43, 1936

No. 79 of 1935. Record.

Appellant's Case

# In the Privy Council.

## On Appeal from the Supreme Court of Fiji, Lautoka Circuit Court.

*Between* MAHADEO - *Appellant* (*in forma pauperis*)

AND

THE KING - - - *Respondent*

## CASE FOR THE APPELLANT

1, This is an appeal by Special Leave from the judgment of the Supreme Court of Fiji sitting as the Lautoka Circuit Court dated the 17th May, 1934, by which the Appellant was found guilty of the murder of a boy called Ramautar and sentenced to be detained during His Majesty's pleasure. pp. 38-9

2. The Appellant is about sixteen years old.

Ramautar was about thirteen years old. He was employed as a labourer by the Appellant's stepfather, Mathura, living at Tagi Tagi.

Mathura also employed as labourers another boy called Sarandas of about the same age as Ramautar and a young man called Sukraj who is about twenty-five years old.

Sukraj lived away from Mathura's house. The others stayed in Mathura's house. Ramautar's adoptive mother and her husband stayed there, too, supported by the earnings of Ramautar.

3. The events on which the murder charge was founded happened on the morning of the 18th January, 1934.

The testimony of Sukraj, himself involved as an accomplice, furnishes the sole evidence either of a crime having been committed or of the Appellant's having committed it. pp. 22-29

Sukraj's story shortly is that on the morning in question the Appellant with the said labourers, Sukraj, Ramautar and Sarandas went to weed one of Mathura's fields.

INSTITUTE OF ADVANCED LEGAL STUDIES

While so engaged, Ramautar and Sarandas began to have words. They grew more heated and finally came to grips. Ramautar was a sickly boy, Sarandas more robust. Sarandas threw Ramautar down and Ramautar caught hold of Sarandas' legs and would not let him go. The Appellant told Sukraj to separate them. Sukraj refused, saying that, like the other two, he was only the Appellant's servant The Appellant was then forced to interfere himself. He released Sarandas from Ramautar's grip and caught Ramautar by the throat while Ramautar was still on the ground. The next thing was that the Appellant called out, and Sukraj, going forward, saw that Ramautar was quivering and in a few minutes expired. 10

The three of them took the body to a tree near by, tied Ramautar's turban around his throat and returned to Mathura's house.

4. It is now necessary to trace shortly the subsequent developments.

Sukraj got back a few minutes before the other two, but waited until they came up before saying anything. The Appellant told Ramautar's mother and her husband that Ramautar had hanged himself. He asked for Mathura who was not at home. He went to find Mathura and he and Mathura returned together in the afternoon. Mathura, having been told everything, ordained silence and himself went to Tavua Police Station, six miles away. There he reported that a boy in his employ had taken his horses out to graze and had not returned. 20

p. 22

5. When Mathura got back from the Police Station in the evening, he and Sukraj and the Appellant removed the body in a sack from under the tree to some broken hilly ground and left it there.

6. Throughout the 19th, 20th and 21st, a pretence was made of searching for the missing boy. Police from Tavua joined in the search.

p. 12

On the 22nd Tavua Police Station reported to the main Police Station at Ba eighteen miles away. Police from Ba searched on the 24th. 30

7. The matter was then allowed to lapse. It was revived purely by chance.

Sarandas went on a holiday to visit his sister at Tavua. On the 13th February, a Mr. Powell sent for him and said that he had heard a rumour that Ramautar had hanged himself. Sarandas made a statement to Mr. Powell, in consequence of which, Mr. Powell took Sarandas to Mr. Probert, Sub-Inspector of Police, and made him repeat the statement (Exhibit C). The purport of this statement was that Sukraj and Ramautar had quarrelled. The Appellant joined in and slapped

p. 77

Ramautar. Ramautar thereupon stopped work and left the place. The others went on working for some time and then returned. On their way back they saw Ramautar's body hanging from a tree.

8. The Police went to Tagi Tagi the next day (14th February) and resumed investigations. On being asked if he knew where the body was, the Appellant pointed to the hill. The Police went there and found among the stones and bushes some thirty-six bones, one of which, a rib, was fractured, and thirteen teeth. pp. 12, 19

9. The Police took the Appellant and Mathura back with them to the Police Station at night, and elicited statements from them both (Exhibits E and F). pp. 80, 83

In the course of the same day (we do not know when because the prosecution suppressed the statement at the trial) Sukraj also made an elaborate statement to the Police. p. 1

In these statements the Appellant and Sukraj adhered to Sarandas' story of suicide subject to minor variations designed to exculpate each respectively from direct participation in any quarrel.

10. The Appellant and Mathura were kept at the Police Station on the night of the 14th. On the 15th they were taken back by the Police to Tagi Tagi where investigation was resumed. More bones were found. At night the Police took back with them to the Police Station Sarandas and Sukraj as well as the Appellant and Mathura. p. 13 p. 14

11. There the Police charged Sarandas with being an accessory after the fact to murder and pressed him with questions. Under this pressure Sarandas for the first time abandoned the suicide story and came out with the story of Ramautar having died at the Appellant's hands (Exhibit G). One feature it had in common with his earlier story and indeed with all the various versions of the occurrance given from time to time by each of the three protaganists, that its object was transparently self exculpation. p. 86

Sukraj was likewise charged with being an accessory after the fact. Under pressure he too changed his story which now assumed the shape of his sworn testimony at the trial. p. 4

The Appellant was then charged with murder. He made the statement at page 88 of the Record, attributing Ramautar's death to a stone thrown by Sarandas.

Sarandas repeated the substance of his second statement (Exhibit G), to the Deputy Commissioner on the 6th March, 1934 (Exhibit J). Sukraj also made a statement to the Deputy Commissioner, but we do not even now know what it was. p. 89

p. 26

12. Sukraj was nominally released from custody on the 16th April, in order that his evidence might be available for use against the other accused, but he remained nevertheless in the custody of the Police. The proceedings in the committing Magistrate's Court began on the 17th April against the Appellant, Mathura and Sarandas.

p 7

13. As a result of these proceedings an information was laid by the local Attorney-General against the Appellant for having murdered Ramautar, against Sarandas for having aided abetted and assisted the Appellant to commit the murder, and against Mathura for having received, comforted, harboured, assisted and maintained the Appellant, well knowing that he had murdered Ramautar. 10

14. The services of Messrs. Chalmers and Rice, a local firm of solicitors and barristers, were engaged on behalf of Mathura and the Appellant. Mr. Phillip Rice, a member of the said firm, was briefed to appear for the Appellant. Mr. N. S. Chalmers, not a member of the said firm, was briefed to appear for Mathura.

pp. 54-5
56-7

It was sufficiently obvious that Mathura's one chance lay in the Appellant's getting off in respect of the substantive offence. Counsel arranged therefore to concentrate on this. Mr. Rice was to deal with there being no evidence of malice and with the want of corroborative evidence 20 of the accomplice Sukraj's testimony, while Mr. Chalmers was to deal with the medical evidence. Mr. Chalmers had prepared an elaborate argument on this part of the case.

15. The trial proper of the said three persons began on the 15th continued throughout the 16th and concluded on the 17th of May, 1934. It was held before the Chief Justice of Fiji with the aid of four assessors as provided by sections 8 and 9 of the Jurors and Assessors Ordinance 16 of 1932.

16. The first incident in the trial after the accused had pleaded not guilty was for the Attorney-General to read out a letter written by the said firm of Chalmers and Rice to the Police Officer in charge of the prosecution. It was in these terms :—

p. 41

" Dear Sir,

" *re Rex v. Mahadeo and Mathura.*

" In connection with the trial of this case, we are asked by " Counsel for the accused that you arrange for production of all " statements by the three accused and by Sukraj, other than those " which have already been produced as exhibits in Court.

" We should be glad if you would kindly make arrange- " ments accordingly."

The Chief Justice characterised the letter as grossly improper and as casting an imputation upon the integrity of the Attorney-General and of the Police which he could not censure too strongly. p. 42

This incident was given due prominence in the local press. pp. 51-2

In point of fact, the two contradictory statements of Sukraj, made to the Police on the 14th and 15th March respectively (vide paragraphs 9 and 11 above) were suppressed in the sense that they were not allowed to be exhibited, were not put before the assessors and were not made available to the defence for cross-examination as to credit. Their existence was kept from the knowledge even of the Attorney-General himself. p. 70

17. The essential evidence in the case was given by Sukraj the approver the substance of whose deposition has been summarised in paragraph 3 above. The Chief Justice intervened of his own motion at various points of Sukraj's cross-examination and reminded him that he need not answer questions which tended to criminate himself. Material appropriate for discrediting him was, as pointed out in the last paragraph, withheld from the defence. And this evidence was, it is submitted, completely lacking such corroboration as established practice requires. pp. 2-3 p. 49

18. The only other evidence of any importance in the case was that given by the Police Officer, the said Mr. Probert, who traced the development of the investigation subsequent to the 13th February, and the medical evidence given by the District Medical Officer and by the dentist. p. 11 pp. 8, 11

The evidence of the doctor was to the effect that the bones found belonged to an adolescent of either sex between 12 and 15 years of age; that one of the bones was broken, that it might have been broken just before death by a kick or blow and that the fractures so caused might have started an internal hemorrhage of a kind to result in death.

The doctor on the available data could not of course give any opinion as to the cause of death.

The dentist was definitely of opinion that the teeth found were those of an adult person not under the age of 40.

19. At the close of the evidence the Chief Justice directed Sarandas (who had not been represented by Counsel) to be discharged. Counsel for the defence then addressed the Court. p. 38

Mr. Rice, in accordance with the aforementioned arrangement, confined his remarks to the absence of evidence of malice and want of corroboration. pp. 55, 58, 60

Mr. Chalmers then began to address the Court on behalf of Mathura. He began by criticising the practice of tendering evidence in the form of statements by accused persons and proceeded to discuss the theory of suicide, arguing that, if that was a reasonable theory to explain the death, the Appellant ought not to be found guilty of murder.

At this stage the Chief Justice required Counsel to confine his argument to the case of Mathura and forbade him to make a second argument in defence of the Appellant whose Counsel had already concluded. Mr. Chalmers pointed out that the essence of the offence charged against his client Mathura was murder by the Appellant, failure 10 to prove which automatically involved a collapse of the case against Mathura. He therefore claimed to be entitled to continue his address on that footing. The Chief Justice however ruled otherwise. Mr. Chalmers thereupon discontinued his address, informing the Chief Justice that his ruling made it impossible for him to proceed.

pp. 43-4, 50, 71

20. The Attorney-General then addressed the Court for the prosecution.

pp. 86, p. 89

He invited the Court to find the necessary corroboration of Sukraj's evidence in Exhibits G and J, the statements made by Sarandas on the 15th February and 6th March respectively (vide paragraph 11). 20

This it is submitted was an obvious blunder of a serious kind. Sarandas was a co-accused in the case, was never a witness, and what he said to the Police was not stated in the presence of the other accused, and was not tested by cross-examination.

On objection being taken by the Defence, the Chief Justice ruled that the Attorney-General was entitled to refer to the statements.

pp. 61-63

The Attorney-General, while admitting that evidence of malice was weak, stated that it was not the duty of the Crown to prove malice, relying on the now finally exploded doctrine that, once the prosecution has proved homicide, the onus lies on the defence to prove such facts as would reduce the offence from murder to manslaughter or to no offence at all. 30

pp. 65-66, 75-76

21. The Chief Justice then summed up to the assessors.

He began by saying that, while corroboration of Sukraj's evidence was necessary, the Appellant's conduct on returning home provided sufficient corroboration. He was referring to the story of suicide given out to Ramautar's parents (vide paragraph 4). He emphasised the fact of the Appellant's failure either himself to give evidence or to call evidence. He expressly shut out manslaughter as a possible alternative to murder and he finished up by saying that he would give favourable consideration to any recommendation to mercy.

The result was that the assessors found the Appellant guilty of murder adding a recommendation to mercy and the Chief Justice sentenced him as set out in paragraph 1 hereof under section 12 of Ordinance 37 of 1932 read with section 37 of Ordinance 6 of 1875.

22. There can, in the Appellant's submission, be little doubt that the assessors could derive no help from a summing up of the nature set out in the last paragraph and, were this a trial by jury, a verdict obtained on directions like this would be of no validity.

10 There is no direction whatsoever on the paramount duty of the Crown to prove the Appellant guilty beyond all reasonable doubt.

There is no attempt to erase from the assessors' minds the Attorney-General's erroneous use of Sarandas' statements or his erroneous proposition of law in relation to what the Crown had to prove, namely homicide and nothing further. In fact in so far as it is permissible to draw any inference as to the Chief Justice's own view from his words to the assessors, it would seem as if he shared the Attorney-General's misconception.

20 The law in Fiji (section 8 of the Jurors and Assessors Ordinance No. 16 of 1930) provides that upon such trial i.e., before the Chief Justice with the aid of assessors "the decision of the Chief Justice with the aid "of such assessors in 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 findings or verdict of a jury thereon."

On the other hand section 29 of an earlier ordinance, Ordinance 6 of 1875, lays down that the Judge's decision shall be final.

At the same time, unlike the rule obtaining in other countries 30 where the Judge's decision, having been vested with an overriding force, is required to be embodied in a reasoned judgment, there is no indication here of the foundation of the Judge's decision except his remarks to the assessors.

It seems permissible to say (1) that in so far as the law ordains that the decision of the Judge has to be arrived at with the aid of assessors, the nature of the summing up was such as to deprive the Appellant of the benefit of a properly instructed opinion from them, and (2) that the summing up revealed misconceptions inhering in the Judge's mind of so radical a kind that his decision of the case could not possibly operate other than injustice to the Appellant of a grave and palpable kind.

The misconceptions shortly stated are (1) that manslaughter was not a relevent consideration; (2) that the onus was at any time shifted to

the Appellant; (3) that Sukraj's evidence was supported by anything which sound practice could regard as corroboration.

23. The Appellant therefore submits that the finding and sentence passed against him by the Chief Justice should be set aside for the following, among other,

## REASONS :

1. BECAUSE the Appellant was not allowed to be heard on the whole case.

2. BECAUSE important evidence was witheld from his counsel.

3. BECAUSE the facts taken to have been established against him justify nothing more serious than a finding of manslaughter.

4. BECAUSE he suffered grave and palpable injustice in that the Judge misdirected both himself and the assessors (*a*) in refusing to consider manslaughter as a proper finding; (*b*) in holding that there had been any corroboration of Sukraj's evidence; (*c*) in failing to apply the principle that the onus lies on the Crown throughout.

5. BECAUSE the evidence of Sukraj was palpably untrustworthy and should not have been acted on.

6. BECAUSE it was improper for the Judge to have intimated to the assessors that a recommendation to mercy would be favourably considered.

J. M. PRINGLE.

BARROW, ROGERS & NEVILL,
*Solicitors for the Appellant,*
26 Budge Row, Cannon Street, London, E.C.4

No. 79 of 1935

# In the Privy Council.

## On Appeal from Fiji

BETWEEN

MAHADEO

*Appellant*
*(in forma pauperis)*

AND

THE KING

*Respondent*

## Case for the Appellant


BARROW, ROGERS & NEVILL,
*Solicitors for the Appellant,*
26, Budge Row, Cannon Street, E.C.4.



E. Snowsill, Waverley Press, Colliers Wood, S.W.