Privy Council Appeal No. 39 of 1987

Shabir Ali *Appellant*

v.

The State *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH FEBRUARY 1989

Present at the hearing:-

LORD KEITH OF KINKEL
LORD ROSKILL
LORD GRIFFITHS
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Roskill**]*

The appellant appeals by special leave of their Lordships. His appeal is brought against the decision of the Court of Appeal of Trinidad and Tobago (Warner, Persaud and McMillen JJ.A.) dated 24th July 1986 upholding his conviction for the murder of his daughter. He was convicted at the Port of Spain Second Assize on 15th March 1985 and sentenced to death. The trial had taken place before Hosein J. and a jury. Their Lordships have transcripts of the learned judge's summing up and of the judgment of the Court of Appeal delivered by Warner J.A. There is no transcript of the evidence given at the trial which took place between 11th and 15th March 1985. Their Lordships have, however, copies of the learned trial judge's full and careful notes of that evidence and of certain objections which were made during the trial as to the admissibility of parts of that evidence.

If the case for the State were proved, it is beyond question that the appellant was guilty of the most brutal murder of his daughter who was some nineteen months old at the date of her death. It was alleged that after their return from Canada the appellant's wife and the child lived in Freddie Street, San Juan. On the night of 23rd December 1980 the appellant arrived
[6] there and asked his wife to go with him to his

brother's house. The wife refused. She said she was not going anywhere. The appellant then took the child by the hand and swung it. He said he would kill the child if his wife did not go with him. He walked out holding the child to his chest and repeated the threat. Then he held the child by both legs and banged her head on a concrete platform near the gateway. The child was seriously injured and later died in hospital as a result of what were described as multiple blunt force head injuries. This was the account given by a man named Hosein whose house it was and who said he was present at the time. He was a relation both of the appellant and of the wife. Substantially the same account of what happened had been given by the wife to the police. The wife was not a compellable witness against the appellant and she was not called at the trial on his behalf.

The appellant's account, when he came to give evidence on his own behalf as he elected to do, was very different. He agreed that he had visited the house and asked his wife to come with him. He said he picked up the child and as he left his wife came behind him. As he walked out he said she was fighting with him and the child from behind. There was a scuffle. He tried to get away from her and she tried to pull at the child. During this pulling and tugging the child fell to the ground. This, he asserted, was the cause of the child's injuries. He denied he had swung the child on the concrete platform.

Three other witnesses gave evidence which is presently relevant, two doctors and a police superintendent. The first doctor was Dr. Manmohansingh. He gave evidence of what he found on a clinical examination of the child before she died. He was not asked when he first gave evidence, for the giving of which he naturally relied largely on his contemporary notes, any questions directed to any non-medical matters. The second doctor was Dr. Dobson, a pathologist who carried out the post mortem on the child. During the first doctor's cross-examination he was asked, seemingly by the learned judge, for his view of the cause of the extensive haematoma which led to the child's death. He replied that "the haematoma was caused by a blow with a blunt object to the head. A considerable force would have had to be used to the head to have caused it". Dr. Dobson said she died "because of multiple blunt force head injuries". He accepted in cross-examination the possibility that "acceleration during scuffle in a downward direction ... could cause the injuries I saw".

The police superintendent described his visit to the hospital to which the child had been taken. He said he saw the appellant's wife and later saw the appellant. The learned judge's note of the next part of the superintendent's evidence reads thus:-

> "I told accused I was a police officer and that his wife Hanifa Ali had made a report to me brief facts of report were that on night of 23/12/80 as the accused went to her house in company with his brother to Freddie Street, Aranguez where he asked her to pack her clothes and come with him to his brother's place she refused. He repeated the request on 3 or 4 occasions and she also refused. At that time his daughter was sitting on a bench in the house and he told his wife he was going to throw the fucking child into the Caroni River. He took up the child and walked out of the yard he then held the child by the legs and struck the child by the head by a bridge by the side of the road."

The superintendent said he then cautioned the appellant. This evidence was given without objection from the appellant's counsel or intervention by the learned judge. It is to be noted that the superintendent gave no evidence of any answer by the appellant or of any reaction by him to the allegations which the superintendent said had been made against him.

When the appellant gave evidence, he gave the account of how the child fell accidentally which their Lordships have already related. At the outset of his cross-examination he mentioned that he had spoken to Dr. Manmohansingh at the hospital. There then followed a request by counsel for the State that the doctor might be recalled on the ground that this last matter had arisen "ex improviso". In fact the State had in its possession a statement from the doctor which mentioned a conversation, which the doctor said had taken place at the hospital, with a man who said he was the child's father but whom the doctor was unable to identify at the trial. Accordingly counsel for the State had not in the first instance sought to lead this evidence from the doctor on the ground that in the absence of proof of identity, i.e. of proof that a conversation had taken place with the appellant, as distinct from a conversation with a man asserting that he was the father of the child, this evidence was inadmissible. It was said that this evidence now became admissible as a result of the appellant stating that he had had a conversation with the doctor. This evidence (which the doctor was only able to give after again refreshing his memory from his notes) was that the person now agreed to be the appellant had told him that the injuries were accidental, but that the appellant's account of the accident was different from that which he had given in examination-in-chief. The learned judge gave leave for the doctor to be recalled and his evidence accordingly was given. The learned judge's reasons, which he recorded in writing, appear in the judgment of the Court of Appeal. Suffice it to say that the reasons were founded on the learned judge's acceptance of the submission that the matter had arisen

ex improviso. On the hearing of the appeal the Court of Appeal upheld the submission that the evidence was admissible but on different grounds from those given by the learned judge. They rejected the submission that the matter had arisen *ex improviso* and learned counsel for the State did not before their Lordships suggest that the Court of Appeal was wrong in that conclusion.

It is against this background that the appeal comes before their Lordships. Two submissions were advanced on the appellant's behalf. First it was said that the Court of Appeal was wrong in upholding the submission that the State was entitled to recall the doctor in the light of the appellant's evidence that he had spoken to the doctor at the hospital. It was said that the further evidence as recorded in the learned judge's notes did not only go to the issue of the appellant's credibility- had it done that and that alone, it was accepted that it might well have been admissible - but went further and went to the central issue of the appellant's alleged guilt. All evidence probative of guilt must, it was said, be given before the prosecution's case was closed. Otherwise an accused did not know when he made his election whether or not to give evidence what the entirety was of the case he had to meet.

The second submission was that the superintendent had been allowed without objection to give hearsay evidence of what the wife said to him. This allowed the jury to hear, through the mouth of the superintendent, hearsay evidence damaging to the appellant from a witness who could not have been called to give direct evidence against the appellant.

Their Lordships are concerned by the fact that not only was this evidence allowed to be given without objection on the appellant's behalf or intervention from the learned judge but also because the second submission was never advanced in the Court of Appeal. It follows that their Lordships have not had the benefit of the views of the Court of Appeal upon this matter which they would greatly have valued.

Their Lordships propose first to express their conclusion upon the second submission because, if those submissions are well founded, that conclusion is sufficient to compel the quashing of the appellant's conviction and the first submission, upon which a number of authorities both English and Commonwealth, which are not perhaps always as clear and consistent as might be wished, were cited to their Lordships, does not call for further consideration.

The superintendent's evidence not having been objected to at the trial, it is not surprising that the learned judge did not deal with this matter specifically in his summing up. He very properly and fairly warned the jury not to draw any adverse inference from the fact that the wife did not give evidence. He rightly

told them that she could not give evidence for the State. Unfortunately having said that, he also told them that they must "decide the matter upon the evidence which you have heard". This of course included the entirety of the superintendent's evidence. Thus the wife's inadmissible evidence had in effect been placed before the jury in hearsay and thus also in inadmissible form. In truth, as the learned judge told the jury at the end of his summing up, the central issue was whether they accepted Hosein's evidence as true. If they did, a verdict of guilty of murder was inevitable. It is clear that the jury, as they were entitled to do, did accept Hosein's evidence because they convicted the appellant. But what troubles their Lordships is that they cannot be certain that in reaching their verdict the jury were not influenced by hearing the inadmissible evidence from the only other person at the scene which was to the same damaging effect as that of Hosein. They were not warned not to do so. Indeed even if they had been so warned it is far from certain that the damage already done could at that stage have been undone. To have given the warning might merely have drawn attention to the inadmissible hearsay evidence.

Their Lordships are aware that there are cases in which it is permissible for evidence to be given of allegations made to the police by a third party and repeated by a police officer to a suspect, in order that evidence of the suspect's reactions or non-reactions to those allegations may also be given as supposedly supportive of guilt. But, in those cases where that is permissible, it is essential for the trial judge to warn the jury with great care how they must regard those allegations so put forward and that they must not regard what is thus alleged as evidence of the truth of the allegations. A number of cases cited to their Lordships such as *Christie* [1914] A.C. 545 and *Finden* [1927] 19 Cr.A.R. 144 makes this clear. Each shows how carefully evidence of this nature must be dealt with by the trial judge if indeed it is allowed to be admitted at all.

Unhappily this did not happen in the present case. There was undoubtedly very strong evidence against the appellant which the jury accepted. But as already stated their Lordships cannot be certain that the jury may not have been influenced by the inadmissible evidence to which their Lordships have already referred and accordingly that there is no risk of a miscarriage of justice. They have therefore reached the conclusion that the submissions on the second point must succeed. It follows that the appellant's appeal must be allowed and his conviction quashed. Their Lordships are of the clear view that it is impossible to apply the proviso. As already stated this conclusion makes it unnecessary to consider the first submission and their Lordships express no conclusion upon it.