

IN THE PRIVY COUNCIL

No. 28 of 1975

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O N A P P E A L  
FROM THE FIJI COURT OF APPEAL

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B E T W E E N :

CESSION LAL and SHIU LAL Appellants

- and -

THE QUEEN Respondent

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CASE FOR THE APPELLANTS

- |    |   | <u>RECORD</u>       |
|----|---|---------------------|
| 10 | 1. These Appeals are against sentence, by special leave in forma pauperis dated the 25th June, 1975.  | p.34                |
|    | 2. The Appellants were jointly charged, on the 2nd April, 1974 with murder, contrary to Section 228 of the Fiji Penal Code. They were tried in the Supreme Court of Fiji (Williams J., sitting with five Assessors). The Assessors were of the unanimous opinion that the Appellants were guilty as charged. The learned Judge, on the 17th May, 1974 found each Appellant guilty as charged and sentenced both of them to death.   | p.1<br>p.20<br>p.20 |
| 20 | 3. The Appellants appealed to the Fiji Court of Appeal against conviction and sentence. By their Notices of Appeal they claimed, in relation to sentence, that, if the convictions were justified, the cases were proper ones for the imposition of sentences of life imprisonment, and that the learned Judge erred in law in not exercising his discretion accordingly. On the 2nd August, 1974 the Fiji Court of Appeal (Gould, Vice-President, Marsack and Bodilly, J.J.A.) dismissed the Appeals | p.22 and<br>p.25    |
| 30 | against conviction and sentence. The Appellants   | p.26-33             |

RECORD

sought special leave to appeal against conviction and sentence but leave was only granted in so far as it related to the sentences imposed.

4. It is material to these Appeals to consider certain past and existing statutory provisions. The relevant ones are set out in Schedule to this Case.

- p.19 5. After the learned Trial Judge had concluded his summing up the Assessors, one by one, gave their opinion in respect of each Appellant. The learned Judge then made his finding in respect of each Appellant and called upon each, in turn. The First Appellant said: "I did not commit this murder and I should not be sentenced." The Second Appellant said: "I should not be so sentenced". The learned Judge then passed sentence: "Of death according to law". 10
- p.20
- pp.26-31 6. The judgment of the Court of Appeal was given by Marsack J.A. The appeals against sentence were dealt with briefly, His Lordship saying that, for the reasons set out in the judgment of the Court in Uday Narayan v. The Queen the Court was of opinion that it had no jurisdiction to interfere with the sentences. 20
- p.33
7. The judgment of the Court of Appeal in Uday Narayan v. The Queen (Gould, Vice President, Marsack and Henry J.J.A.) was given on the 28th November, 1973 and a copy of the judgment ~~from Schedule II to this Case.~~
8. Narayan was convicted of murder after a trial by a Judge sitting with five Assessors. The Assessors had been unanimous in their opinion that he was guilty of murder. The Court of Appeal were unanimous in their Judgment and held that they had no power to hear an appeal against sentence of death. 30
9. Their Lordships (in the case of Narayan) considered Sections 21(c) and 23(3) of the Court of Appeal Ordinance (Cap.8) to determine the right of appeal against sentence and their powers upon such an appeal. They considered the short history of the Penal Code in so far as it had stipulated the penalty for murder and they then construed Section 229 of the 40

10 Penal Code (Re - Enactment of Provisions) Act, 1972. They were of the opinion that Section 229 provides two sentences for a murder both of which are fixed by law. Further their Lordships observed that if the Judge certified that the case was not (sic) one for the death penalty, was it the intention of the legislature that a defendant should have three chances of commutation, namely under the Prerogative, by the trial Judge and by the Court of Appeal.

20 10. Their Lordships commented on the use of the word "certify" as being unusual, none the less they expressed the view that a certification "could no doubt be made the subject of an appeal but it would be unusual". Their Lordships then continued their reasoning by a close analysis of Section 23(3) of the Court of Appeal Ordinance, concluding that they had no power to pass a sentence of life imprisonment because until such time as there was a certificate by the trial Judge such a sentence was not "warranted by law by the verdict". Further they were of the opinion that their power of making "such other order as they think just" must be other than the passing of a sentence and would not encompass an order to the trial Judge to give a certificate.

30 11. In conclusion their Lordships stated that the certificate did not form part of the sentence or the conviction and that if a right of appeal had been intended clear language could and should have been used to create such a right. None the less they expressed concern at the absence of any procedure or rules for guidance.

40 12. It is respectfully submitted that in adopting the reasoning in the Narayan Case the Court of Appeal erred. It is submitted that where a statutory provision relating to sentence grants a discretion to the Judge to choose between two sentences, one less severe than the other, the more severe sentence cannot be fixed by law, while the less severe will be so fixed. It is respectfully agreed that an appeal against a certification would be unusual - indeed it is submitted that such an appeal would never occur. In any event the sentence of life imprisonment would constitute a sentence fixed by law.

RECORD

13. It is submitted that Section 229 of the Penal Code (Re - Enactment of Provisions) Act, 1972, provides for two possible sentences upon conviction for murder, both of which are warranted by law, but the selection of which is left to the discretion of the Judge. In so far as the legislature conferred a discretion, according to general principle such a discretion must, it is submitted, be exercised judicially. Upon a true construction of the proviso the actual exercise of the discretion is mandatory but the decision is discretionary.

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14. It is submitted that in the context of sentencing the use of the word "certify" denotes no more than that the Judge should publicly declare, that he has come to the conclusion, that the case is not a proper case for the death penalty to be imposed. It is submitted that there is no reason for construing the requirement to "certify" as a substantial procedural pre-requisite, exercisable only by the Judge. It is properly to be regarded as an ancillary power of sentencing and as part of the sentence. "Sentence" is defined by Section 2 of the Court of Appeal Ordinance (Cap. 3) as including "any order of the Court made on conviction with reference to the person convicted ... as recommendation made or imposed by the Court ..."

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15. It is respectfully submitted that the effect of the statutory provisions is to impose upon the Judge the duty to exercise his discretion in every case of murder. Failure by him to do so, or a failure to do so on judicial principles and the imposition of a sentence of death will result in a sentence which is not fixed by law. Further it is submitted that since a sentence of life imprisonment is a "sentence warranted by law by the verdict" the Court of Appeal have the power to impose such a sentence. It is submitted that in construing their power to make "such other order as they think just" as a power to order something other than another sentence the Court of Appeal in Narayan's Case were correct. In a proper case, it is submitted, (for example) where it was manifest that the Judge had failed to address his mind to his powers under the proviso, the Court of Appeal might well remit the case to the Judge directing him to consider whether or not to certify.

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16. In the instant appeal the learned Trial Judge apparently failed to consider his powers under the proviso, alternatively if he did so, the principles he took account of are not apparent on the Record. In failing to consider what did happen at the trial and further in finding that they had no power to impose any sentence themselves it is respectfully submitted that the Court of Appeal erred.

10 17. Accordingly it is submitted that these Appeals ought to be allowed and the cases remitted to the Court of Appeal for them to consider whether to impose their own sentence or remit the cases to the trial Judge in the Supreme Court, for the following, among other

REASONS

- 20 (i) BECAUSE Section 229 of the Penal Code (Re-Enactment of Provisions) Act, 1972 confers a discretion which the Judge must exercise in every case where a defendant is convicted of murder, and which he must exercise according to judicial principles;
- 30 (ii) BECAUSE Section 23(3) of the Court of Appeal Ordinance enables the Court of Appeal to hear an appeal against a failure to certify under Section 229 and a failure by the Judge to exercise his discretion judicially;
- (iii) BECAUSE the learned trial Judge failed to exercise his discretion, alternatively failed to exercise it on judicial principles;
- (iv) BECAUSE the Court of Appeal erred in adopting the reasoning of the case of Uday Narayan v. The Queen

GEORGE NEWMAN

(i)

S C H E D U L E

1. THE PENAL CODE (as it stood prior to 1966)

"Section 224(1). Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder".

"Section 225. Any person convicted of murder shall be sentenced to death".

(These Sections were amended by the Penal Code (Amendment) Ordinance, No. 17 of 1966)

2. THE PENAL CODE (AMENDMENT) ORDINANCE, No. 17 of 1966

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"Section 1. This Ordinance may be cited as the "Penal Code (Amendment) Ordinance 1966", and, unless extended by resolution of the Legislative Council, shall expire on the 31st day of May, 1971"

"Section 5. Sub-section (1) of Section 224 of the Principal Code is amended by inserting the following words immediately after the word "murder" in the third line:-

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"And shall, on conviction, be sentenced to imprisonment for life"."

"Section 6. Section 225 of the Principal Code is repealed and replaced by the following section:-

"Section 225(1). Subject to the provisions of the next following sub-section the following murders shall be capital murders:-

...  
Sub-section (3) Where it is alleged that a person accused of murder is guilty of capital murder, the offence shall be charged as capital murder in the Information, and if a person charged with capital murder is convicted thereof, he shall be sentenced to death"."

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(This Ordinance stood until the 1st of January, 1973, when the Penal Code (Re-Enactment of Provisions) Act 1972 came into force)

3. THE PENAL CODE (RE-ENACTMENT OF PROVISIONS)  
ACT No. 28 OF 1972

10 "Section 2(1). Subject to the provisions of the next succeeding sub-section and notwithstanding the provisions of Section 20 of the Interpretation Ordinance 1967, on the expiry of the Penal Code (Amendment) Ordinance 1966, hereinafter referred to as the latter Ordinance, all the provisions of the Penal Code amended by and repealed and replaced by the latter Ordinance shall be re-enacted and revived as if the latter Ordinance had never been enacted".

20 "Section 2(2). Section 229 of the Penal Code ... is amended by substituting a colon for the full stop at the end and by inserting the following proviso thereto:-

"Provided that a Judge may, before passing sentence, certify that the case is a proper case for not sentencing the Accused to death in which event the Accused shall be sentenced to imprisonment for life".

"Section 3. The Code is amended by inserting the following section immediately after Section 28D:-

30 "28E. Whenever a sentence of imprisonment for life is imposed on any convicted person the Judge who imposes the sentence may recommend the minimum period which he considers the convicted person should serve".

4. THE COURT OF APPEAL ORDINANCE C.8 OF THE  
REVISED EDITION OF THE LAWS OF FIJI, 1967

40 "Section 2. "Sentence", includes any order of the Court made on conviction with reference to the person convicted and any disqualification, penalty, punishment or recommendation made or imposed by the Court and "sentenced" shall be construed accordingly."

(iii)

"Section 21. A person convicted on a trial held before the Supreme Court of Fiji may appeal under this part of this Ordinance to the Court of Appeal -

"(c) With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law"."

"Section 23(3). On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, or may dismiss the appeal or make such other Order as they think just."

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5. THE CRIMINAL PROCEDURE CODE

"Section 6. The Supreme Court may pass any sentence authorised by law and may make any order which a magistrates' court is authorised to make."

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"Section 288. The Court may, before passing sentence receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed."



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B E T W E E N:

CESSION LAL and  
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- and -

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CASE FOR THE APPELLANTS

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