88, 1947

Appeal No. 93 of 1946.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF FIJI
(CRIMINAL JURISDICTION)

BETWEEN

EMMANUEL JOSEPH — *Appellant,*

AND

THE KING — *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal *in forma pauperis* by Special Leave against the judgment and sentence of the Supreme Court of Fiji (Criminal Jurisdiction) dated the 10th September, 1945, whereby the Appellant was found guilty of manslaughter and sentenced to five years penal servitude.

2. Special Leave to appeal *in forma pauperis* to His Majesty in Council was granted by Order in Council dated the 6th November, 1946. pp. 159—160.

3. The ground upon which the Appellant submits that his conviction should be quashed and his sentence set aside is that the learned Trial Judge failed to comply with the imperative provisions of Sections 248 and 308 (2) of the Criminal Procedure Code (19 of 1944) which enact (*inter alia*) that, in a case tried with the aid of assessors, the judge shall require each of the assessors to state his opinion orally on all the charges on which the accused has been tried and shall record such opinion, and shall thereafter himself give judgment but in doing so shall not be bound to conform to the opinion of the assessors. The learned Judge, who sat with five assessors, summed up to the said assessors as if they had been a jury and treated their opinions as if such opinions constituted a verdict and failed to deliver any judgment as required by the said Sections or at all.

4. The material Sections of the Criminal Procedure Code read as follows:—

" 248. Every trial before the Supreme Court in which the accused or one of them or the person against whom the crime or offence has

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been committed or one of them is a native or of native descent, or of Asiatic origin or descent, shall be with the aid of assessors in lieu of a jury, unless the presiding judge for special reasons to be recorded in the minutes of the court thinks fit otherwise to order, and upon every such trial the decision of the presiding judge with the aid of such assessors on all matters arising thereupon which in the case of a trial by jury would be left to the decision of the jurors shall have the same force and effect as the finding or verdict of a jury thereon."

"308.—(1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinions.

"(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

"(3) If the accused person is convicted the judge shall pass sentence on him according to law.

"(4) Nothing in this section shall be read as prohibiting the assessors or any of them, from retiring to consider their opinions if they so wish, or, during any such retirement or at any time during the trial, from consultations with one another."

p. 1. 5. The Appellant was charged jointly with two others named Mandatt and Rampatrap with murder contrary to Section 220 of the Penal Code, the particulars of the charge being that they on the 4th February, 1945, at Mulomulo in the Western District murdered Ravindra.

pp. 5—14. 6. Chotabhai Patel, the father of the deceased, gave evidence to the following effect: He was the owner of a store at Mulomulo where he lived with his wife and seven children of whom the deceased, Ravindra, aged eight months, was the youngest. At about 1 a.m. on the night of the 3rd—4th February he was awakened by the noise of five gun shots fired in quick succession. After the firing ceased he left his bed and found the deceased bleeding and dead and his eldest child suffering from an injury to his hand. He then went outside to wake a neighbour and, while he was doing so, three more shots were fired from the direction of the Appellant's house. On later examination he found that three bullets had penetrated his house, the one which killed the deceased having penetrated through the floor, which was roughly three feet above the ground.

pp. 7—8. This witness further deposed that he had formerly allowed the Appellant to live rent free in a bure of which he (Chotabhai Patel) was the owner but that, about five or six months before the death of the deceased, a dispute had arisen over a jack. He himself had borrowed the jack from one Mohammed Ali and had lent it to the Appellant who had broken it. The Appellant had refused to pay the price of the jack and he himself had agreed to pay £5 by way of compensation to Mohammed Ali. He had then ordered the Appellant to leave his premises Thereafter he had had a further dispute with the Appellant's family owing to the action

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of the Appellant's younger brother who had started racing his horses near the store. Fearing that his children might get run over he stood in front of the oncoming horse and raised a stick. The horse shied and the rider was thrown. Later on the same day the whole of the Appellant's family, including the Appellant himself, came to his store and abused him Since then they ceased to deal at his store.

7. During the course of the investigation each of the accused made statements to the police which the Crown tendered in evidence at the trial. Mandatt stated that the Appellant had suggested that they should p. 161.
10 frighten Chotabhai Patel; that they had all three stationed themselves under a mango tree near the store and that the Appellant had fired the gun at the store. Rampratap made a statement to the same effect adding p. 164.
that he himself had protested that someone might die but the Appellant had replied: "Never mind. Let him die. If you will say something I will also kill you." Neither of these statements was made in the presence of the Appellant.

The Appellant himself made or purported to make four statements in none of which did he admit taking any part in the shooting. He stated that he was in bed in his house at the material time and was
20 awakened by the sound of shots. His third statement contained the p. 171, l. 40.
allegation that on the day after the shooting Mandatt had informed him that the persons who had done it were himself (Mandatt) Rampratap and one Ramprasad.

8. The Appellant deposed that he had not participated in the shooting p. 92, l. 11.
and had been asleep in his house on the night in question. He had been awakened by his mother who had told him that shots were being fired. He denied that Ramprasad had admitted to him being involved in the shooting or that he had so informed the police. He further denied the pp. 88—89.
alleged dispute with Chotabhai Patel over the jack and stated that he
30 had taken no part in the quarrel over the horse. Elizabeth Joseph, the Appellant's mother, corroborated his evidence. pp. 115—126.

9. Mandatt gave evidence in the same sense as his aforementioned p. 129, ll. 19—43.
statement to the police, namely that the gun had been fired by the Appellant. He also alleged that, before firing the gun, the Appellant had said to him and Rampratap: "Chotabhai is doing quite a lot of business here; I want to frighten him and chase him away from the district, and I want to erect my store here."

10. The charge to the assessors by the learned Trial Judge included the following passages:—

40 "If any of these persons are to be convicted of murder you p. 149, l. 3.
must be satisfied beyond a reasonable doubt, firstly, that they were parties to this unlawful killing—undoubtedly the killing was unlawful —and secondly, you must also be satisfied that when that shooting took place the parties responsible for it had the intention to cause death or grievous bodily harm to the inmates of that house. You must be satisfied of those two things.

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p. 157, l. 43.

" I think that is sufficient, gentlemen. I remind you that, as Mr. Prichard has truly said, the onus of proof in these criminal cases is upon the Crown, and you should consider the case of each one of these accused separately and you should not convict any of them unless you are satisfied beyond reasonable doubt that the crime has been brought home to him. And you will remember on the subject of murder, that if they are to be convicted of murder you must be satisfied, not only that they took part in the shooting, but also that at that time they had the intention to cause death or grievous bodily harm. If you are not satisfied of that, none of them should be found guilty of murder. But, if on the other hand, you are satisfied that they did go in a party in common agreement to shoot up the store, that they were quite reckless whether they killed anybody or not, but that they had not formed any intention to kill, then your verdict should be manslaughter."

p. 158, l. 10.

11. All five assessors expressed the opinion that all the accused were guilty of manslaughter. Their said opinions were recorded in the Record of Proceedings as " Verdict of Assessors."

12. The learned Judge did not himself give judgment but proceeded to pass sentence on the accused in the following terms:—

p. 159.

" Say to these three accused that they have been very properly convicted of an outrageous offence. If there had been any intention to cause death of this child, or any of the inmates of that house, at the time of the shooting, they would certainly have been convicted of murder. I am satisfied that the head of this affair was the eldest of the three accused, Manu, and his offence is the more serious because he is educated enough to have known better, and whatever his quarrels with Chotabhai and Lalji may have been, he had no business to drag these other two lads into it. The offence of all of them is serious and must be severely punished. I take into account that they have been in prison for some seven months awaiting trial.

" Manu (the Appellant) will go to penal servitude for five years and the other two to imprisonment with hard labour for two years."

13. That the Appellant presented a humble Petition for leave to appeal to His Majesty in Council which was referred to the Judicial

p. 160, l. 24.

Committee of the Privy Council. The Lords of the Committee reported their opinion that leave ought to be granted to the Petitioner to enter and prosecute his appeal *in forma pauperis* against the aforesaid judgment of the Supreme Court of Fiji (Criminal Jurisdiction) but that the appeal ought to be limited to the question of the effect upon the trial before the said Supreme Court of the failure (if any) to comply with the requirements of the Criminal Procedure Code of the Colony of Fiji. An Order-in-Council was passed accordingly.

14. The Appellant respectfully submits that this appeal should be

allowed, and his conviction should be quashed and his sentence set aside for the following, among other,

REASONS:—

1. Because the learned Judge treated the assessors as if they were a jury and failed to arrive at his own decision and to give judgment as required by Sections 248 and 308 (2) of the Criminal Procedure Code and thereby failed to comply with the imperative requirements of the said Code.

10 2. Because (if it be material) the evidence was not such as to justify the conviction of the Appellant and therefore the failure of the learned Judge to comply with the requirements of the said Code has resulted in the Appellant being wrongly convicted and sentenced.

DINGLE FOOT.

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