Privy Council Appeal No. 28 of 1975

Cession Lal and Another – – – – – – *Appellants*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH OCTOBER 1975

Present at the Hearing:

LORD DIPLOCK
LORD KILBRANDON
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD DIPLOCK]

The appellants were tried in the Supreme Court of Fiji for the crime of murder committed in December 1973. The trial Judge, who sat with five Assessors, found each of the appellants guilty of murder. This accorded with the unanimous opinion of the Assessors. The Judge then passed on each of the appellants the sentence " of death according to law ".

The appellants' appeals against their convictions were dismissed by the Fiji Court of Appeal; and nothing further turns on these. At the same time, however, they applied for leave to appeal against the sentences of death upon the ground that theirs were proper cases for the alternative sentence of imprisonment for life which the Judge had power to impose. The Court of Appeal did not consider this application on the merits. They dismissed it out of hand upon the ground that they had no jurisdiction to interfere with a sentence of death for the crime of murder once this had been passed by the trial Judge. In so deciding they followed their own previous judgment in a recent (unreported) case of *Uday Narayan v. Reginam* of which their Lordships have been provided with a transcript.

Against this dismissal of their application for leave to appeal against the sentences of death passed upon them, the appellants now appeal from the Fiji Court of Appeal to this Board by special leave.

As a consequence of the passing of the Penal Code (Re-enactment of Provisions) Act, 1972, the relevant provisions of the Penal Code of Fiji relating to the crime of murder, as they have stood since 1st January, 1973, are as follows:—

"S. 228 (1). Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

"S. 229. Any person convicted of murder shall be sentenced to death:

> 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."

So upon a charge of murder, as in the case of other crimes, the Judge has not completed his judicial functions when he has found the accused guilty of the offence charged. He must then go on to consider what is the proper sentence to be passed in all the circumstances of the particular case. Murder differs from other crimes in that the choice of sentences open to the Judge is limited to two: sentence of death or sentence of imprisonment for life—although even here if he decides that imprisonment for life is the proper sentence, he may also recommend the minimum period which he considers the convicted person should serve. (Penal Code S 28E.)

Whenever a Judge of the Supreme Court of Fiji has found a person charged before him to be guilty of murder, it is his duty before passing sentence to apply his mind to the question whether the case is one which is a proper case for not sentencing the accused to death. In arriving at the answer he applies his own discretion; but it is a discretion which must be exercised judicially—not arbitrarily or idiosyncratically. To exercise judicially a discretion of which the consequences are so grave, the Judge should take into account not only the facts already proved in the evidence leading to the conviction of the accused, but also any mitigating circumstances (or aggravating circumstances such as previous convictions) that may be brought to his attention after he has reached his finding of guilt. If the sentence is to be just and is to be seen to be just, the Judge should give to the advocate appearing for the accused an opportunity to address an argument to him on the question of the proper sentence; and should manifest his willingness to be informed of any mitigating circumstances, either by exercising the power conferred upon the court by s. 288 of the Criminal Procedure Code to "receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed" or, where the facts relied upon in mitigation are unchallenged, in some less formal way.

None of this was done by the trial Judge in the instant case. In sentencing both the appellants to death he gave no indication that he was aware that he was invested with any discretion to pass the alternative sentence of imprisonment for life. He gave no opportunity to either of their Counsel to address him on the question of the proper sentence or to bring to his attention by calling evidence or otherwise any mitigating circumstances that might be relevant to the sentence he should pass. As soon as he had announced his finding that the appellants were guilty of murder, he formally called upon each in turn to say if there was any reason why they should not be sentenced according to law—an historical survival, inappropriate to Fiji, from the period in England when "benefit of clergy" could be claimed after conviction of some felonies. Both said that they should not be sentenced, one adding, as the only reason, that he was not guilty of the murder. Thereupon the Judge immediately passed sentence of death.

The jurisdiction of the Fiji Court of Appeal to entertain an appeal against a sentence passed by the Judge on a trial in the Supreme Court of Fiji is conferred by s. 21 of the Court of Appeal Ordinance, viz.

> "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."

The powers of the Court of Appeal on an appeal against sentence are to be found in s. 23 (3) of the same Ordinance, viz.—

> "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."

In their Lordships' view, upon the coming into force of the Penal Code (Re-enactment of Provisions) Act, 1972, sentence of death for the crime of murder ceased to be a sentence "fixed by law". It became a sentence fixed by the trial Judge in the exercise of his judicial discretion to determine which of two alternative sentences was proper to be passed in all the circumstances of the particular case. The Court of Appeal accordingly have jurisdiction under s. 21 of the Court of Appeal Ordinance to entertain an appeal against sentence of death passed on conviction for the crime of murder.

On such an appeal if the Court of Appeal think that in all the circumstances of the case sentence of imprisonment for life should have been passed instead of the death sentence, not only does it lie within their power but it is also their duty under s. 23 (3) to quash the sentence of death and to substitute for it the alternative sentence warranted by law for the crime of murder, viz. imprisonment for life.

In reaching the contrary conclusion in *Uday Narayan v. Reginam* the Fiji Court of Appeal had laid stress upon the word "certify" in s. 229 of the Penal Code to describe the form in which the trial Judge was to make known his decision that the case was a proper case for not sentencing the accused to death. They considered that the use of this unusual expression indicated the intention of the legislature that the power to certify should be personal to the trial Judge and not subject to any appeal; that the granting of a certificate by him was a condition precedent to any power to pass a sentence of imprisonment for life; that in the absence of such certificate, sentence of imprisonment for life was not a sentence "warranted by law by the verdict"; and that accordingly the Court of Appeal had no power under s. 23 (3) to pass it in substitution for the death sentence passed by the trial Judge.

The clear intention of the legislature in enacting s. 21 (*c*) and s. 23 (3) of the Court of Appeal Ordinance was that the exercise by a trial Judge of a discretion vested in him by the law to decide what sentence, within such limits as might be imposed by the legislature, was appropriate in all the circumstances of the particular case, should be open to review by the Fiji Court of Appeal upon the application of the person upon whom the sentence had been passed. In their Lordships' view it would be wholly unreasonable to infer from the use of the word "certify" to describe the form in which the Judge was to make known the way in which he had exercised his discretion, that the legislature intended to exclude the right of review in cases where the way in which he exercises that discretion has the gravest consequences of all—a matter of life or death.

The requirement of certification is more readily accounted for by the history of the legislation on capital punishment for murder before the passing of the Penal Code (Re-enactment of Provisions) Act, 1972. Up to 1966 the death sentence was mandatory upon a conviction of murder. For an experimental period between 1966 and 1st January 1973, the Penal Code (Amendment) Ordinance, 1966, was in force. This substituted imprisonment for life as the mandatory sentence for most murders, but retained the death sentence as mandatory for a limited category of murders called " capital murders ". In abolishing this arbitrary distinction between capital and other murders and substituting for it a discretion vested in the judiciary to determine in each individual case whether in all the circumstances the murderer deserved to be punished by death or whether the lesser punishment of imprisonment for life would be a sufficient penalty, the legislature may well have wished to provide some reassurance to the public that the Judge had given careful consideration to the exercise of the discretion newly vested in him, before deciding on the lesser penalty; and this may well have been the reason for a requirement that the Judge should place on record the fact that he had done so in the form of a certificate to this effect.

On an appeal against sentence of death on a conviction of murder the Fiji Court of Appeal has jurisdiction to review the decision of the trial Judge not to certify that the case is a proper case for not sentencing the accused to death; and, if they think that he came to a wrong decision, to substitute a sentence of imprisonment for life. As in all appeals against sentence an Appellate Court should not lightly interfere with the exercise of his discretion by the trial Judge. He will have had the advantage of hearing all the oral evidence and of observing the demeanour of the accused in the dock and, maybe, in the witness box. But if, despite this, the Appellate Court is satisfied that the Judge was wrong, either because it is apparent that he has failed to take into consideration matters that he should have taken into consideration or has taken into consideration matters that he should not or for any other compelling reason, it is the duty of the Appellate Court to quash the sentence of death and substitute for it a sentence of imprisonment for life.

In the instant case, however, it would appear that the trial Judge before passing sentence never applied his mind to the question of how his discretion as to the proper sentence should be exercised. In these circumstances, the sentences of death upon the appellants have, in their Lordships' view, not been validly passed. In consequence of the course he took the Judge deprived both himself and the Court of Appeal of the opportunity of knowing whether there existed any mitigating circumstances properly to be taken into consideration before passing sentence, other than those (if any) which had already emerged in the evidence leading to the conviction of the appellants. So material that may be relevant to a review by the Court of Appeal of the Judge's decision to pass sentence of death is not available to that Court.

In these unusual circumstances, their Lordships consider that the appropriate order for the Court of Appeal to have made was to remit the case to the trial Judge (if he is still in office) for further hearing on the issue as to the proper sentence to be passed. At that further hearing the Judge should adopt the course that has been indicated earlier in this opinion. If, after that hearing, the Judge decides not to certify but to pass sentence of death on the accused, it will be open to the accused, but only with the leave of the Court of Appeal, to appeal to the Court of Appeal against the sentence of death passed upon them.

Their Lordships have humbly advised Her Majesty that this appeal be allowed and that the case be remitted to the Fiji Court of Appeal with a direction that they should remit it to the trial Judge, if still in office, for

further hearing on the question as to whether the case of each accused is a proper case for not sentencing the accused to death; or, if he is not still in office, to consider that question for themselves and for that purpose to receive such further evidence as they may think fit in order to inform themselves as to the sentences proper to be passed.

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In the Privy Council

CESSION LAL AND ANOTHER

v.

THE QUEEN

DELIVERED BY

LORD DIPLOCK

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