IN THE SEYCHELLES COURT OF APPEAL

BERNARD LARUE — 1st Appellant
SIMON BARRACK — 2nd Appellant

v/s

THE REPUBLIC — Respondent

Criminal Case No. 1 & 2 of 1989

Mr D Derjacques for Republic
Mr K Shah for 1st Appellant
Mr B Georges for 2nd Appellant

JUDGMENT

At about 9.00 am on Monday 18th January, 1988 the body of Claude Antat was found between two huge rocks in an area of upper Cascade some 100 metres from the house of the appellant, Simon Barrack. The evidence was that Antat had last been seen alive on the night of Saturday 16 January, 1988 in the yard of that house where a number of men, among whom was Antat, had been drinking and merrymaking.

Three principal witnesses gave oral evidence as to the events which had led to that gathering - Pascal Jean, Irene Jean and Bernard Labrosse. Although there are discrepancies, the essential elements of the narrative are clear.

Pascal Jean and Claude Antat worked as security guards at the New Port. On Saturday 16 January, 1988 they had permission

to leave work early. They went into the town with another worker, Bernard Labrosse. There they met Simon Barrack whom Pascal Jean appeared to know well. The group of four did some drinking in town. On one version they consumed at least 16 beers. Thereafter they went at Simon Barrack's invitation, to his house in upper Cascade. His house is in an area of many large rocks where paths are steep and edged by precipitous drops.

On their way up to Simon Barrack's house they met the first appellant Bernard Larue who was either standing near or sitting on a rock which bordered the path. He was a friend of Simon Barrack and joined the group.

In the yard of Simon Barrack's house they settled down to drinking and merrymaking - the drinks being toddy and baka. There was music from a taperecorder placed on a table in the open. Later a barrell was beaten as a drum to provide music. Simon Barrack did the cooking helped by his brother Willie Barrack who was already at the house.

While the group ate, drank and made merry night fell. There is evidence that at one stage Simon Barrack took Claude Antat inside the house to show him the rooms because he had not come there before and to show him photographs of his family in an album.

At some stage, for reasons which the evidence leaves unclear, Simon Barrack became angry. It may have been an argument over witchcraft or meditation. It may have been the breaking of a glass. In his anger he went into the house and picked up a large knife. Bernard Larue armed himself in like manner and they both rushed towards Claude Antat, giving him chase.

The persons near Antat, uncertain of Simon Barrack's intentions, ran away as did Antat.

Bernard Larue and Simon Barrack returned to the yard shortly after but Claude Antat did not return. The estimate of the time they were away varied widely as could be expected Pascal Jean's estimate was 30 to 40 minutes. Bernard Labrosse stated that it was perhaps 5 to 6 minutes and could have been 2 or 3 minutes. Irene Jean did not return to the yard. He hid in the bush and slept there that night.

When Simon Barrack returned he had Claude Antat's identification card and his sun glasses. These he handed to Pascal Jean on request.

A search was conducted on the Sunday morning but nothing was found. A more thorough search on Monday under police direction led to the discovery of the body of Claude Antat.

Bernard Larue and Simon Barrack were charged with having murdered him. They were convicted and each sentenced to life imprisonment. From this conviction they have appealed. The grounds of appeal in the case of each appellant are identical.

The first ground of appeal is that the trial was a nullity as the presiding judge had failed to convict the appellants in accordance with the verdict of the jury. The record reads -

"Court: Members of the jury have you reached a verdict?

Foreman: Yes My Lord we have found both accused 1 and 2 guilty for murder. Our verdict was unanimous.

Court: Members of the jury have found the accused guilty for murder. There is only one sentence

I therefore sentence accused 1 and 2 to life imprisonment."

Mr Shah relied substantially on Ahkon v The Republic [1977] Sey. L.R. 42 in which Sauzier J. stated at p. 43 that -

> " When there is a failure on the part of the trial judge to record a conviction against an appellant, then such a defect is fatal and cannot be cured as the conviction is one of the basic elements of the judgment."

Sauzier J had himself raised the issue of the adequacy of the record having noted on a perusal of the file that the magistrate's judgment had no conclusion and had neither been signed nor dated. His remarks do not make clear whether the judgment, though not signed or dated, did record a finding of guilt.

We asked that the original file be produced for examination and it was. It appears that the judgment, after an exhaustive review of the evidence tending towards a conclusion of guilt, ended as follows -

> "As I have already indicated I do not accept that the Accused was actually seen to take the handbag, but he was there at the car at or very near to the time it was stolen and it is only if the circumstantial evidence supports an inescapable inference of guilt - there being no other inference reasonably possibly - may the Accd. be committed."

Subsequently the magistrate signed a warrant of commitment. The written judgment thus contained neither a finding of guilt nor a conviction.

Against that background the decision of Sauzier J in Camille v R [1972] Sey. L.R. 16 becomes crystal clear. He stated at p. 16 -

> "The magistrate found the accused guilty as charged but did not record a formal conviction against the accused as required by s. 149 (2) of the Criminal Code. I have taken cognizance of the case of Confiance v R [1960] Sey. L.R. 220. I am of the opinion that in this case the judgment although deficient contained the basic elements necessary to make it a valid judgment. The deficiency which I have pointed out did not occasion a failure of justice in this case and is curable under section 338 of the Criminal Procedure Code."

Sauzier J was distinguishing between a case where there was neither a finding of guilt nor a conviction recorded and one in which there was a finding of guilt recorded but not a conviction.

All of these were cases of appeals from magistrates sitting as judges both of law and fact. The principles were based on Confiance v R [1960] Sey. L.R. 220. In that case the court considered what are now sections 140 to 142 of the Criminal Procedure Code Ch. 45 which make mandatory the pronouncement of a judgment and specify what it should contain.

Much of the discussion in that case is not relevant to the facts of this case since a conviction had been recorded in Confiance v R (supra). The defects related to whether the points or point for determination the decision thereon and the reasons for the decision had been properly set out.

The court did, however, consider the meaning of the term judgment in English Criminal Law and concluded atp. 227-8

> "We do not need to examine that question further, for it is clear that under section 149 of the Seychelles Code of Criminal Procedure [now section 141] the judgment must contain the decision of the points

> "for determination the most important of which is whether the accused shall be convicted or not; that being so and conviction being a prerequisite to sentence, it follows that the conviction is a basic element of the judgment."

Sauzier J reached his conclusion in Camille v R (supra) despite this statement in Confiance v R. In that case there was some discussion of the possibility that a finding of guilt may not be followed by a conviction if there was a successful motion for arrest of judgment. Mr Shah made ~~such~~ much of this but was unable to elucidate the circumstances in which if this could arise; an indication that it is distinctly exceptional.

We approve of the decision in Camille v R (supra) that where there is a finding of guilt in a judgment by a magistrate the failure to record a conviction is an irregularity which can be cured under section 331 of the Criminal Procedure Code.

In this case, of course, there was a trial by jury and there was no judgment. Section 264 of the Criminal Code governs such a trial. This provides -

> " (1) The verdict of the jury and the majority, if any, shall be recorded.
>
> (2) If by accident or mistake a wrong verdict is delivered the jury may, before or immediately after it is recorded, around the verdict and it shall stand as ultimately amended.
>
> (3) The accused shall be acquitted or convicted in accordance with the verdict."

While it is provided that the verdict of the jury must be recorded there is no such provision in relation to the conviction,

understandably so since it must follow the verdict of the jury. In the absence of a provision for a judgment, the reasoning in Confiance v R (supra) is inapplicable. There is, therefore, neither statutory provision nor judicial pronouncement which would require that the omission to record the conviction should be regarded as a fatal irregularity. We see no reason to conclude that it is. On the assumption that such omission may be regarded as ~~an ambiguity,~~ an irregularity it should have no greater effect than the failure by a magistrate to record a conviction once there had been a recording of a finding of guilt.

Accordingly the first ground of appeal fails.

Grounds 4 and 5 challenged the judge's admission of the deposition of Willie Barrack and the directions which he gave on the manner in which the evidence contained in that deposition should be treated.

Willie Barrack had given evidence before the Magistrate in the preliminary enquiry. In the course of so doing it appeared that he was about to resile from the statement which he had given to the police. The enquiry was adjourned for a short while. Willie Barrack was shown his deposition by the police. Thereafter he had continued his evidence and had implicated Simon Barrack by testifying that he had chased Claude Antat while armed with a large knife. Counsel for the appellants did not cross-examine him. Willie Barrack died before the trial and the prosecution tendered his deposition as they were entitled to under section 241(3) of the Criminal Procedure Code.

brother of Simon Barrack the prejudicial effect of the statement far outweighed its probative value as there would be a predisposition to conclude that one brother would not have involved another in a matter of such importance unless the facts were plainly as he testified. The trial judge considered the objection and exercised his discretion in admitting the deposition. We cannot say that he erred in so doing. There were three eye-witnesses giving oral testimony of the evening's events. While there were discrepancies there was general agreement on what had happened. It was the case that Willie Barrack had not been cross-examined, but there had been an opportunity for cross-examination. The fact that it was declined should not weigh against the prosecution.

In his summing up the trial judge stated that that the evidence contained in that deposition was as good as that of any of the accused persons or of any of the witnesses who testified before the jury. This statement is clearly correct in the sense that the statement was admissible and had to be considered. In the context in which the direction arose this must clearly have been what was meant since it followed, almost immediately on a direction that the jury were entitled to give to the evidence in the deposition the weight it deserved in the same way they were to consider all the other evidence led before them.

Later in the summing up the trial judge recounted accurately the circumstances in which Willie Barrack had given evidence in the Magistrate's court and drew attention to the criticisms levelled at his evidence by the defence. He pointed out that Willie Barrack was not present so that the jury could form no opinion of him, particularly as to his sanity which the defence doubted. He directed the jury to reject the evidence in the deposition if they accepted the evidence of Simon Barrack that

Willie was not at all there and was particularly under the influence of drink that day. He then concluded by asking whether it was likely that Willie Barrack might have made up the evidence recorded in the deposition or whether he was actually saying what he had witnessed - more so as it would be clear that he was implicating his brother.

The ground of appeal contended that the trial judge should have stated that the deposition should have been given little weight because the witness had not been cross-examined and had been a reluctant witness bordering on hostility. The fact that the witness had not been cross-examined was drawn to the attention of the jury as was the fact that he was almost hostile. The jury were directed to give the deposition such weight as they thought it deserved. The fact that the jury were told of factors which enhanced its credibility does not make the direction faulty.

Accordingly these grounds of appeal fail.

Grounds 3, 6 and 7 all, in effect, raised one issue - whether or not the evidence did establish with reasonable certainty that the death of Claude Antat was caused by an act of the two appellants.

In the summing up the trial judge correctly referred to section 199 (e) of the Penal Code. He pointed out that if in escaping the violence threatened by the two appellants as they chased him armed with large knives Claude Antat had fled and if while fleeing he had slipped and fallen to his death then the appellants would have caused Claude Antat's death.

He then concluded -

> "The Prosecution is telling you that these two gentlemen on that fateful night took a cutlass and chased Claude Antat. Claude Antat took to his heels to escape in order to avoid violence and was killed. If you accept this kind of evidence, then it is established that their conduct materially caused the death of Claude Antat."

It is submitted that in this resume of the prosecution's case the trial judge failed to point out gaps in the prosecution's case which left open the possibility that Claude Antat may not have died while he was being chased.

As has been indicated the body was not discovered until about 9.00 am on Monday 18 January, 1988. The chase in the yard would have taken place about 9.00 pm on Saturday 16 January, 1988 some 36 hours later. The pathologist Dr Brewer conducted the post-mortem at about 1.30 pm on Monday 18 January, 1988. He was unable to fix accurately the time of death. It could have taken place between 15 hours and 46 hours of the time of the performance of the post-mortem. This, it was contended, left open the possibility that Claude Antat may have escaped his pursuers. Having done so he may have slipped and fallen some time afterwards as he sought to make his way down the hill. Had this been the case, the flight from threatened violence would not have been the cause of death. The submission was developed in the course of addressing the jury by both counsel appearing for the defence. The trial judge did not advert to it in the course of the summing up.

In failing to do so we are of the opinion that he erred. All issues which arise in a case should be left to the jury by the trial judge, even if not raised by the defence. We are satisfied.

the provisio to Rule 41 of the Seychelles Court of Appeal Rules 1978 which states -

> "Provided that the Court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice had occurred."

We do not think that any substantial miscarriage of justice has occurred and accordingly this ground of appeal fails.

We turn now to ground 2 which alleges that the trial judge misdirected the jury on the degree of intoxication required to nullify the formation of malice aforethought in this case. The direction which appears on the penultimate page of the summing up in the Record needs to be set out in full.

> "You have also told that if even you find that the accused persons chased Claude Antat you must also consider another verdict, which is less than Murder. That is manslaughter. You can only do so if you find that they did the chasing but they were so drunk as not to know what they were doing. However, ladies and gentleman, you will ask yourself in the case of 1st accused, a man who was so drunk was able to show Bernard Labrosse the way down to the public road and he never fell once on the way. Bernard Labrosse said he fell several times on the way, such a complicated, dangerous place. Yet 1st accused made his way like that, without slipping once. So you have to consider whether such a person could be classified as so drunk that he could not form any intention or malice aforethought for the offence of murder. Was he so drunk as to be senseless? The accused kept on telling you they were under the influence of alcohol but they were not drunk. I asked counsel to explain and he said 'steam' and so on. You know more than I do on that. You can

> only reduce the offence to manslaughter if you are sure that they were so drunk as not being capable of knowing of what was going on. 2nd accused said even he went down with the torch to find Antat and he saw the I.D. card and a pair of sunglasses of the deceased, and this was immediately after the incident. Could you say that such a person was so drunk that Saturday night that his senses were so bad that he could not have formed the necessary intention? Apart from the inability to form the intention required, drunkenness, which may lead a person to attack another in a manner in which no reasonable man would do so, cannot be pleaded as an excuse in reducing the crime from murder to manslaughter."

We were addressed at some length on the directions as to the level of intoxication which was needed to reduce the crime of murder to manslaughter in circumstances such as those under consideration. It appeared to us, however, that there was a serious error with regard to where the onus lay in ensuring that there was no such reduction.

As appears above the trial judge stated that the jury could only reduce the charge of murder to one of manslaughter if they were sure that the accused persons were so drunk as not to be capable of knowing what was going on. Such a formulation clearly places the burden of proof on the accused persons.

Mr Derjacques drew our attention to a number of cases summarized in the Digest of East African Cases. These make clear that intoxication operates as a defence at two levels. Section 14(2) provides for the case where it is a complete defence. The preconditions are that at the time of committing the offence the person charged did not know that the act was wrong or did not know what he was doing. The state of intoxication must also have

caused without his consent by the malicious or reckless act of another person. This is in effect a defence of insanity and the burden of establishing this on a balance of probabilities rests on the defence.

The circumstances here however fall under Section 14(3) which reads -

> "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise, in the absence of which he would not be guilty of the offence."

In these circumstances the cases make clear that the burden rests on the prosecution to establish beyond reasonable doubt that the person charged was not so intoxicated as to be incapable of forming the specific intent.

The trial judge plainly reversed the onus in this case. Not only was the onus placed on the accused persons but the jury were to feel sure that they were intoxicated to the level described before they could reduce the offence from murder to manslaughter. This misdirection, as has been indicated, was given almost at the end of the summing up. The likelihood is that it would have been fresh in the minds of the jury as they considered the evidence.

On that ground we hold that the appeal succeeds. The conviction is quashed and the sentence set aside. We substitute a conviction for manslaughter.

In imposing sentence we take into account that all the persons in the yard that evening were "steamed". An aggressive attack

house is however, a serious matter. It has resulted in the loss of life and this must be reflected in the punishment imposed.

Each appellant will serve a sentence of 8 years imprisonment.

Dated this 26th day of October 1989.

A-Mustafa
..... A MUSTAFA (PRESIDENT)

C. d'Arifat
..... C D'ARIFAT (JUSTICE OF APPEAL)

T. Georges
..... T GEORGES (JUSTICE OF APPEAL)