Appeal No. 5 of 1950.

In the Priby Council.

ON APPEAL

FROM THE SUPREME COURT OF SARAWAK.

Between KONG SIEW YAP - *Appellant*

AND

THE KING *Respondent.*

CASE FOR THE APPELLANT.

1. This is an appeal from the judgment of the Supreme Court of Sarawak given on the 12th July, 1949, whereby the appeal of the Appellant against his conviction for murder and the sentence of death imposed by the Second Circuit Court sitting at Sibu, Sarawak, on the 13th June, 1949, was dismissed. p. 17.

2. Special Leave to Appeal to His Majesty in Council was granted, and the Appellant was authorized to prosecute this Appeal *in forma pauperis*, by Order in Council dated the 3rd February, 1950. p. 18, 19.

3. The trial was conducted by His Honour Judge Barcroft sitting with two Assessors. The provisions of the Criminal Procedure Code governing trial with Assessors (Sections 190-205), so far as they are relevant to this appeal, are set out in Appendix "A" to this Case.

4. The Appellant was charged jointly with Kong Sam Moi (f) (hereinafter called "No. 1 Accused") with the murder of the newly-born child of Liew Sam Kiew (f) (hereinafter called "P.W. 1"). No. 1 accused is the mother of P.W. 1. P.W. 1 married her husband, Kong Yee Fang (hereinafter called "P.W. 4") in November, 1948.

5. The case for the Crown was that the Appellant was the father of P.W. 1's child, who was born on the 18th May, 1949. When P.W. 4 discovered his wife's condition he sent her home to her mother (No. 1 Accused)'s house at Sungei Gerinyu to give birth to the infant. In the evening of the 19th May, 1949, the Appellant, it was alleged, visited the house between 8 and 11 p.m. and killed the baby by strangulation. p. 2. p. 4, l. 18.

in which No. 1 Accused participated. The body was immediately thrown into the river.

p. 7. 6. The evidence of No. 1 Accused at the trial virtually amounted to a confession of guilt. She was convicted and sentenced to death, but following the dismissal of her appeal to the Supreme Court she was reprieved and ordered to be imprisoned for seven years.

7. The grounds for the present appeal are that the conduct of the proceedings, so far as concerned the Appellant, exhibited a number of procedural irregularities and other unsatisfactory features, particularly inappropriate to the hearing of a capital charge, and that these matters collectively, if not individually, are of such gravity as to induce disbelief in the soundness of the verdict reached by the two Assessors and to require the judgment to be quashed.

p. 8. 8. The case raised acute issues of fact. The Appellant gave evidence and denied that he was the father of P.W. 1's child. He denied visiting the house on the 19th May, 1949. He suggested that the infant had not been murdered, but that P.W. 1 had suffered an abortion which had been caused by a beating administered by P.W. 4 and his family in order to make her disclose who was responsible for her condition.

9. The only facts established beyond controversy were:—

p. 3. (*a*) P.W. 1 either aborted or was delivered in No. 1 Accused's house on the 18th May, 1949;

p. 3. (*b*) If born alive, the child was not living after the 19th May, 1949;

p. 6. (*c*) The body of the infant had never been recovered;

p. p. 22. (*d*) On the 20th May, 1949, P.W. 1 and No. 1 Accused reported to the Police that the former had been assaulted by P.W. 4 and his family and in consequence had had an abortion;

p. 7, p. 23. (*e*) P.W. 1 was examined by Dr. Wallace on the 21st May, 1949, and her condition was consistent with the report made to the Police.

p. 3. 10. There was further the evidence of Chin Moi (f) (P.W. 2) that the child had been born alive and no complaint is made concerning the acceptance of her evidence on this point. But the evidence incriminating the Appellant was solely that of P.W. 1 and No. 1 Accused, who said that the Appellant strangled the infant, and of Liew Kim Shui (P.W. 3), son of No. 1 Accused, who said that the Appellant had joined with No. 1 Accused in the strangulation.

p. 3, p. 7. p. 4.

11. The irregularities and unsatisfactory features complained of are the following:—

A. There was no preliminary inquiry before a Magistrate. The relevant provision, Section 138 of the Criminal Procedure Code, 1933, is set out in Appendix "A" to this Case. This point

p. 17. was commented upon by Hedges, C.J., in delivering the judgment of the Supreme Court and Section 291 of the Code, to which he refers, is also set out, together with other Sections (285-289) relating to the powers of the Supreme Court on an appeal.

The practical result, however, must have been that the Appellant was ignorant of the precise case he would have to meet until the trial commenced. This was particularly important in view of his assertion that he was elsewhere at the time of the alleged crime and then in the company of other persons.

B. The Appellant was not legally represented. There appears to be no provision in Sarawak for legal aid in criminal cases. The absence of legal representation no doubt explains the inadequate cross-examination of the Crown witnesses. For example, P.W. 2 testified that she visited the house of No. 1 Accused on the evening of the alleged crime, but she did not say that the Appellant was there, although he was known to her. She was not asked to fix the time of her visit. If she had placed it between the hours of 8 and 11 p.m. (which it may well have been), her evidence would have destroyed or gravely weakened the case against the Appellant. As a further example, P.W. 1's evidence that she was "sick and too weak to resist or even protest" was untested by cross-examination. p. 3. p. 3.

C. The record indicates that the Appellant was not even offered the opportunity of cross-examining No. 1 Accused, although her evidence was strongly incriminating. This was an infringement of the Criminal Procedure Code, Section 179 (6), which is set out in Appendix "A." p. 7, 8.

D. Hearsay evidence was received in several instances. p. 3, l. 37.

E. Liew Kian Nguk (P.W. 5), younger son of No. 1 Accused, gave evidence refuting the suggestion of the Crown that the Appellant had visited the house on the material evening. Thereupon, without any application to treat him as hostile, he was confronted with a statement made by him to the Police on the 24th May, 1949, which contained some matter inconsistent with his evidence at the trial. This step must have been designed to discredit a witness whose testimony assisted the Appellant on an important point. p. 4, l. 36. p. 5. l. 22. p. 5.

F. The statement referred to in "E" was admitted in evidence as a document and is included in the record, although its contents were only relevant to the credit of the witness. On evidentiary points the law of England appears to apply by virtue of the Law of Sarawak Ordinance, 1928, included in Appendix "A." p. 20, 21,

G. In his summing-up the learned Judge properly put forward No. 1 Accused as an accomplice, but he failed to direct the Assessors that P.W. 1 might also be an accomplice and that P.W. 3, whose abnormal demeanour is noted in the record, might be quite unreliable as a witness. The different accounts given by No. 1 Accused and P.W. 1 on the one hand and P.W. 3 on the other as to who was present when the strangulation occurred, who took part in it and who disposed of the body were so marked as, fairly and properly considered, to induce doubt as to the veracity of these witnesses on a vital matter. p. 11, 12. p. 7, 8. p. 3, p. 4.

p. 12, H. The learned Judge invited the Assessors to consider whether the suggestion that the family were seeking a " drastic revenge " on the Appellant was acceptable. The more credible possibility that the family were moved by instincts of self-preservation rather than revenge was overlooked. If the child was born alive, all members of the household would fall under suspicion as soon as its disappearance became known. The suspicion would be deepened by the consideration that the family would incur dishonour and possible financial loss by reason of P.W. 1 bearing a child six months after marriage. No explanation of the child's disappearance short of an alleged kidnapping could lift suspicion from all members of the household, but a story that the Appellant had instigated and carried out the destruction of the infant might relieve the family of the major responsibility. This, in fact, has been the result of the case to date. A reasoned appreciation of these factors should have brought to mind the possibility that the three witnesses who incriminated the Appellant had deep motives of self-interest to mislead the Court by false evidence and that their evidence had been fabricated when the Police appeared to reject the story of the abortion.

J. The learned Judge wholly failed to direct the Assessors and, presumably, himself as to what evidence in the case could provide corroboration in law of No. 1 Accused's story; or as to what evidence there was constituting corroboration which implicated the Appellant.

K. There was no direction that the rejection of the Appellant's suggestion that the child had not been born alive carried no necessary implication that the Appellant had participated in the killing. There was no direction that unless the Appellant was the father of the child he had no motive for killing it and that, even if he were, his motive might have been far less weighty than that of the family of the mother. There was no direction that the only evidence of the Appellant's presence in the house on the evening of the 19th May was that of three members of the family p. 5. who were contradicted by a fourth (P.W. 5).

The powers of the Supreme Court in the face of irregularities in the proceedings, so far as they are relevant to this appeal, are set out in Criminal Procedure Code, 1937, Section 368-371, which are included in Appendix " A " to this case.

p. 12. L. The evidence of the Appellant's witness in support of his alibi provoked an unfavourable comment from the learned Judge. The inadequacy of the evidence was apparent, but it was just such an inadequacy as might be expected when a witness it brought to Court by an accused person acting without legal assistance. It is submitted that if proper consideration had been given to the matters aforementioned a more sympathetic approach to this alibi evidence would have been engendered and that the Court should have afforded the Appellant an opportunity of amplifying his evidence

in this respect, especially in view of his reference to named persons. p. 8, l. 25, l. 28.

After the presentation of the Petition for Special Leave to Appeal herein affirmations were obtained from the two persons referred to by the Appellant in his evidence and from a third man, Kong Jee Chee, at whose house the Appellant slept on the night of the 19th May, 1949.

The Appellant asserts that the record does not correctly set forth his evidence as to what he did after parting company with Kong Shaw Kim and Kong Fui Min and that in fact he said that he slept at Kong Jee Chee's place.

The three affirmations mentioned were read on the hearing of the Petition and they are now included in Appendix "B" to this Case.

Sibu is said to be a full three hour (river) journey away from Sungei Gerinyu.

12. The Appellant accordingly prays His Majesty in Council to allow his appeal and to quash the conviction and sentence of death for the following among other

REASONS.

1. The Appellant was under the necessity of conducting his own defence in a complex case under disadvantageous conditions.

2. He received little or no assistance from the Court in testing the credibility or weight of the evidence adduced.

3. The rules of evidence were not properly applied and matter of possible detriment to the Appellant was admitted.

4. He was denied the opportunity of cross-examining the most important witness against him.

5. It was left open to the Assessors to accept as corroboration of the evidence of No. 1 Accused testimony which was as much subject to criticism as her own.

6. The learned Judge failed to appreciate the danger that the case against the Appellant was wholly founded on a family conspiracy.

7. The Appellant was not afforded a reasonable opportunity of developing his evidence in support of his alibi.

8. The verdict was contrary to the true weight of the evidence.

9. The Appellant was not guilty and has been wrongly convicted.

10. The principles of natural justice have been violated and a grave miscarriage of justice occasioned.

J. T. MOLONY.

APPENDIX " A."

LAW OF SARAWAK ORDINANCE (1928).

CHAPTER 1.

LAW OF SARAWAK.

To provide for a general rule in the absence of specific legislation.

16th February, 1928.

1. This Ordinance may be cited as the Law of Sarawak Ordinance.

2. The Law of England in so far as it is not modified by Ordinance enacted by the Governor with the advice and consent of the Council Negri, and in so far as it is applicable to Sarawak having regard to native customs and local conditions, shall be the Law of Sarawak.

CRIMINAL PROCEDURE CODE (1933).

CHAPTER XVII.

Preliminary Inquiries into Cases triable by a Resident's Court.

Sec. 138. (1) In the case of persons charged with any of the following offences which are triable before a Resident's Court, namely:—

Offences against the State
Mutiny
Offences connected with secret societies
Rioting with deadly weapons
Cases relating to false evidence and offences against Public Justice
Offences relating to coin, notes and Government stamps
Offences affecting life
Causing miscarriage
Abortion
Kidnapping
Abduction
Slavery and forced labour
Rape
Unnatural offences
Gang robbery
Criminal breach of trust by a public servant, agent, etc.
Forgery
Arson
Shipwrecking

a preliminary inquiry may be held by a District or Police Court Magistrate with a view to the committal of the accused person for trial before a Resident's Court.

(2) Where any person is charged with an offence not enumerated in sub-section (1) of this section which is triable by a Resident's Court, the Chief Justice or a Resident's Court Magistrate may order that a preliminary inquiry be held.

CHAPTER XIX.

Summary trials by Magistrates.

Sec. 175. (1) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(2) If the accused pleads guilty to a charge whether as originally framed or as amended under Section 178 the plea shall be recorded and he may be convicted thereon: Provided that before a plea of guilty is recorded the Court may hear the complainant and such other evidence as it considers necessary and shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

Sec. 176. (1) If the accused refuses to plead or does not plead or claims to be tried, the Court shall proceed to hear the Complainant (if any) and to take all such evidence as may be produced in support of the prosecution and such further evidence (if any) as it may of its own motion cause to be produced.

(2) When the Court thinks it necessary it shall obtain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before itself such of them as it thinks necessary.

(3) The accused shall be allowed to cross-examine the complainant and all the witnesses for the prosecution and the complainant or officer or other person conducting the prosecution may, if necessary, re-examine them.

(4) The Court may on behalf of the accused or prosecution or of its own motion put such questions to the witnesses as it considers necessary.

(5) In cases which have been committed for trial to a Resident's Court after a preliminary inquiry, the statement or evidence of the accused recorded by the committing Magistrate under Section 143 may be put in and read as evidence.

Section 178. (1) If, when such evidence has been taken and the Court has, if it thinks fit, examined the accused under Section 220 of this Code for the purpose of enabling him to explain any circumstance appearing in the evidence against him, and the Court is of opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence, which such Court is competent to try and which in its opinion it ought to try, it shall consider

the charge recorded against the accused and decide whether it is sufficient and, if necessary, it shall amend the same.

(2) The charge if amended shall be read and explained to the accused and he shall be again asked whether he is guilty or has any defence to make.

Section 179. (1) If the accused does not plead guilty to the charge as amended or if no amendment is made the accused shall then be called upon to enter upon his defence and to produce his evidence, and the Court shall explain to the accused the provisions of Section 221 of this Code, or may proceed in accordance with the provisions of Section 160.

(2) If the accused elects to give evidence, his evidence shall ordinarily be taken before that of other witnesses for the defence.

(3) The complainant or officer or other person conducting the prosecution shall be allowed to cross-examine all the witnesses for the defence, and the accused may, if necessary, re-examine them.

(4) At any time when he is making his defence the accused may be allowed to call and cross-examine any witnesses present in Court or its precincts.

(5) If the accused puts in any written statement the Court shall file it with the record.

(6) An accused person who elects to give evidence may be cross-examined on behalf of any other accused person.

Section 184. In trials under this Chapter:—

(*a*) the officer or other person conducting the prosecution may open the case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused or he may forthwith produce his evidence;

(*b*) when the accused is called upon to enter on his defence, he may before producing his evidence open his case by stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution, and if the accused gives evidence or witnesses are examined on his behalf he may sum up his case;

(*c*) the officer or other person conducting the prosecution shall have the right of reply on the whole case whether the accused adduces evidence or not.

CHAPTER XX.

Trials with the aid of Assessors.

Section 190. (1) In all cases where the punishment of death is authorised by law the accused shall be tried with the aid of two or more assessors of whom at least half the number shall, if possible, be of the same race as the accused.

(2) The Chief Secretary may by notification in the GOVERNMENT GAZETTE order that the trial of any particular offence or class of offences shall be with the aid of assessors, and may revoke or alter such order.

(3) The Supreme Court or a Resident's Court may in its discretion order that any case shall be tried with the aid of assessors.

(4) When the accused or any one of the accused is or are European, the assessors shall also be European.

Section 191. When the Court is ready to commence the trial it shall proceed in accordance with the provisions of Section 175.

Section 192. If the accused refuses to plead or does not plead or claims to be tried, the Court shall proceed to choose assessors as hereinafter directed and to try the case.

Section 195. Subject to the provisions of this Chapter when the assessors have been chosen the trial shall proceed in accordance with the provisions of Sections 176, 177, 178, 179, 180, 184, 185, 186, 187, 188 and 189.

Section 199. When the case for the defence and the reply (if any) of the officer or other person conducting the prosecution are concluded, the Court may sum up the evidence for the prosecution and defence and shall require each of the assessors to state his opinion orally and shall record such opinion.

Section 200. (1) In a trial with the aid of two assessors if the Court agrees with the opinion of both assessors, or where the assessors are of different opinions or one assessor only remains as provided by Section 194 (I), with the opinion of one assessor, or where the Court does not consider it necessary to express its disagreement with the opinion of both assessors or with the opinion of the remaining assessor, the Court shall give judgment accordingly.

(2) Where there are more than two assessors and the Court agrees with the opinion of all the assessors or, where the assessors are of different opinions, with the opinion of at least two assessors, or where the Court does not consider it necessary to express its disagreement with the opinion of the assessors, the Court shall give judgment accordingly.

(3) If the accused is acquitted the Court shall record judgment of acquittal. If the accused is convicted the Court shall pass sentence on him according to law.

Section 201. If, where there are two assessors, the Court disagrees with the opinion of both assessors or with the opinion of the remaining assessor as provided by Section 194 (1), or, where there are more than two assessors, when there are not at least two of the assessors who are of the same opinion as the Court on all or any of the charges on which the accused has been tried, and the Court is of the opinion that it is necessary for the ends of justice, the Magistrate may order a new trial with the aid of fresh assessors or he may submit the case to the Supreme Court recording the grounds of his opinion, and, when the assessors consider that the accused is not guilty, stating the offence which he considers to have been committed.

Section 202. If the Magistrate submits a case under Section 201 he shall not record judgment of acquittal or of conviction on any of the charges on which the accused has been tried, but he may either remand the accused to custody or admit him to bail.

(2) In dealing with the case so submitted the Supreme Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it may, after considering the entire evidence and after giving due weight to the opinions of the Magistrate and the assessors, acquit or convict the accused of any offence of which the assessors could have convicted him upon the charge framed, and, if it convicts him, may pass such sentence as might have been passed by the Resident's Court.

Section 203. In proceedings before the Supreme Court the Court shall not be bound to conform to the opinions of the assessors, but the Court may stay the proceedings and order a new trial with the aid of new assessors.

Section 204. (1) In the trial of cases with assessors it is the duty of the Judge or Magistrate: —

(*a*) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial;

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(*d*) to decide whether any question which arises is for himself or whether it is a matter upon which the assessors may express an opinion, and upon this point his decision shall bind the assessors.

(2) The Judge or Magistrate may, if he thinks proper, in the course of his summing up, express his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Section 205. It is the duty of the assessors: —

(*a*) to say which view of the facts is, in their opinion, true, but for the Judge to decide the legal effect of such view;

(*b*) to state their opinion on all questions which, according to law, are to be deemed questions of fact.

CHAPTER XXII.

General Provisions as to Inquiries and Trials.

Section 220. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of a trial or an inquiry, without previously warning the accused, put such questions to him as the Court considers necessary.

(2) For the purposes of this section the accused shall not be sworn or affirmed and he shall not be rendered himself liable to punishment

by refusing to answer such questions or by giving false answers to them, but the Court may draw such inferences from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such trial and put in evidence for or against him in any inquiry into or other trial for any other offence which such answers may tend to shew he has committed.

(4) The examination of the accused shall be for the purpose of enabling him to explain any circumstances appearing in evidence against him and shall not be a general examination on whatever suggests itself to the Court.

(5) The discretion given by this section for questioning a prisoner shall not be exercised for the purpose of inducing him to make statements criminatory of himself.

(6) It shall only be exercised for the purpose of ascertaining from a prisoner how he may be able to meet facts disclosed in evidence against him so that those facts may not stand against him unexplained.

(7) Questions shall not be put to the prisoner merely to supplement the case for the prosecution when it is defective.

(8) Whenever the accused is examined under this section the substance of such examination shall be recorded in full in English, and such record shall be shown or read to him or, if he does not understand the English language, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(9) When the whole has been made conformable to what the accused declares to be the truth the record shall be signed by the presiding Magistrate.

Section 221. (1) At every trial or inquiry if and when the Court calls upon the accused for his defence it shall inform and explain to him that he may, if he wishes:—

(*a*) make an oath or affirmation and give evidence on his own behalf in the witness box upon which he is liable to be cross-examined; or

(*b*) make a statement from the dock not on oath or affirmation upon which he is not liable to be cross-examined.

(2) If the accused elects to give evidence on oath or affirmation on his own behalf or to make a statement not on oath the Court shall call his attention to the principal points in the evidence of the prosecution which tell against him in order that he may have an opportunity of explaining them.

(3) If the accused elects not to give evidence on oath or affirmation the Court shall ask him, but shall not compel him to answer, whether he wishes to give any reason for not doing so and it shall record as part of the proceedings any reason which he may voluntarily assign.

(4) The fact that the accused does not give evidence on oath or affirmation shall not be made the subject of any adverse comment by

the prosecution, but the Court may draw such inference from such refusal as it thinks just.

(5) Nothing in this section shall limit the right of the Court to question the accused under Section 220.

CHAPTER XXVIII.

Appeals.

Section 285. In an appeal from a conviction the Court may:—

(*a*) dismiss the appeal; or

(*b*) quash the conviction and sentence and acquit or discharge the accused; or

(*c*) direct that further inquiry be made or order a new trial on the same or an amended charge; or

(*d*) quash the conviction and convict the accused of any offence of which the Court below might have convicted him, and maintain, reduce, or increase the sentence or alter the nature of the sentence; or

(*e*) uphold the conviction and maintain, reduce, or increase the sentence or alter the nature of the sentence.

Section 286. In an appeal from any other order the Court may:—

(*a*) dismiss the appeal; or

(*b*) direct that further inquiry be made; or

(*c*) vary or reverse such order.

Section 287. (1) In dealing with any appeal under this Chapter the Court, if it thinks additional evidence to be necessary or that any witness should be recalled, may either take such evidence itself or direct it to be taken by a Magistrate.

(2) When the additional evidence is taken by a Magistrate he shall certify such evidence to the appellate Court, which shall thereupon, as soon as may be, proceed to dispose of the appeal.

(3) Unless the appellate Court otherwise directs, the accused shall be present when the additional evidence is taken.

Section 288. (1) When the appeal has been heard the Court shall either at once or on some future day of which notice shall be given to the parties deliver the judgment.

(2) The judgment shall ordinarily be delivered in open Court but in the absence of the appellant or for other just cause the Court may deliver judgment by service of a written copy or may direct that the judgment be read out in the Court below.

Section 289. (1) Whenever a case is decided on appeal by a Court under this Chapter it shall certify its judgment or Order to the Court by which the finding, sentence or order appealed against was recorded or passed.

(2) Whenever an appeal is not dismissed such certificate shall state the grounds upon which the appeal was allowed or the decision of the Magistrate's Court was varied.

(3) The Court to which the appellate Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the appellate Court and, if necessary, the record shall be amended in accordance therewith.

Section 291. No judgment or order of a Magistrate's Court shall be reversed or set aside unless it is shewn to the satisfaction of the Court above that such judgment or order was either wrong in law or against the weight of the evidence.

CHAPTER XXXIX.

Irregularities in Proceedings.

Section 368. No finding, sentence or order of any Criminal Court of competent jurisdiction shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at, passed or made, took place in a wrong local area or before a wrong Magistrate or Court, unless it appears that such error occasioned a failure of justice.

Section 369. If any Court before which a confession or other statement of an accused person recorded under Sections 119 or 220 is tendered or has been received in evidence finds that any of the provisions of such section have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and, if it is satisfied of the same, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

Section 370. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed unless, in the opinion of the Court of appeal or revision, a failure of justice has been occasioned thereby.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by the omission to frame a charge it shall order that a charge be framed and that a new trial be held.

Section 371. (1) Subject to the provisions of Sections 368, 369 and 370, no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:—

(*a*) any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or

(*b*) the want of any sanction required by Section 132; or

(*c*) the omission to inform an accused person of his rights under Section 221; or

(*d*) the want of qualification of any assessor; or

(*e*) the improper admission or rejection of any evidence; or

(*f*) any misdirection in any charge to assessors;

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

(2) In determining whether any error, omission, or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

NOTE: (*a*) Certain sections have been omitted from the above extracts as irrelevant to any matter arising on this appeal.

(*b*) Of the sections referred to in the printed extracts 119 empowers a Magistrate to record a statement or confession made to him before an inquiry or trial; 143 enables the accused to make a statement or give evidence at the preliminary inquiry; 160 relates to the adjournment of a trial or a new trial when the charge is changed; 177 relates to failure by the Crown to establish a *prima facie* case; 180 deals with applications by the accused for the production of witnesses or documents; 185 modifies the procedure when the charge alleges a previous conviction; 186 relates to the withdrawal of the prosecution; 187 provides for compensation where a charge is frivolous or vexatious; 188 directs what particulars are to be included in the record; 189 provides for the transfer of cases.

APPENDIX "B."

Affirmation of Kong Shaw Kim.

I, KONG SHAW KIM, of Sungei Pak, Batang Rejang, Sibu, chairman of Yuk Choi School, Sungei Pak, do hereby solemnly affirm and declare as follows:—

1. That my name, place of residence and occupation are correctly set forth as above.

2. That I was in Sibu on business on the 19th day of May, 1949, and met Kong Siew Yap at about 8.30 p.m. that day as he was coming out of Tai Wha Book Store. Then both of us went to the Wha Kiaw Coffee Shop in Market Road, Sibu, to discuss the matter of the school lottery.

3. That Kong Siew Yap was until he was arrested on the charge of being concerned in the murder of a child of Liew Sam Kiaw (f) the principal of the Yuk Choi School, that the school had got up a lottery for the school funds with the permission of the Government and that it was his duty to go to Sibu to find out how the lottery tickets were selling. It was at that particular time mentioned above that I met him in Sibu.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declaration Act, 1835.

Affirmed and declared by the said Kong Shaw Kim this 5th day of October, 1949, at Kuching.

KONG SHAW KIM
(in the vernacular).

Before me,
(Sgd.) .....
Magistrate, 2nd Class.
(Abang Haji Abdulrahim).

Affirmation of Kong Fui Min.

I, KONG FUI MIN, of Sungei Lemong, Batang Rejang, Sibu, Sarawak, rice miller, do hereby solemnly affirm and declare as follows:—

1. That my name, place of residence and occupation are correctly set forth as above.

2. That I was in Sibu on the 19th day of May, 1949, and did meet Kong Siew Yap at a coffee shop (Wha Kiaw Coffee Shop) in Market Road, Sibu, with Kong Shaw Kim at about 9 p.m. that evening.

3. That I joined in the party and after finishing our drinks together we went for a stroll until about 11 p.m., when we dispersed.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declaration Act, 1835.

Affirmed and declared by the said Kong Fui Min this 28th day of September, 1949. } KONG FUI MIN (in the vernacular).

Before me,

Magistrate, 2nd Class, Kuching, Sarawak.

Affirmation of Kong Jee Chee.

I. KONG JEE CHEE, of No. 3, Lotus Road, Sibu, rubber planter, do hereby solemnly affirm and declare as follows:—

1. That my name, place of residence and occupation are correctly set forth as above.

2. That I was sleeping in my shop at No. 3, Lotus Road, Sibu, on the night of the 19th May, 1949, when, at about midnight, Kong Siew Yap came and knocked at my door and asked to put up the night with me. I received him and he slept in my shop till 6 o'clock the next morning (20th May, 1949), when he left.

3. That I know the said Kong Siew Yap very well, being relations, and that whenever he came to Sibu he used to put up in my place.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declaration Act, 1835.

Affirmed and declared by the said Kong Jee Chee this 28th day of September, 1949. } KONG JEE CHEE (in the vernacular).

Before me,

Magistrate, 2nd Class, Kuching, Sarawak.

Appeal No. 5 of 1950.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF SARAWAK.

BETWEEN

KONG SIEW YAP — *Appellant*

AND

THE KING - *Respondent.*

CASE FOR THE APPELLANT.

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