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DHANI CHAND

v.

REGINAM

B

[COURT OF APPEAL, 5, 28 November 1979 (Gould V. P., Marsack, J. A., Spring, J. A.)]

Criminal Jurisdiction

C

Criminal Law—procedure—retrial—when order for appropriate.

S. D. Sahu Khan for the Appellant.

M. Jennings For the Respondent.

Appeal from a decision of the Supreme Court of Fiji (Lautoka) wherein the learned Judge allowed an appeal against a conviction of the appellant for arson: A new trial was ordered. The appellant contended there should be no retrial.

D

The facts of the case generally are set out in the Reasons for judgment. The appellant's main argument to the Court of Appeal was that the appellate Judge in ordering a new trial wrongly exercised his discretion. It is on this ground that the matter is now reported. The court noted that a new trial can be ordered pursuant to the Criminal Procedure Code S.300 as amended. The court said it was implied this can be done—

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“... if the interest of justice so required;”
even though those words were not used in that section.

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Held: The case dealt with a serious crime in which considerations relating to interests of the public played an important part. The potentially admissible evidence amounted to a very strong case against appellant. He should not be relieved of the necessity to answer this case e.g. because of what could be little more than a technical error, i.e. a failure to take into account when admitting confessional evidence whether or not appellant was in custody.

Appeal dismissed.

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Order for new trial confirmed.

Cases referred to:

Daulat Khan v. R. 22 F.L.R. 27.

Nirmal v. R. Appeal 46/1970.

Salim Muhsin v. Salim Bin Mohammed (1950) E.A.C.A. 128.

Ahmedi Sumar v. Republic (1964) E.A. 481.

Pascal Clement Braganza v. R (1957) E.A. 152.

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Au-Pui-Kuen v. Attorney-General of Hong Kong (1979) 1 All E.R. 769.

GOULD, V. P.:

Judgment of the Court

This is an appeal from a judgment of the Supreme Court at Lautoka sitting in appeal from the Magistrate's Court; and is therefore, under section 22(1) of the Court of Appeal Ordinance, limited to questions of law. A

The appellant was charged before the Magistrate's Court at Ba with the offence of arson. The learned Magistrate convicted the appellant and sentenced him to five years' imprisonment. He appealed to the Supreme Court against both conviction and sentence. The learned judge allowed the appeal against conviction and ordered a new trial before another Magistrate. No decision was given with reference to the appeal against sentence. B

The evidence against the appellant at the original hearing consisted very largely of confessions alleged to have been made by the appellant, admitting confessions as "the mainstay of the prosecution case." One of these was to Detective Corporal Jainappa who deposed that on the 7th October, 1978 he interviewed the appellant, cautioned him and then questioned him in Hindi. He made notes of the interview in his note book and at the conclusion of the interview asked the appellant to sign the book. Appellant said that he could not sign and put on his thumb print. C

The second alleged confession was made on the same date to Detective Sergeant Shiu Shankar. This witness deposed that he had read the statement over to the appellant who agreed with the contents and made no alterations. D

The third alleged statement was made to a farmer named Mahesh Prasad, who met the appellant in the vicinity of the Police Station, and when the latter emerged from the toilet gave him a bowl of yaqona and asked him about the fire he was talking about. He testified that the appellant replied:

"There was some enmity between myself and my neighbour so I set fire to his house. I have already told the police about this." E

The appellant alleged that the statements obtained from him by the investigating officer were obtained as a result of a severe beating and a false promise. After hearing evidence on this point the learned Magistrate ruled that there was no ground for the appellant's allegations, and that the statements made to Corporal Jainappa and Sergeant Shankar were admissible in evidence. F

The learned Judge held that the learned Magistrate should have decided whether or not the accused was in custody at the time the statements were made to the police officers and, if so, whether the fact that he was in custody affected the voluntary nature of the admissions. He does not refer in his judgment to the statement deposed to by the witness Mahesh Prasad. In view of his finding that the Magistrate did not consider all the relevant factors when finding that the statements were admissible he allowed the appeal, set aside the conviction, and ordered a retrial. It is from that order that this present appeal is brought. G

Two grounds of appeal were submitted to this Court. They read:

1. THAT the learned Appellate Judge erred in law in not considering the remaining grounds of appeal before ordering a retrial.
2. THAT the learned Appellate Judge erred in law in exercising his powers in ordering a retrial in the circumstances." H

It is to be noted that the second ground is silent as to what errors in law had been committed by the learned appellate Judge, but in argument counsel relied on the wrong exercise of a judicial discretion.

- A On the first ground the argument of the appellant was to the effect that if the learned judge had considered the other grounds of appeal he might well have found one that justified the quashing of the conviction without any question of retrial. But apart from the general ground that the verdict was unreasonable and could not be supported having regard to the evidence, there were only two grounds of appeal to the Supreme Court, other than those concerning the question of the admissibility of confessions made when appellant was alleged to be in custody. The first was that the learned trial Magistrate erred in law in admitting in the trial proper the evidence given by the appellant during the trial within a trial. However, in that respect formal application was made by counsel for the prosecution that the evidence of the prosecution be admitted in the trial proper. Counsel for the defence consented "on the basis that defence evidence is admitted in the trial proper." Counsel for the prosecution raised no objection to this. It was because of this agreement that the evidence was admitted; and accordingly there was no impropriety in that course being taken.

C It is true that in *Daulat Khan v. R.* 22 F.L.R. 27 this Court held:

"If counsel for accused calls evidence he may, with consent, follow a similar course but this cannot and must not be allowed to arise until after the close of the prosecution."

- D This however means that the evidence given by the accused on the voir dire cannot form part of the prosecution; it must be considered with the defence. In the present case it was so treated, and there is therefore nothing here which conflicts with the judgment in *Daulat Khan v. R.*

- E The second of the two grounds mentioned above as having been put forward in the Supreme Court was that though the oral statement made by the appellant to Corporal Jainappa was taken down by the latter in his notebook, and the appellant put his thumb print thereon, only the Corporal's oral testimony was tendered in evidence and the notebook was not put in. We are satisfied that if the appellate Judge should have regarded this as a meritorious ground of appeal it was not one which ought to have deterred him from making the order for a new trial.

- F The first ground of appeal to this Court therefore fails and we pass to the second.

- G It is clear that the Supreme Court has power, on hearing an appeal from the Magistrate's Court, to confirm, reverse or vary the decision of the Magistrate's Court or to order a new trial: Criminal Procedure Code, section 300 as amended by section 39 of 13/69. The court of Appeal may, under section 23(2) of the Court of Appeal Ordinance, order a new trial "if the interests of justice so require;" and although these words do not appear in section 300 we consider that they should be there implied.

- H Counsel for the appellant strongly contended that the learned trial judge was wrong in ordering a new trial as, if the confessions were struck out, there was no evidence upon which a conviction could properly be based. He relied on the principle set out in the decision of the Privy Council in *Nirmal v. R.*, Appeal 46/1970. He cited this passage from their Lordships' judgment:

"The argument for the appellant was that the interests of justice do not require a new trial in this case. The only object of a new trial would be to

enable the prosecution to make a new case or at any rate to fill gaps in their evidence. The alleged confessions have been held to have been wrongly admitted on the evidence given at the trial. Without the confessions the prosecution had no case. In a second trial the confessions could not be admitted on the same evidence. Therefore the prosecution would have to bring other evidence either to fill gaps or to make a new case. It would not be fair to the appellant if the prosecution were given this opportunity of making a second attempt to secure his conviction."

The Lordships went on to quote East African cases supporting the proposition that justice does not require a new trial for the purpose of enabling the prosecution to fill gaps in the evidence.

It is necessary to look more closely at *Nirmal's* case. It was a trial for murder in the Supreme Court in which the case against the accused rested essentially upon written and oral confessions. The trial judge, having held a trial within a trial, ruled that the confessions had been voluntarily made and were admissible. On appeal to this Court a different view was taken, and it was held that the trial judge had fallen into error in his approach to the question of assessment of the credibility of witnesses. Two matters were given some weight by this Court: evidence by the accused's mother that she had heard him crying out and had herself cried out in reply and, secondly, failure to call as a witness a senior police officer to whom the accused said he had complained at the material time. The finding of this Court was that the evidence did not justify the trial judge's ruling that the Crown had discharged the onus of showing that the main statement by the accused was a voluntary one. The Privy Council, though it considered the action of this Court unusual, did not find it to be wrong.

It is in this context that the passage quoted above from the Privy Council's judgment in *Nirmal's* case must be read and compared with the position in the present case. In both cases the trial court ruled that the statements were voluntary and admissible, and in both cases the first appellate court found that the evidence did not justify the admission of the statements.

There, however, the resemblance ceases. In *Nirmal's* case the criticism was directed to the allegation that the statements, if made at all were made because of physical illtreatment by the police. In the present case no such question arises, as it has been ruled out by the trial magistrate's findings which cannot, on this subject, be now challenged. The criticism of the first appellate judge here was that the trial magistrate had failed to consider whether the appellant was in custody at the relevant time, and if so whether that factor had any effect on the voluntary nature of the admissions. The learned judge in this respect was following the judgment of this court in *Daulat Khan v. Reginam*, 22 F.L.R. 27 where the importance of this question was emphasised, and it was made plain that the question whether or not accused was in custody is relevant to the discretion of a judge to admit or exclude statements having regard to the conduct of the police and all other circumstances. Although the allegations of an accused person as to illtreatment, inducement and other relevant factors are rejected, it may still be considered unfair to use his own statement against him. This is the question which the first appellate court has held that the magistrate failed to consider.

A It is to be noted that in *Nirmal's* case the confessions were held by the appellate tribunal to be inadmissible. That is not entirely so here. It has been found that a relevant factor was not considered and to that extent the question remains an open one; if, on a reconsideration of the factors relating to the question of custody the Magistrate finds that these statements were made voluntarily, there is nothing in the ruling of the appellate judge to prevent his reaching that conclusion.

B It is apparent that a great deal of what was said by the Privy Council in the passage quoted does not apply, or applies with less force, in this situation. The prosecution does not wish to make a new case or to fill gaps in its evidence. No further evidence would be required, and on the same evidence there would be no reason why a magistrate at the new trial could not arrive at a proper and fully informed decision. Counsel for the appellant, on this subject, pointed out that there was a police officer present at the taking of the statements, who had not been called as a witness. This was an important point in *Nirmal's* case but is of no consequence in the present one. The Crown no doubt considered there was no need to call the particular officer and, if he were called at a subsequent trial it would not be because of a gap left in the evidence, or to present a new case. The neglect to consider or exercise a discretion is, in our opinion, a different matter from the presentation of evidence of physical matters such as the treatment, mental or physical, of the accused person.

D In *Nirmal's* case the Privy Council considered it would not be "fair to the appellant" to give the prosecution the opportunity of making a second attempt to secure his conviction, but that must be taken as relating to the case before them; as there would be no point in giving the courts power to order a retrial if it were never fair to exercise it.

E East African cases have been referred to and counsel for the appellant quoted the headnote in *Salim Muhsin v. Salim Bin Mohammed* (1950) 18 E.A.C.A. 128 which indicates that an order for retrial was set aside, on the ground that—"although (a misdirection) may not have been the fault of the prosecution the important consideration is that it was not the fault of the accused." In *Ahmedi Sumar v. Republic* (1964) E.A. 481, however, Duffus J.A. pointed out that that case had been badly reported. He quoted a passage from the judgment, at p.483, as follows:

F "With respect to the learned Chief Justice it would appear that at this stage of his Lordship's judgment a wrong test was applied. It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is *not* to blame it does not in our view follow that a retrial should be ordered. Clearly, of course, each case must depend on its particular facts and circumstances

G but in this present case where the conviction was quashed because the magistrate had misdirected himself as to the onus of proof, it would be most unjust to compel the accused to stand another trial. The magistrate's error may not have been the fault of the prosecution but surely it is a more important consideration that it was not the fault of the accused.

H On principle and on the authorities we do not consider that this was a case where the order of a retrial was justified."

In the same judgment and page Duffus J. A. said—

"We were also referred to the judgment in *Pascal Clement Braganza v. R* (1957) E.A. 152. In this judgment the court accepted the principle that retrial should not be ordered unless the court was of opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result, but the court did not disagree with the principles as laid down in the *Salim Muhsin* case. Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice require it, and should not be ordered where it is likely to cause an injustice to an accused person."

In our opinion that passage puts the position quite correctly.

In the case just mentioned, that of *Braganza*, there were two statements, one of which was held to have been wrongly admitted and a new trial was ordered. There is a passage of some interest in the judgment of the court at p.153:

"... It is possible that on the retrial there may be more evidence against the appellant than was produced at the first trial. That is not either a reason against ordering a retrial or a reason in favour of it. The order was not made on the basis that the Crown had failed to prove its case the first time, but might be able to do so the second time, and it could not properly have been made on that footing. We say no more than that there was evidence on the record indicating that on a retrial a conviction might eventuate."

The court was careful to point out that it was not a case of the prosecution filling in gaps in the evidence at the first trial.

Finally we refer to the decision of the Privy Council in the recent case of *Au Pui-ken v. Attorney-General of Hong Kong* (1979) 1 All E.R. 769, dealing with what is included in the "interests of public." The headnote reads:

"It was implicit in the judicial character of an unqualified power to order a new trial, such as the power under S.83E(1), that it should be exercised judicially, i.e. in the interests of justice, and the express reference in s.83E(1) to the interests of justice did no more than state that implicit requirement. The interests of justice included the interests of the public that persons guilty of serious crimes should be brought to justice, as well as the interests of the prosecutor and the accused. It was not a condition precedent to the exercise of a discretion to order a new trial that the court should have reached the conclusion that conviction was probable on the retrial, and it was sufficient if the court were of the opinion, on a proper consideration of the evidence, that conviction might result on a retrial."

With those matters in mind we proceed to consider whether the interests of justice justified the order for retrial made in this case. For reasons already given we do not consider the case one of closing a gap in the evidence or presenting a new case. Does any other element of unfairness to the appellant arise, paying due regard to the interests of the public just mentioned? The evidence against him, as we have indicated, was comprised in the main in three sets of admissions made on the 7th October, 1978. One in the morning to Corporal Jainappa, one to the farmer Mahesh Prasad apparently during an interval during the taking of the statement by the corporal, and the charge statement by Sergeant Shiu Shankar in the afternoon

- A (some 3 hours later) naturally at a time when the appellant would be lawfully and normally in custody. The first appellate judge did not distinguish between the statements: but what the appellant said to the farmer Mahesh Prasad was said at a purely fortuitous meeting, and in itself amounted to an unequivocal confession. It is hardly possible to accept that this incident had any relation to the appellant's position vis-a-vis the police.

- B *Daulat Khan's* case, which we have referred to above, was relied upon by counsel for the appellant. In it this court held that any objection taken to the first statement must also apply to the second which followed hard upon it, when the mental attitude of the accused could not be expected to have changed within that very short interval. After finding that the learned Magistrate had not taken into account all the matters he should have considered with regard to the admissibility of the confessions, the judgment of the Court goes on to say:

- C "This is not an appropriate case to order a new trial."

- D No reasons were given regarding this part of the judgment. In no wise does it purport to lay down the principles upon which a new trial should be ordered or refused. It must be taken to mean that upon consideration of the whole of the facts of that particular case a new trial should not be ordered. But, although that case concerned an appeal from a judgment of the Magistrate in somewhat similar circumstances to the present, the facts in one or two aspects are definitely different. As has been pointed out in the present case, there were three alleged confessions, one being made to a person not connected with Police, in circumstances which could give rise to no suggestion of undue influence. The other two were separated in time by at least three hours. Consequently, there is nothing in the judgment in *Daulat Khan v. R.* which would lead this Court in the present instance to say "This is not an appropriate case to order a new trial." *Daulat Khan v. R.* does not lay down the general principle that
- E whenever an appellate tribunal holds that the Magistrate has not fully considered all matters he should take into account in deciding the admissibility of a confession or confessions, it would be wrong to order a new trial.

- F Upon full consideration we have come to the conclusion that the case is one of serious crime of a nature in which considerations relating to the interests of the public play an important part. The potentially admissible evidence builds up a very strong case against the appellant and it is one which he should not be relieved of the necessity of answering by reason of what could prove to be in the particular circumstances little more than a technical error on the part of the magistrate.

In the result we are satisfied that the order for a retrial in the present case was in all respects a proper order to make, and the appeal is accordingly dismissed.

Appeal dismissed.