury is entitled to attach different degrees of credibility to different parts of a statement or statements. Many instances occur when an accused person has voluntarily admitted his guilt, but on thinking it over afterwards has decided that he was foolish to do so, and then makes another statement completely contradicting his first. In such cases there is no rule that the second statement nullifies the first. It is well recognised that no man will in normal circumstances confess to a crime which he had not committed. It is a matter for the jury, or in this case the Judge, to give full consideration to the incriminatory statement and to the circumstances in which it was made; and if it is held to be voluntary and credible then the Court is entitled to accept it. In this case the trial Judge has given adequate reasons for holding that the incriminatory statement was voluntary, that it was consistent with the outside evidence, and that it should be accepted as some proof of the appellant's guilt. In these circumstances there was no obligation on his part to reject the statement on the ground that the appellant had made other statements which were inconsistent with it. We can find no merit in this ground of appeal.

A The fourth ground was that on which counsel for the appellant most strongly relied in his contention that the verdict could not be upheld. In his submission the confession made by the appellant, if the facts were accepted by the learned trial Judge, was not sufficient to justify conviction, unsupported as it was by any form of corroboration.

B It is well established law that a man can be convicted when the sole evidence against him is his own confession. The following passage from the judgment of Ridley J. in *Sykes* 8 Cr. App. R. 233 at p. 236 has been cited with approval in many subsequent decisions:

C "A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it."

In the present case, however, the conviction of the first appellant is not based solely on his confession. The learned trial Judge has made this clear in his judgment; and has set out the other pieces of evidence, which he accepts as true, which are consistent with and to some extent corroborative of the confession of the appellant. These are:

D (a) Jawahir Lal's evidence that he saw first and second appellants together on the Elevuka Bridge walking towards Fong Lee's Building about 10 p.m. on the 7th January 1971. In view of this evidence the trial Judge found that first appellant was lying when he made a statement to Corporal Salik Ram to the effect that he had been at home from 9 p.m. onwards on the night of the 7th January and had not been in the company of the second appellant as stated by Jawahir Lal;

E (b) The undisputed prosecution evidence that when the appellants were being taken in the police van to the Ba Police Station on the 10th January the second appellant said to the first appellant, "Narend, that night three drivers saw us". To this first appellant made no reply.

F (c) The evidence that at the end of his cautioned statement to the Police when he was charged with murder, the first appellant said, "On Friday during the day Lum Sik told me and gave the keys saying to keep it somewhere. I put the keys into a tin and place it near his shop in bamboo roots". Superintendent Walli Mohammed then asked if first appellant could give him the keys. First appellant said, "Yes, we go." First appellant went with the Police Officer to the bamboo tree near his shop and there he dug into the roots and pulled out a small tin which he handed to Sergeant Jai Raj. When the tin was opened it was found to contain the keys to deceased's premises and his safe.

G Accordingly we find that there was outside evidence confirmatory of the confession made by first appellant and it is therefore not correct to say that the trial Judge's finding of guilt against him was based solely on his self-incriminatory statement. We can find no misdirection on the part of the trial Judge to the assessors and himself on this question.

H

Great emphasis was placed by counsel for the first appellant on the fifth ground set out above, namely that the learned trial Judge did not put forward sufficient reasons for differing from the unanimous opinion of the five assessors. It is clear from his judgment that the learned trial Judge was fully conscious of the need for cogent reasons for rejecting the advice of the assessors, especially as their opinion was unanimous and the case was one which largely rested on credibility, questions of fact and inferences to be drawn from the facts. The Judge proceeds to discuss possible reasons for the opinion of the assessors, and in the course of that discussion asks whether the assessors during their brief deliberations gave adequate consideration to the evidence against the first appellant. It is in fact worthy of comment, in our opinion, that after so lengthy a trial, followed by a full detailed summing-up which took more than an hour to deliver, the assessors took a mere ten minutes to form their opinions in respect of both accused.

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Be that as it may, the learned trial Judge in his judgment has, in our view, given full consideration to all the evidence and all the issues involved and has set out adequate reasons to justify his finding him guilty against the unanimous advice of the assessors. The possible misunderstanding of his summing-up to which he refers in his judgment may be speculative, particularly in view of the assessors' very brief retirement. But his major reason was clearly that the evidence, as he saw it, was so cogent that the assessors must have misdirected themselves in some manner upon it, and that to accept their opinions would result in a miscarriage of justice.

This case bears a close resemblance to that of *Ram Bali v. R.* (Privy Council Appeal No. 18 of 1961) which was an appeal against the judgment of this Court. There the trial Judge had disregarded the unanimous opinion of the assessors and found the appellant guilty. At p. 4 of the Record their Lordships of the Privy Council said :

E

"This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or of their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing-up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence."

F

"Their Lordships can discern no error in the approach of the learned Judge in arriving at his positive and affirmative conclusions: it is manifest that his acceptance of certain witnesses and his rejection of others made him satisfied beyond even "the slightest shadow of doubt" of the guilt of the appellant."

G

The judgment of the Privy Council upheld the action of the trial Judge and sustained the conviction. We are of the opinion that the passages quoted from their judgment would apply with equal force to the case before this Court. We are satisfied that ample reasons did exist for the action of the learned trial Judge in differing from the opinion of the assessors, and that proper consideration had been given by him to all the factors involved.

H

A The sixth is the normal ground that the verdict was unreasonable and not supported by the evidence. As we have said earlier, we propose to discuss the question of the evidence as to common purpose at a later stage. Subject to that, we think that for the reasons already given there is no merit in this ground.

We now turn to the appeal of the second appellant who has submitted three grounds of appeal. These read :

- B**
1. That the decision is unreasonable and cannot be supported having regard to the evidence.
 2. That the learned trial Judge ought to have ordered separate trials.
- C**
3. That the learned trial Judge, immediately prior to giving his ruling in the trial within a trial to decide whether certain admissions made to the Police by me, erred in law in looking at the note book of Acting Superintendent Chandar Deo such note book not having been tendered in evidence.

D We have already dealt with ground No. 2, and it is not necessary to make further reference to it.

E The third ground had this Court in some difficulty, in view of the affidavit of Counsel, Mr. N. V. Pillai, filed in support of it. This affidavit set out that before the learned trial Judge gave his ruling on the admissibility of the evidence as to statements made by the appellant, the Indian interpreter Mohammed Sarwar asked for, and obtained, his note book from Assistant Superintendent Chandar Deo as he said the Judge wished to see it. As nothing appeared in the Record with regard to this incident and counsel for the Crown assured the Court that he had directed inquiries to counsel who appeared for the Crown in the Supreme Court and to Assistant Superintendent Chandar Deo, and neither had any recollection of the incident, this Court applied under Rule 39(1) of the Court of Appeal Rules for a report from the learned trial Judge. In his report the Judge

F says that he had no recollection of sending for the note book and looking at it, and he was sure that if he had done so he would have remembered it. He further states that he communicated with Mohammed Sarwar who said that the Judge had not asked him to bring a note book; and in fact denied that any such incident had taken place.

G In the circumstances this Court is compelled to treat the matter on the basis that the recollection of counsel — who, it is conceded, raised no objection at the time — may well be faulty, though there is no suggestion whatever that Counsel in making his affidavit acted otherwise than in complete honesty. Accordingly we must hold that the facts upon which this ground of appeal is based have not been established.

H In any event the Court has considered the matter as if such an incident had actually occurred, and has concluded that in that event no miscarriage of justice would have taken place. If it had been necessary to apply the proviso to section 23(1) of the Court of Appeal Ordinance the Court would have done so.

That leaves for determination only the question of whether the verdict was unreasonable and could not be supported having regard to the evidence. In the course of his very clear and concise argument, Mr. Pillai submitted that the only definitely incriminating evidence against the second appellant is the statement to Inspector Jone Waisele, "I am like a dog. Lum Hing told me to kill Lum Chee Ming. I kill him." Counsel contended that this statement consisted of a mere couple of sentences extracted from a series of five statements made by the first appellant, which statements were contradictory in the extreme but generally asserted the innocence of the appellant.

We have already considered the argument that the learned trial Judge is not entitled to pick out one or two sentences from a mass of contradictory statements and ignore the rest and we do not think it necessary to say any more on that point. As we have indicated, we propose to discuss the evidence of common purpose under this head in relation to both appellants. Their presence at the scene of the killing at the time it was committed must be taken as established. In the first appellant's case, though in an unsworn statement in Court he denied his presence, his earlier statement in which he admitted it, is so consistent in detail with what the police found in the deceased's room that the only reasonable conclusion to be drawn from it is that he was present. The second appellant has (after his early denials) admitted his presence and made no retraction.

The learned Judge held that the first appellant voluntarily participated in the attack and struck the deceased at least twice with an iron piece; he was also satisfied that the appellant knew the deceased was to be attacked and either killed or grievously harmed. He had before him ample evidence to support this finding in the first appellant's confession that he and the second appellant murdered the deceased, and his later detailed statement, in assessing the credibility of which the Judge was able to consider the outside evidence to which we have already referred. In the circumstances we think there is no merit in the argument that there was insufficient evidence to show that the first appellant was not only present but also aiding and abetting.

With regard to the second appellant, as we have said, his presence at the scene of the murder is admitted; but in his detail statement he has at all times blamed others and denied striking any blows. Nevertheless the learned Judge held that this appellant had prior knowledge of the coming attack and was a party to it. In this he based his finding largely on the admission, "I am like a dog. Lum Hing told me to kill Lum Chee Ming. I kill him," together with his longer statement. While the reference to Lum Hing is apparently a lie, we consider that the learned Judge was perfectly justified in placing weight upon the last three words (whether the word "kill" should be read "hit" or not) by reason of the admission in the subsequent statement, the second appellant's evasions and lies, his apparent influence with the first appellant manifested in the interview with him which was followed by a parallel course of action, together with the evidence that they had been seen together at an important stage. We think that on this evidence the learned Judge was fully justified in holding that the second appellant was party to the common design to kill or do grievous bodily harm, and we reject counsel's argument to the contrary.

- A** We have referred to the evidence in some detail in order that the distinction between the present case and the facts which gave rise to the judgment of the Privy Council in *Walli Mohammed v. R.* (P.C. Appeal No. 16 of 1967) may be seen. In that case each of two persons charged with murder made a number of statements in which each at first denied but subsequently admitted presence at the scene of the crime. They never admitted complicity but accused each other and a number of other named persons. All the latter were called at the trial and asserted their innocence. The Privy Council took the view that, even assuming that all the persons called as witnesses were innocent, it was still possible that a third person was being sheltered; and, in any case, if one or other of the two accused were guilty it was not possible to say which. The appeal was therefore allowed. The basic distinction between the facts of that case and the present circumstances is that in *Walli Mohammed's* case there was no evidence whatever of participation of either of the accused in the actual killing or of any design to kill. In the present case there is ample evidence, which was accepted, of active participation by both. From specific confessions and inferences from the surrounding circumstances, including the subsequent pattern of conduct, the learned Judge was in our opinion fully entitled to find a common purpose shared by the appellants.
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- C**
- D** For these reasons we reject the ground of appeal in both cases that the judgment should not be supported having regard to the evidence, and for the reasons given in relation to the whole case both appeals are dismissed.

Appeals dismissed.