Privy Council Appeal No. 5 *of* 1950

Kong Siew Yap – – – – – – – – – *Appellant*

v.

The King – – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF SARAWAK

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1950

Present at the Hearing :

LORD SIMONDS
LORD OAKSEY
SIR JOHN BEAUMONT
THE CHIEF JUSTICE OF CANADA
(THE RIGHT HON. T. RINFRET)
SIR LIONEL LEACH

[*Delivered by* SIR JOHN BEAUMONT]

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. Special leave to appeal *in forma pauperis* to His Majesty in Council was granted on the 3rd February, 1950.

At the conclusion of the argument their Lordships announced that they would humbly advise His Majesty that the appeal be dismissed and they now give their reasons for such advice.

The trial took place in the Second Circuit Court at Sibu on the 25th May, 1949, before Judge Barcroft and two assessors.

Under the Criminal Procedure Code applicable in Sarawak the position of assessors differs from that which they occupy under the Indian Code of Criminal Procedure. Under section 205 of the Sarawak Code it is the duty of the assessors to say which view of the facts is, in their opinion, true, and to state their opinion on all questions which, according to law, are to be deemed questions of fact. If, where there are two assessors, the court disagrees with the opinion of both assessors, the judge is not free to act upon his own opinion, but if he is of opinion that it is necessary for the ends of justice, he may order a new trial with the aid of new assessors or he may submit the case to the Supreme Court which then has full power to deal with the matter. (Sections 201 and 202.)

At the trial the case for the Crown was that the appellant, who was the second accused, had sometime in 1948 had sexual intercourse with Liew Sam Kiew, who will hereinafter be referred to as " the wife ", as a result of which she became pregnant. Some six months after her marriage her husband discovered that she was pregnant and sent her

back to her mother, Kong Sam Moi, who was the first accused in the case and is hereinafter referred to as " the mother ". On the 18th May, 1949, the wife gave birth at the house of the mother to a male child which was alive on the evening of the 19th May. It was further the Crown's case that the appellant, who had been sent for by the mother, arrived at her house on the 19th May about 9 p.m. and he and the mother then strangled the baby and threw its body into the river. The body has never been recovered. The case of the appellant as disclosed in his evidence was that he was not responsible for the pregnancy of the wife ; that the wife had an abortion as a result of a beating she had received from her husband and his family ; that he, the accused, was not at the house of the mother on the evening of the 19th May, but on the contrary was at Sibu ; and that he knew nothing about the death of the child.

Three witnesses gave evidence that the appellant was a party to the murder (i) The mother as an accused gave evidence on her own behalf to the effect that she and the appellant murdered the child on the 19th May and that the appellant disposed of the body. She attributed the active part in the murder to the appellant. (ii) The wife gave evidence that she was present in the room on the 19th May when the child was killed by the appellant and said that she was too sick and weak to resist or even protest. (iii) Liew Kim Shui, who was a step-brother of the wife, said that he went into the wife's room on the night of the 19th May about 9 p.m., and that he saw both the mother and the appellant strangle the child and that he saw the mother throw the body into the river. His evidence corroborates that of the mother and the wife as to the appellant having taken part in the murder, though it attributes a more active part in the murder to the mother than she was prepared to admit. There was no evidence to support the appellant's suggestion that the wife had had an abortion, and the evidence of the mid-wife who attended the confinement established that the child was born alive on the 18th May and was still alive on the evening of the 19th.

Both the assessors found the two accused guilty and the learned trial judge convicted them and sentenced them to death.

An appeal was lodged by the two accused to the Supreme Court and was dismissed on the 12th July, 1949, by the learned Chief Justice. Their Lordships have been informed that the death sentence on the first accused has been commuted to a sentence of seven years imprisonment and she has not appealed to His Majesty. Her guilt does not involve the guilt of the appellant.

Before this Board it was argued for the appellant that there were many irregularities at the trial, and that their cumulative effect was such as to show that the conviction of the appellant involved so grave a miscarriage of justice as to require, upon the principles upon which this Board normally acts in criminal appeals, the quashing of the conviction. In considering the matters raised it is necessary to bear in mind, as did the learned Chief Justice in the Supreme Court, the provisions of section 291 of the Criminal Procedure Code which direct that no judgment or order of a Magistrate's Court (which now includes a Circuit Court) shall be reversed or set aside unless it is shown to the satisfaction of the court above that such judgment or order was either wrong in law or against the weight of the evidence.

The irregularities relied upon were the following:—

1. There was no preliminary inquiry before a magistrate. As was pointed out by the learned Chief Justice, under section 138 of the Criminal Procedure Code a preliminary inquiry is permissive and the omission to hold one does not constitute an error in law.

2. The appellant was not legally represented at the trial. There is no suggestion that it was the duty of the government or the judge

or anybody else to appoint anyone to represent the appellant, and the omission to provide the appellant with legal assistance cannot be a ground for challenging the conviction.

3. That the mother, first accused, gave evidence and the appellant was denied the right to cross-examine her, a right to which he was entitled under section 179, subsection 6 of the Code. The only basis for the suggestion that the appellant was denied the opportunity of cross-examining his co-accused is that the record does not note that the appellant either asked any questions or had no questions to ask. Assuming that the learned judge had not realised that the appellant had a right to cross-examine his co-accused and did not therefore advise the appellant as to his right, upon the correctness of which assumption their Lordships express no opinion, in their Lordships' view no injustice could have arisen through this omission. The appellant himself gave evidence directly after his co-accused, and it is clear from his evidence that he challenged the whole of the evidence of his co-accused which concerned his own part in the murder. Their Lordships are unable to see what useful questions could have been put to the mother in cross-examination. A general suggestion that the appellant had not been present at the time of the murder and that the evidence that he was present was entirely untrue would not have carried the matter any further.

4. Some hearsay evidence was admitted, but it is not suggested that such evidence was of any serious importance.

5. One witness for the Crown gave evidence favourable to the appellant and was discredited by a statement put to him by the prosecution which the witness had previously made to the police. The complaint is that the record does not show that the judge had given leave to treat the witness as hostile, but clearly such leave must have been given impliedly, if not expressly.

6. The learned judge in his summing-up did not develop a theory that the family of the wife were moved by instincts of self-preservation to throw the blame of the murder upon the appellant. The learned judge only suggested revenge as a possible motive. There is no evidence to support the suggested theory which is difficult to reconcile with the important part attributed to the mother in the murder.

7. There was no proper direction by the learned judge as to corroboration of an accomplice's evidence. As already noted it was the duty of the assessors to determine the facts, and it was for them to say, if there was any evidence to go before them, whether any witness was an accomplice. The mother on her own evidence was plainly an accomplice and the learned judge so told the assessors and very properly directed them that it would be dangerous to act upon her evidence unless it was corroborated. He did not point out, as their Lordships think he should have done, that one of the witnesses to corroborate the mother was the wife, and that it was open to the assessors to treat her as an accomplice, since she was present at the time when the murder was committed, if they disbelieved her statement that she was too weak and ill to protest. The learned judge should have warned the assessors that if they thought the wife to be an accomplice her evidence could not be used to corroborate that of the mother. However, their Lordships are satisfied that the failure of the learned judge to deal more fully and adequately with the question of accomplices' evidence and its corroboration did not affect the result of the trial. As already pointed out the evidence of Liew Kim Shui provided clear corroboration of the evidence of the mother and the wife that the appellant took part in the murder. Their Lordships see no reason for thinking that the assessors, had they been properly directed, would not have acted upon the evidence of the mother, the wife and Liew Kim Shui as they were entitled to do.

The only other point relied upon by the appellant is in relation to the alibi which he set up in his evidence. His case was that on the evening of the 19th May he was in Sibu and he mentioned various persons whom he had seen in the course of his visit. At the trial he called one of such persons who corroborated having met the appellant in Sibu on one evening, but could not remember the date or even the day of the week. Clearly, therefore, the evidence failed to establish an alibi. Before this Board there were produced as Appendix "B" to the appellant's Case—affirmations of three persons, two of whom had been named by the appellant in his evidence as persons whom he had met on the night in question. The effect of all the statements is that the deponent had met the appellant in Sibu on the night of the 19th May, but none of the deponents gives any reason for remembering particularly that the meeting was on the 19th May rather than on any other day about that period. It would require a strong case to induce the Board to direct the taking of further evidence which might have been produced at the trial. This is not such a case.

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