IN THE PRIVY COUNCIL No. 28 of 1975

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN :

CESSION LAL and SHIU LAL — Appellants

- and -

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

RECORD

1. These Appeals are against sentence, and are by leave of the Privy Council granted the 14th May, 1975.

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 he passed sentences of death. — p.1; p.20; p.20

3. The Appellants appealed to the Fiji Court of Appeal against conviction and sought leave to appeal against sentence. In their Notices of Appeal they claimed, inter alia, 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 against conviction and the applications for leave to appeal against sentence. — p.22 l.37 and p.25, l.6; pp 26-33

4. The relevant statutory provisions are, and were, as set out in the Schedule to this Case.

RECORD

p.20

5. The sequence of events at the trial, after the Learned Judge had concluded his summing up, was as follows. 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. The First Appellant was called upon, and said: "I did not commit this murder and I should not be sentenced." The Second Appellant was called upon, and said:- "I should not be so sentenced". The Learned Judge then passed sentence: "Of death according to law".

pp 26-31

6. The judgment of the Court of Appeal was given by Marsack J.A. The applications for leave to appeal against sentences were dealt with briefly,

p.33 l.31

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.

7. The judgment of the Court of Appeal in Uday Narayan v. The Queen was given on the 28th November, 1973. Narayan had been convicted, in the Supreme Court, of having murdered one Daya Prasad in January, 1973. As in the present case the trial had been before a Judge sitting with five Assessors. The Assessors were unanimously of the view that Narayan was guilty of murder. The Trial Judge accepted their opinion, convicted Narayan and setenced him to death. Narayan appealed against conviction and sought leave to appeal against sentence. The Crown agreed with Narayan that, in the circumstances of the case, an appeal against sentence lay. The Court of Appeal dismissed the appeal against conviction and, refusing leave to appeal against sentence, dealt with the history of the legislation, saying that the 1972 Act made provision for sentences, both of which were fixed by law. Their Lordships posed the question (so it would appear) whether it was the intention of the Legislature that a person convicted of murder should have three chances of commutation, vis: under the prerogative, by the trial Judge, and by the Court of Appeal. If it was intended that an Appeal should lie from a death sentence, the powers of the Court of Appeal must be wide enough to deal with the new type of fixed penalty. In their Lordships' view the Court of Appeal could not pass the sentence of life imprisonment, because it had no power to do so. The power depended upon a certificate by the trial Judge: without such

certificate the sentence of life imprisonment was not one "warranted by law" within the meaning of Section 23(3) of the Court of Appeal Ordinance. Further, the power could not be subsumed under the phrase: "make such other Order as they think just". The use of the words "other" must mean that the power conferred was "other than the power of passing sentence" mentioned earlier in the sub-section. But to be effective in the case before the Court this power must be such as to allow the Court to quash the death sentence and order the Trial Judge both to give a certificate and pass a life sentence. Their Lordships were unable to construe the power so widely. In their view the section contemplated that the Court of Appeal was to pass sentence on Appeal (in appropriate circumstances). So, the power: "to make such other Order as they think just", could not be read as empowering the Court of Appeal to order the trial Judge to pass such sentence as to the Court of Appeal seemed just. In their Lordships' view the true effect of the 1972 legislation was to require the trial Judge to arrive at a decision as to whether or no to certify the case as one in which it would not be right to sentence the convicted person to death. The legislation created a judicial power that was both new and anomalous. If the new power was to be made subject to appeal, then clear words were needed to vest the Court of Appeal with appropriate powers to deal with the new situation. Their Lordships concluded by expressing regret that the Legislature had laid down no rules for guiding a trial Judge in his new task.

8. It is respectfully submitted that, in the instant case, both the learned trial Judge and the Court of Appeal erred. As to Uday Narayan v. The Queen it is submitted that the Court of Appeal were correct, for the reason given, in holding that they had no power to pass the particular sentence of life imprisonment and were correct, so far as they went, in their analysis of the nature of the new power. It is, however, respectfully submitted that the Court of Appeal erred in their conclusion as to what was necessary to be effective, and erred, consequentially, in the limitation they placed upon the phrase: "make such other Order as they think just". It would appear, by necessary implication, that the Court of Appeal assumed that the learned Judge had

exercised his discretion before passing sentence of death, and, moreover, that he had done so in the manner required by law. If the Court of Appeal did so assume, then it is respectfully submitted they erred.

9. It is submitted, respectfully, that it is not merely for the trial Judge to arrive at a decision as to whether or no to certify, but also for him to show that he has arrived at such a decision. Further, that such decision must be reached upon the application of judicial principles. If it does not appear that the decision has been reached, or if it appears that the decision has been reached, but not upon the application of proper judicial principles, then, it is submitted, this is error. Judicial principles, it is submitted, require a trial Judge, after he has convicted, to invite the submission of material that would enable him to judge whether or no the case was one in which certification would be proper. As to whether the Court of Appeal can correct such error, it is submitted that that Court has such power and that it is subsumed under the power: "to make such other Order as they think just". Correcting the error does not, it is submitted, require the Court of Appeal to make the Order the Court of Appeal would have made. What is required is that the Court of Appeal should order the trial Judge to arrive at his decision, after following accepted procedure, and by applying correct principles, and to show that he has so arrived.

10. It is respectfully submitted that, as it does not clearly appear on the record that the learned Judge gave consideration (either after following accepted procedure, or, indeed, at all) in the case of either Appellant, to the question whether or no he should certify that the case was a proper case for not sentencing to death, the Court of Appeal ought to have remitted the case to the Supreme Court with the Order that the learned trial Judge do give such proper consideration to the case in respect of each Appellant, and, after giving such consideration, to sentence accordingly. It is accordingly submitted that the appeals ought to be so remitted to the Supreme Court for the Learned Trial Judge so to consider and sentence.

11. It is respectfully submitted that these Appeals

should be allowed, and that the case should be so remitted to the Supreme Court of Fiji for the following, among other

R E A S O N S

(1) BECAUSE the proviso to Section 229 of Penal Code confers upon the Trial Judge a discretion in the matter of sentencing upon a conviction for murder, which discretion is to be exercised according to judicial principles.

(2) BECAUSE the learned trial Judge did not exercise such discretion, alternatively did not exercise it after applying the proper principles.

(3) BECAUSE the Court of Appeal failed to correct the Order of the Learned Trial Judge.

GERALD DAVIES.

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

"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:-

> "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"."

(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.

"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".

"Section 2(2). Section 229 of the Penal Code ... is amended by substituting a colon for the fullstop 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:-

> "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 CRIMINAL PROCEDURE CODE, C.14 OF THE REVISED EDITION OF THE LAWS OF FIJI, 1967

"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."

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

"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".

"Section 27. The Judge before the person is convicted, shall in the case of an appeal under this part of this Ordinance against the conviction or against the sentence, or in the case of an application for leave to appeal under this part of this Ordinance, furnish to the Registrar, in accordance with Rules of Court, his notes of the trial; and shall also furnish to the Registrar in accordance with Rules of Court, a report giving his opinion upon the case or upon any point arising in the case".

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SHIU LAL — Appellants

- and -

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London WC2A 3UL.
Solicitors for the ~~Appellants~~ Respondent