IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: RAMADHANI, J.A.; NSEKELA, J.A.; And MSOFFE, J.A.)
CRIMINAL APPEAL NO 44 OF 2004
BETWEEN
KEVIN HAULE ... APPELLANT
AND
THE REPUBLIC ... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mbinga)
(Manento, J.)
dated the 6th day of November, 2003
in
Criminal Sessions Case No. 41 of 2001
JUDGMENT

RAMADHANI, J.A.:

The appellant had been hospitalized for more than two months and upon his discharge he went home where he found his wife, Gerwanda d/o Joseph Henjewele, the deceased, and his daughter Felista Kevin Haule (PW 3). The appellant saw four chicken which he had not left behind when he went to hospital and so he asked the deceased where the birds had come from. The deceased replied "rudely", according to the investigator DC Michael (PW 2). Their daughter, PW 3, the only eyewitness, said that after that enquiry by the appellant "They quarreled, father and mother. They were abusing each other". The appellant himself said "... and she asked me if I could ask for everything [I] ate at home".

It was after that altercation that the appellant picked up a piece of wood measuring 75cm long by 20 cm diameter, according to the investigator, PW 2, and struck the deceased on the head.

That story satisfied the learned trial Judge who found the appellant guilty of murder as charged and sentenced him to death. The appellant is aggrieved and hence this appeal in which he was represented by Mr. V. Mkumbe, learned counsel, and the respondent/Republic was advocated for by Mr. Manyanda, learned State Attorney.

Mr. Mkumbe presented a sole ground of appeal: "in the circumstances of this case, the appellant should have been convicted of manslaughter and not of murder". The learned advocate pointed out that the sole eyewitness, PW 3, said that "They were abusing each other" and that the investigator, PW 2, said that he was told by the appellant that there was an exchange of harsh words. The learned advocate said that these harsh words or abuses were not mentioned in court. He pointed out further that words could be provocative as was decided by this Court in Richard Venance Tarimo v. R., [1993] TLR 142. He asked us to find that there was provocation.

In reply Mr. Manyanda submitted that there was no provocation. He submitted that the only words spoken were those which the appellant

himself said that the deceased asked him why he did not ask about everything he ate at home. The learned State Attorney went further to point out that PW 2 merely repeated what he was told by the appellant himself.

The only issue here is whether or not there was provocation. But first of all what is provocation in law?

Section 202 of the Penal Code (Cap. 16) provides:

> 202. The "term provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

In this case there were utterances which the appellant claim to have provoked him. As already said, we have two versions: one, of the daughter, PW 3, which does not say much but that her parents abused each other. Then we have the account of the appellant that

after he had asked the deceased where she got the four chicken, the deceased retorted whether he, the appellant, that is, had always asked where the food he ate came from. This reply is what made the appellant lose his self-control and hit the deceased. Was such a reply an insult under section 202 quoted above?

According to OXFORD Advanced Learner's Dictionary, 6th Edition, 2000, an "insult" is "a remark or an action that is said or done in order to offend somebody". If that is so, then we have no difficulty to consider as "insults" under the provisions of section 202 the so called "harsh words" or "abuses". The question is if the insults are of such a nature likely to deprive the appellant the power of self -control and to induce him to commit such assault on the deceased? In short, were the insults provocative?

The litmus test of whether or not an insult was provocative, according to section 202, is the ordinary person who is defined as follows:

> For the purposes of this section the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belongs.

What an ordinary person of the community of the appellant would or would not do is the province of the assessors. So, that question had to be put to the assessors for a specific determination. Was that done in this case? We are aware of what this Court said in Hatibu Gandhi and Others v. R., [1996] TLR 12:

> The word 'may' in Section 283(1) of the Criminal Procedure Code (now Section 298(1) of the Criminal Procedure Act, 1985) is unambiguous and crystal clear; and thus the trial judge's summing of the case to his assessors is not mandatory, but is prudent as a matter of practice.

It is our opinion that, apart from summing up being prudent, once the learned Judge has decided to sum up then it should be thorough. In the present case the learned judge summed up as follows in relevant places:

> ... The accused said that he was provoked by the sight of 4 chicken ... having previous knowledge that his late wife had sexual affairs with one Beatus he reasonably believed that those 4 chicken might have been given to the deceased by the said Beatus. Besides that he was more angered by the reply of the deceased when asked as to where the chicken were from and the answer he got that "you have been eating many other things without asking where they came from, why today ask about the chicken"...
>
> Likewise, the learned counsel for the accused have submitted that this court should admit the defence of provocation so that it could find the accused guilty of a lesser offence that is manslaughter and not murder...
>
> It is now your duty to give me your independent opinion, as to whether you believe from the evidence that the accused maliciously killed the deceased or it was by bad luck as he said, so that he is found guilty of manslaughter ...

From the summing up it does not appear to us that the assessors were told what constitutes provocation in law as provided by section 202 of the Penal Code. Again the last paragraph did not charge the assessors with the specific duty of making a finding of whether or not there was provocation, that is, whether that reply by the deceased would have made an ordinary person in the community to lose his self-control and do what the appellant did. Then, the directive of the learned judge that the assessors were to make a finding of whether the appellant killed "by bad luck as he said", was, in our opinion, misleading.

The misdirection is clearly manifested, for example, in the muddled opinion of the first assessor, Ms. Akwinatha Hyera:

> My Lord, from the evidence, there is no dispute as to the death of the deceased. The accused, by bad luck, he was hospitalized for over 2 months and might have been affected by the drugs, he got at the hospital, on being angered, he could without reasoning cause the death of deceased. Finally, I leave it to the court for its decision.

The assessor talks of "being angered", did she find that there was legal provocation and if so, what decision was she leaving to the court to make? The second assessor, on the other hand, considered the presence of the chicken and he then said "[the appellant] should not have taken the club and beat his wife, he was to refer the matter to the authority". Is that the same as saying that there was no provocation? It would appear that the learned trial Judge took it to mean so when he said:

> I agree with the opinion of the gentleman assessor that these words spoken by the deceased could not amount into provocation, but were fair comments by the deceased.

If the words spoken by the deceased "were fair comments", as the learned Judge understood the gentleman assessor to have said, we ask: Why did the gentleman assessor find it necessary for the appellant "to refer the matter to the authority"? Why do you refer a fair comment to authorities?

Besides that the learned Judge did not at all discuss the opinion of the first assessor who, as we have said, found that the appellant was "angered".

It is our opinion that had the learned Judge properly addressed the assessors on what is provocation and then charged them specifically to make a finding of whether or not there was provocation, the assessors would have come out more clearly. It is clear to us that there was a great probability that the appellant was provoked from the evidence of PW 3 that her parents quarreled and abused each other and from what the appellant said that the deceased answered him. So, we find that there was provocation.

Mr. Manyanda referred us to the decision of this Court in Moses Michael alias Tall v. R. [1994] TLR 195 where it was said that malice aforethought may be inferred from the amount of force which an

offender employs in inflicting fatal injury. He used that decision as authority for his contention that because of the weapon used by the appellant, the number of times he used it and the fact that he struck the head, the most vulnerable part of the body, then, even if there was provocation, the appellant used excessive force and, so, it was murder.

What this Court said in Moses Michael is valid. In fact malice aforethought can be inferred not only from the amount of force used but also from the weapon used, and the vulnerability of the part of the body attacked. However, those factors do not negate the defence of provocation. We said so in Herman Nyingo v. R. [1995] T.L.R. 178:

> Normally the defence of provocation is available in circumstances which would otherwise constitute murder except for the sudden loss of control of oneself as a result of some act which provokes the accused person.

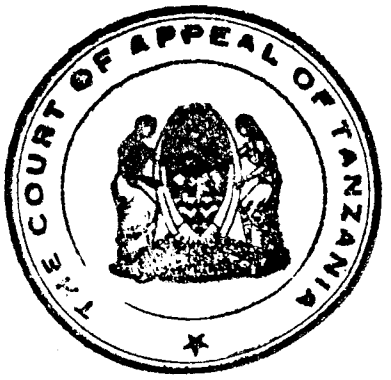
We may add here that by definition killing on provocation is murder which is reduced to manslaughter because of provocation. Section 201 provides:

> 201. When a person who unlawfully kills another under circumstances which, **but for the provisions of this section would constitute murder,** does the act which causes death in the heat of passion caused by the sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only. (emphasis is ours).

We can put it in mathematical terms that: killing on provocation is manslaughter and is equal to murder plus provocation.

We find that the appellant killed on provocation and we, therefore, convict him of manslaughter. Taking into account the time he has already spent in custody, it is our opinion that a sentence of a term of imprisonment for five years will meet the justice of the case. It is so ordered.

DATED at MBEYA this 2nd day of May, 2004.



A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR