Privy Council Appeal No. 26 of 1957

Mohamed Fiaz Baksh - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF BRITISH GUIANA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH FEBRUARY, 1958

Present at the Hearing:

LORD REID
LORD TUCKER
LORD SOMERVELL OF HARROW
LORD DENNING
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

The appellent was convicted of murder on 5th December, 1956, after a trial before Clare, J. and a jury in the Supreme Court of British Guiana. He had been charged jointly with one Nabi Baksh with the murder of Mohamed Saffie on 12th June, 1956. Nabi Baksh was also found guilty.

Both prisoners appealed to the Court of Criminal Appeal for British Guiana and on 7th June, 1957, that Court dismissed the appellant's appeal but quashed the conviction of Nabi Baksh and ordered a new trial in his case.

The appellant appealed by special leave to Her Majesty in Council and his appeal was heard by the Board on the 13th February, 1958.

The case for the prosecution was that the deceased man was killed shortly after 3 a.m. on 12th June, 1956, by shots from a gun fired by one or other of the two accused acting together with the common design of killing or doing grievous bodily harm to the deceased.

The case rested largely upon the identification of the accused by three prosecution witnesses named Mohamed Haniff the deceased's brother-in-law, Mohamed Nazir brother-in-law of Haniff, and Bebe Mariam who had been living with the deceased.

Haniff at the trial swore that on 12th June, he was living with the deceased at a house at Clonbrook, East Bank, Demerara. Also living in the house were Nazir and his wife and Bebe Mariam. He woke about 3 a.m. and helped the deceased and Nazir load a boat with vegetable produce, and then returned to the house with the deceased. Nazir and his wife and Bebe Mariam went away with the boat. He went to lie on his bed, and before Nazir returned with the boat he heard gun fire from the kitchen direction and went to the window with his torch. He saw two men whom he could identify.

He shouted to them " Alright Fiaz and Jacoob no use run any more I see you already." Nabi Baksh was known as Jacoob. He saw a gun in the appellant's right hand. He ran downstairs and saw deceased lying at the top of the step leading from the kitchen. Nazir was there, and they lifted the deceased and placed him on his back.

He said he had been acquainted with both accused for three or four weeks before 12th June.

Nazir swore that after he had taken his wife and Bebe Mariam with the vegetable produce to the bus when he reached the spot where he usually tied his boat he heard a shot. He ran underneath his house and from there saw the appellant and Nabi Baksh crossing a trench near the house. He heard Haniff shout to them " Alright Fiaz and Jacoob, don't run I see you ". He turned his torch on them and saw the appellant had a gun.

Bebe Mariam swore she and the deceased were awakened about 2.30 a.m. on 12th June by the barking of dogs and by a torchlight she saw the appellant and Nabi Baksh about 48 yards away from the house. She said she had known them for about two years.

Neither of the accused gave evidence but in statements from the dock denied that they were anywhere near the scene of the murder. They gave an account of their movements and said that the statements they had given to the police were true. They both called a number of witnesses in support of their alibis.

Both prisoners appealed and on 13th May, 1957, counsel who had appeared on behalf of Nabi Baksh at the trial swore an affidavit stating that at his request the Solicitor-General had allowed him to inspect the statements made to the police by the witnesses Haniff, Nazir and Bebe Mariam on the morning of 12th June, 1956, which had not been available to him at the trial, and that these statements showed serious discrepancies and contradictions in vital matters when compared with the evidence given by them at the trial. The Court of Criminal Appeal accordingly allowed these statements to be produced and proved. They were found to contain the following discrepancies—Haniff in his statement had said that after he heard the gunshot he looked out of the window and shone his torch and saw the appellant and another man whom he did not know by name on the parapet of the trench dividing the yard and the rice field ; that he ran on the bridge and was all the time shouting " all right Fiaz, all you run, me see all you two ".

Nazir had said that neither he nor Haniff had shouted at the men who were escaping because they were afraid of being shot.

Bebe Mariam had said that when she was awakened by the barking of dogs she saw the appellant by the light of her husband's flashlight running away in the rice field south of her home.

After examining the statements and comparing them with the sworn testimony at the trial the Court of Criminal Appeal in their judgment delivered on 7th June, 1957, said :—" From an examination of the additional evidence it will be seen that Bebe Mariam made no mention of seeing Nabi Baksh on the morning of 12th June shortly before the shooting ; Mohamed Haniff did not know the name of the man he saw with Fiaz Baksh and therefore could not have called it out. Had the jury known these facts we are unable to say that inevitably they would have arrived at the same conclusion. They may have done so because they may have accepted Mohamed Nazir's evidence that he saw the two appellants, or the two witnesses already mentioned may have been able to explain or amplify their original statements."

They went on to say that in their view in respect of Nabi Baksh in the interests of justice the value and weight of the evidence should be determined by a jury and not by that Court. They accordingly quashed the conviction in his case and ordered a new trial.

With regard, however, to the present appellant they considered entirely different considerations applied. They could find a good deal unfavourable and nothing favourable to him in the statements and considered that nothing favourable to him could have been obtained therefrom which was not obtained at the trial. They accordingly held that the jury's verdict in respect of this appellant could not be disturbed on this ground.

Their Lordships are unable to accept this reasoning. If these statements afforded material for serious challenge to the credibility or reliability of these witnesses on matters vital to the case for the prosecution it follows that by cross examination—or by proof of the statements if the witnesses denied making them—the defence might have destroyed the whole case against both the accused or at any rate shown that the evidence of these witnesses could not be relied upon as sufficient to displace the evidence in support of the alibis. Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question it cannot be right to accept their verdict against one and re-open it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases.

It remains only to say that their Lordships are in complete agreement with the view expressed by the Court of Criminal Appeal with regard to the criticisms which were made, and which have been repeated before the Board, of the trial Judge's summing up with respect to the onus of proof in connection with the defence of alibi. Taking the summing up as a whole the jury could have been left in no doubt that the onus remained on the prosecution throughout to establish the guilt of the accused.

For the reasons stated above their Lordships have humbly advised Her Majesty that the appeal should be allowed and the case remitted to the Court of Criminal Appeal of British Guiana with the direction that they should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial whichever course they consider proper in the interests of justice in the existing circumstances.

(39302) Wt. 8075—17 100 3/58 D.L.

In the Privy Council

MOHAMED FIAZ BAKSH

v.

THE QUEEN

DELIVERED BY
LORD TUCKER

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