RICHARD VENANCE TARIMO v. REPUBLIC

COURT OF APPEAL OF TANZANIA

(Kisanga, Mnzavas and Mfalila, JJ.A.)

CRIMINAL APPEAL NO. 29 OF 1993

21 May, 1993 – ARUSHA

(From the conviction and sentence of the High Court of Tanzania at Arusha, Mroso, J.)

Criminal Practice and Procedure – Assessors – Directions to assessors – Trial judge misdirects assessors on the nature of provocation – Assessors fail to determine and advise on the provocative nature of the deceased's words – Effect of such misdirection.

Criminal Law – Provocation – Deceased uttered words tending to show that she had an adulterous association with some men – The test of provocation.

The appellant was convicted of the murder of his wife and was sentenced to death. Among the defences raised during trial was provocation; the appellant had contended that his wife made statements which tended to show that she had adulterous associations with some men. When giving directions to the assessors, on the question of provocation, the learned Trial Judge put emphasis on alleged or suspected adultery as constituting provocation and not the words uttered by the deceased. This way of directing the assessors was attacked on appeal.

Held:

(i) The immediate alleged provocation was not the deceased's adultery, but rather the words allegedly uttered by the deceased when asked where she had been and why she had gone out without telling the appellant;

(ii) The test in this case was on the provocative nature of the deceased's words, whether the words themselves were capable of provoking an ordinary man of the appellant's community to induce him to react in the manner the appellant did, not whether these words suggested or amounted to a confession of adultery by the deceased;

(iii) The learned Trial Judge misdirected the assessors on the question of provocation and this misdirection resulted in failure by the assessors to determine and advise on the provocative nature of the deceased's words;

(iv) Before a conviction for murder can be upheld in a situation where there was a misdirection or non-direction on the question of provocation the following two conditions must be present: firstly the omission

must have been deliberate on a view of the evidence taken by the judge and, secondly, the judge must have made a specific finding making it clear that he would in any case have overridden the contrary opinions of the assessors the contrary;

(v) In the present case, the assessors were misdirected away from the true nature of the provocative act; so neither the assessors nor the judge made any finding on it.

Appeal allowed.

Cases referred to:
1. *Wafula s/o Waninira v. R.* [1957] EA 498.
2. *Bullard v. R* [1957] 3 WLR 656.
3. *Tulubuzya Bituro v. Republic* [1982] TLR 264.
4. *Abdullahi Ali v. R* [1958] EA 725.

Ngalo, for the appellant
Mrs. Lyimo, for the respondent

Mfalila, J.A. delivered the following considered judgment of the court:

The appellant Richard Venance Tarimo was convicted of murder of his wife Delfina Richard by the High Court sitting at Moshi and was sentenced to death. He filed this appeal consisting of two grounds against both his conviction and the sentence of death. In ground 1, he complained that the Trial Court ought to have considered the evidence that the appellant and the deceased had been drinking for a long time and that at the time of the commission of the offence the appellant was still under the influence of alcohol. In Ground 2 he complained that the Trial Court ought to have held that there was sufficient provocation to reduce the offence of murder to manslaughter.

Apart from the appellant, there was no other person who witnesses the deceased being assaulted. The two neighbours, (PW6) Orest Ntaimo and his wife Akwilina Orest (PW7) who arrived at the scene in answer to the cries of the deceased, found the appellant standing at the door of his house holding the door frame. When they asked him what was the matter, the appellant ordered them to go away and threatened to teach them a lesson if they dared to come any nearer. At being so threatened, the two retreated to the safety of their home. But they heard the deceased crying from inside the house and lamenting that she was dying leaving behind her children as orphans. The next day they heard of Delfina's death and reported the incident to the police who came to the village and arrested the appellant.

A At his trial the appellant explained that the deceased Delfina was his wife whom he regrettably killed. Narrating the circumstances of her death, he said that on the day in question, he and the deceased went to drink pombe at 5 pm and they returned home at 8 pm. On their way home, they met two men one of whom he identified by his
B voice to be Orest (PW6). Orest then attacked him and threatened to teach him a lesson because he alleged the appellant was back-biting him. He, however, managed to free himself from Orest enabling him and his wife to proceed home where they slept. But later during the same night as he and the deceased were asleep, he woke and realised
C that the deceased was not in bed with him. He went out to look for her thinking that she had gone to the latrine, but she was not there. He decided to wait on the veranda. At last she appeared coming along the path leading from Orest's house. When they were both inside the house, he asked her where she had been and why she had
D gone out without informing him. She replied:

> 'Mimi sichungwi. Kama huko Dar es Salaam una wanawake na mimi nina wanaume,'

E and pushed him. The appellant said he fell on the table, the deceased also fell over him. There was a knife on the said table which he picked up intending to put away. But she also held it and a struggle for the knife between the two of them ensued. In the course of this struggle, he said, he stabbed her accidentally. He does not know how many times he stabbed her but he was shocked
F at what he had done. He slept until the following morning. He explained that the deceased sustained several cut wounds because they struggled over the knife.

Both in his summing up to the Assessors and his judgment, the learned Trial Judge considered that three defences were open to the
G appellant, namely provocation, self-defence and accidental killing. The learned Judge considered all these three defences and rejected them as did the assessors. He therefore found the appellant guilty of murder as charged and sentenced him to death.

At the hearing of this appeal, Mr *Ngalo* who advocated for the
H appellant, argued that as the appellant and the deceased had been drinking for many hours before the attack, the appellant must have been so drunk that he was incapable of forming a specific intent.

On our part, we do not think the evidence on record supports Mr *Ngalo's* contention that the appellant was at the time so drunk that
I he was not in a position to form a specific intent. On his way home, the appellant was strong enough to wriggle out of the clutches of his

assailant and to continue with his journey home. On arrival at home, he was sober enough to wake up and realise that his wife was not in bed with him. He went out looking for her thinking that she had gone to the latrine, and when he found that she was not in the latrine, he decided to wait on the veranda until she returned. We are satisfied that these are not the actions of a man so drunk that he cannot form an intent to do a specific act. What took place inside the house up to the fatal stabbings of the deceased confirms this view.

On the second ground, Mr *Ngalo* argued that when all the evidence is considered including the appellant's cautioned statement, it is clear that provocation was established and that therefore the Trial Court should have convicted the appellant of manslaughter not murder.

In connection with the defence of provocation, the learned Judge explained to the Assessors what this defence entails and after explaining its elements he directed them as follows:

> 'Finding a wife in the act of adultery or in circumstances suggesting reliably that she had just been committing adultery can provide legal provocation.
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> Accused did not find the deceased in the act of adultery. But do you think he suspected she had just been committing adultery with someone when she left him in bed during the fateful night? If so, were those circumstances that irresistibly suggested she had been committing adultery? Mere suspicion is not enough.
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> If you believe she must have been committing adultery when the accused saw her returning home and he killed her in the heat of passion, then you can advise me to find the accused guilty of manslaughter only. You may consider in that connection, whether you believe the deceased, on being asked where she had been, said 'Mimi nina wanaume wengi, ukipenda nenda ukatafute mke wa kwako' or 'Mimi sichungwi, kama huko Dar es Salaam una wanawake na mimi nina wanaume.' If you believe she replied in that manner to the accused, do such words indicate that she was confessing to having just committed adultery? Would that be unequivocal confession of adultery?'

By this direction the learned Judge wanted the Assessors to assume two things. Firstly, that the act of provocation was the deceased's alleged or suspected adultery. Secondly, that the deceased had gone out at night leaving the appellant alone in bed and when she came back and on being asked where she had been, she answered in the manner the appellant alleges she did and therefore to consider

whether this answer suggested adultery on her part. We think it was a serious error to ask the Assessors to act on the basis of these two assumptions. In our view the immediate alleged provocation was not the deceased's adultery, but rather the words allegedly uttered by the deceased when asked where she had been and why she had gone out without telling the appellant. The judge should therefore have directed the Assessors to answer the following questions:

(a) Whether on their way back from the pombe drinking, the appellant and his wife encountered Orest and another man and that Orest threatened to assault him.

(b) Whether the deceased had gone out of the house in suspicious circumstances leaving the appellant alone in bed?

(c) Whether after her return and being asked where she had been, she answered the appellant in the manner the appellant alleged she did.

(d) If the answer to *(c)* is in the affirmative, whether such words were provocative capable of inducing the kind of reaction exhibited by the appellant.

In other words, the test in this case was on the provocative nature of the deceased's words, whether the words themselves were capable of provoking an ordinary man of the appellant's community to induce him to react in the manner the appellant did, not whether these words suggested or amounted to a confession of adultery by the deceased. This misdirection resulted in the failure by the Assessors to determine and advise on the provocative nature of the deceased's words. On his part, the learned Judge also continued to act on this error and rejected the defence of provocation because adultery had not been established. The learned Judge rejected the defence of provocation because there was only suspicion that the deceased had committed adultery. In the circumstances he held that the appellant killed the deceased to punish her because of his suspicions that she had committed adultery.

What then are the consequences of this misdirection? Except in very rare cases, both this Court and the old Court of Appeal for East Africa considered such misdirection as fatal. In the case of *Wafula s/o Waninira v R* (1) the appellant who had been struck with a stick following a beer party, stabbed and killed his assailant. At his trial for murder, the appellant's plea of self-defence was rejected and was convicted and sentenced to death, but the Trial Judge failed to appreciate that the evidence clearly raised an issue of provocation. On this omission, the Court of Appeal of East Africa (Forbes

JA) held that the omission of the Judge to direct himself and the Assessors on the issue of provocation was a serious misdirection and the conviction of murder could not stand. The Court quoted with approval the following passage from the judgment of the Privy Council in *Bullard v R* (2) at 659:

> 'It has long been settled law that if on the evidence whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by Counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the Judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.'

On the consequences of such misdirection the Court held and state at 499:

> '. . . It is once more stated that it is not open to a Court of Appeal to speculate on what the conclusion on the issue of manslaughter would have been if the issue had been left to the jury. Similarly it is not for us to speculate on what conclusion would have been reached by the Assessors and the learned Trial Judge had they considered this issue. In the circumstances the conviction for murder could not stand.'

Similarly this Court in *Tulubuzya Bituro v Republic* (3) considered this point and held that failure by a Judge to direct Assessors on the issue of provocation where evidence shows so, vitiates the entire proceedings. In that case the record indicated Appeal for Eastern Africa in an appeal from the Somaliland Protectorate in the case of *Abdullahi Ali v R* (4). In that case on the question of provocation the Trial Judge had held as follows:

> '. . . This followed her repudiation of the settlement and refusal to go home and allowance must be made for the 'last straw' doctrine of commulative provocation, but, put at its highest, this could not excuse so grossly excessive reaction. For these reasons I was of the opinion there was no evidence of provocation on which a verdict of culpable homicide could properly be founded and I did not refer to such a possibility in the summing up.'

On appeal, the Court of Appeal for Eastern Africa held at para 708:

> 'With respect, we thought that it was not correct to remove the

A question of sufficient provocation or no sufficient provocation from the Assessors. However since the learned Judge in the next sentence of his judgment found as a fact, as he was entitled to do, that the story that the woman refused to go home at that time and in that situation, was not credible, it is quite clear that he would have overridden the assessors whatever their opinions on the question of provocation might have been. Accordingly his omission to mention provocation in the summing up did not affect the result.'

The Court of Appeal then concluded the judgment with the following words:

'We would add that we agree with the learned Judge that even if the appellant's statement were to be taken at its face value, the provocative received could not have justified so brutal a retaliation by the appellant. We merely point out that this matter should not have been removed from the consideration by the Assessors. The question whether or not the retaliation was out of proportion to the provocation was a question of fact which they should have been required to take into consideration before giving their opinions.'

Thus before a conviction for murder can be upheld in a situation where there was a misdirection or non-direction on the question of provocation, the following two conditions must be present. Firstly, the omission must have been deliberate on a view of the evidence taken by the Judge. Secondly, the Judge must have made a specific finding so that it is clear to this Court that he would in any case have overridden the opinions of the Assessors to the contrary. In the present case, the assessors were misdirected away from the true nature of the provocative act so neither the Assessors nor the Judge made any finding on it. We are therefore in no position to speculate on what the conclusions might have been had the Assessors been properly directed on the provocative nature of the words uttered by the deceased or what view the learned Judge himself might have taken of these words. We can only resolve this uncertainty in favour of the appellant and hold that his conviction for murder cannot stand. Mrs *Lyimo* who appeared for the Republic conceded as much and declined to support the appellant's conviction for murder.

Accordingly we allow the appeal, quash the conviction for murder and set aside the sentence of death. Instead we find the appellant guilty of the offence of manslaughter and convict him accordingly.

On the question of sentence, we agree with Mrs *Lyimo* that this was a wicked assault on the unfortunate woman and we also agree that the sentence to be imposed must reflect this fact.

With all these factors in mind we sentence the appellant to fifteen years imprisonment.

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