Was there evidence of provocation which trial magistrate should have put to assessors, for an alternative finding of manslaughter instead of murder = misconviction for accessory after the fact to murder stand where there was no proof when victim died?

Criminal law - murder
Criminal law - manslaughter
Criminal law - accessory after the fact
Criminal law - provocation

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IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeals Nos. 28 & 25 of 1981

Appellant appealed against murder conviction claiming there was evidence of provocation which had not been put to assessors & appellant appealed conviction for accessory after the fact to murder, claiming that there was no evidence that victim was dead when throw into the river

Between:

1. SHIU BACHAN SINGH s/o Shiu Sewak Singh
2. DEO MATI d/o Bhaggan — Appellants

and

REGINAM — Respondent

A. Narayan for 1st Appellant.
G.P. Shankar for 2nd Appellant.
S. Chandra for Respondent.

Hearing: 6th November 1981.
Delivery of Judgment: 25th November 1981.

JUDGMENT OF THE COURT

Marsack J.A.

These are appeals against convictions entered in the Supreme Court at Lautoka on the 19th Moy 1981, of 1st appellant for murder and of 2nd appellant for being accessory after the fact to murder. Appellants were tried jointly before a Judge and four assessors. All faur assessars gave the opinion that 1st appellant was guilty of murder, and three of the faur thot 2nd appellant was guilty as chorged. The learned trial Judge accepted the opinions of the mojority of the assessors and convicted the appellants accordingly.

The relevant facts may be shortly stoted. The deceased man Balwant Singh was a farmer living at Kumkum Ba.

2nd appellant was wife of the deceased. 1st appellant was lover of the 2nd appellant; this fact was known to the deceased but did not give rise to any quarrel between the two men.

In the evening of 19th May deceased and 1st appellant hod been out together and had drunk a certain amount of liquor. About 9 p.m. they went together to deceosed's house, 1st oppellant remaining outside. Inside the house there was a quarrel between the deceased and the 2nd appellant regarding a photograph of 2nd appellant which had been seen in 1st appellant's house. 2nd appellant then ran out of the house and was pursued by her husband who was carrying in his hand an iron bar about 2 feet long. Then, according to 1st appellant, deceased turned and chased him, swinging the iron bar at 1st appellant who seized the bar ond struck deceased with it. After several blows deceased fell to the ground. As he appeared to be dead 1st appellant with the help of 2nd appellant placed the body on the back of a horse which 1st appellant led to a streom, throwing the body into the water. On the following doy 1st appellant when interrogated by the police took the police inspector to the river and showed him where he said he had thrown the body. The body was found there and was taken to the police station. A postmortem examinotion was carried out by Dr. Gounder on 20th January. He found evidence of six or more blows to the body which he said would need reasonable force; they were consistent with hard blaws from an iron rod or hardwood. In the doctor's opinion death was caused by asphyxia by compression of windpipe due to extensive haemorrhage into the soft tissues of the neck. The trial of the two appellants commenced on 11th May 1981. Each of the appellants made statements to the police and both gave evidence at the trial. In the course of his summing up the learned trial Judge made it clear that the only evidence leading up to the killing of the deceased came from the

appellants. The most important feature of that evidence is that it was admitted that the blows causing the injuries found on the deceased were inflicted by the 1st appellant by the iron bar which he had taken from deceased.

Several grounds of appeal were filed on behalf of the appellants but only one ground was argued on the oppeal for the 1st appellant and one other ground for the 2nd appellont.

The ground argued for the 1st appellant was in these terms:

> " That the learned trial Judge in his summing up failed to direct the gentlemen assessors and himself on the question of provocation. "

As it was admitted that 1st appellant had actually struck the blows from which, according to the medical evidence, death resulted, the question of whether there was such provocation as would reduce the charge from murder to manslaughter became one of vital importance to the determination of the appeal. It must be remembered, as has been stated, that the only evidence as to the events leading to the striking of the blows came from the appellants; and the prosecution would not be entitled to choose two or three sentences from that evidence and ignore the remainder. In the course of his evidence the 1st appellant said:-

> " Deceased was pursuing accused 2 holding an iron bar obout 2' long. It was used for pounding yaqona.
>
> Accused 2 paused near me.
>
> Deceased approoched her with the iron bar and she ran away. Then deceased charged me wielding the iron bar at me. I ran away down the slope in the direction of my home.

I had not noticed which way occused 2 ran.

I was scared. I was drunk. Deceased pursued me and did not give up the chase. It wos dark. I had wide bottomed trousers. I thought that if I fell the deceased would kill me.

I chonged direction. Deceased turned too and swung the iron bar at me.

I grosped the iron bar. The deceosed tried to hold it. We struggled for it. I got possession of it. I thought deceased would speak and stop being aggressive. He tried to hit me with his fists. He shawed no sign of stopping.

To save myself I hit him once with the iron bar. I am not sure where the blow landed in the excitement. It did not stop deceased's attack. He was on the upper side of the slope. He tried to put me to the ground. He came close to me.

To save myself I struck another blow. Deceased remained on his feet.

I do not know how many blows I struck - two, three or four.

I did not intend to kill him. It was only in self-defence. "

The issue of provocation was not raised by the defence, though counsel for the prosecution in his opening address said "There could have been provocation from the deceased". No direction on the subject of provocation was given to the assessors by the learned trial Judge. It is however well established that, as appears in the judgment of the Privy Council in Bullard v. The Queen [1957] A.C. 635 at page 242 -

" 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 sotisfied beyond reasonable doubt that the killing was unprovoked. "

It is therefore necessary to ascertain if there is, in the present cose, evidence of provocation fit to be put to the assessors for their opinion on that issue.

The learned trial Judge devoted some time to the question of self-defence, which had been pleaded by the first appellant in his evidence, and his direction to the assessors on this issue was summed up in these words:

> " Should the prosecution satisfy you thot accused 1 although acting in self-defence used much more force than was needed for protecting himself and thereby killed Balwant then that would be murder."

He further dealt with the issue of drunkenness, which was raised by the 1st appellant in his evidence; and directed the assessors, quite correctly in our opinion, that no defence based on that ground could possibly succeed on the facts proved in this case. In any event no portion of the orgument by counsel for the defence before us referred to this question.

When in his summing up learned trial Judge referred to the issue of self-defence, he made no reference to the principle set forth by the Privy Council in Palmer v. R. 55 Cr.App.R. 223 at page 234:

> " If the jury are satisfied by the prosecution beyond doubt that an accused did not act in self-defence then it may be that in some cases of homicide they will have to consider whether the accused acted under the stress of provocation."

The principle has been set out in more detail in R. v. Shaushi (1951) 18 E.A.C.A. 198 at 200:

> " No doubt this element of self-defence may and, in most cases will in practice, merge into the element of provocation and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress or provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter. "

This authority was cited in support of the judgment in R. v. Jai Chand 18 F.L.R. 101 at page 108.

The authorities make it clear that though it may be held, in a particular case, that the action taken by the accused person went substantially beyond what was necessary for him to protect himself from the attack made on him, the defence of provocation may well be involved. In the present case the evidence of the 1st appellant - and, as the learned trial Judge properly points out, the only evidence leading up to the killing came from the accused - makes it clear that the violence which erupted was started by the deceased, in that he attacked 1st appellant with an iron bar. This would certainly call for some reaction from the 1st appellant. The question for determination is whether the reaction was totally disproportionate to the provocation received.

On these aspects of the matter counsel for respondent relied on the well known judgment in Lee Chun Chuen v. The Queen /1963/ A.C. 220 at page 231:

" Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. "

In the present case there was ample evidence fit to leave to the assessors relative to the first and second of these requirements. It is the third which is definitely in issue: was there a credible narrative suggesting the presence of this element: retaliation proportionate to the provocation received? It is to be noted that this element need not be established beyond reasonable doubt before there is an onus on the learned trial Judge to leave the issue to the jury - or the assessors. It is sufficient that the presence of element in question be credibly suggested by the evidence. As is stated in the judgment of the House of Lords in Holmes v. DPP [1946] A.C. 588 at page 597:

" (On a view of the evidence most favourable to the accused).....the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. "

In the recent case of DPP v. Camplin [1978] 2 All E.R. 168 the judgment of the House of Lords at page 177 affirms the principles to be applied:

" It will be for the jury to say whether they think that whatever was or may have been the provocation such provocation was in their view enough to make a reasonable man do as the accused did. "

We have already quoted the evidence of the 1st appellant on what took place between the deceased and himself at crucial times. In our opinion that evidence could well be said to have produced a credible narrative of events suggesting the presence of such provocation as possibly may have led the 1st appellant to retaliate as he did. If the principle laid down in Holmes v. DPP (supra) is applied: "on a view of the evidence most favourable to the accused", then it was in our respectful opinion the duty of the learned trial Judge to direct the assessors on this aspect of the case, and obtain their views as to whether the charge should be reduced to manslaughter on that ground. Accordingly, as is set out in Bhorat v. R. /1959/ 3 All E.R. 292, the learned trial Judge may well have given a different judgment if the assessors had expressed the opinion - as they might possibly have done - that the verdict should be manslaughter on the ground of provocation.

For these reasons we allow the appeal of 1st appellant, quash the conviction for murder and in its place susbtitute a conviction for manslaughter. On this conviction we pass sentence of 10 years' imprisonment, to take effect from 19th May 1981.

The ground of appeal argued on behalf of the 2nd appellant was the following:

> "3. That the learned trial Judge in his summing up correctly stated 'There is not sufficient information to establish the exact time of Balwant's death' but failed to direct the Gentlemen Assessors that if they were not satisfied that the victim was dead when the appellant allegedly loaded the body on the horse she would not be guilty of the offence as charged but possibly of a lesser offence. "

This issue was raised at the trial, counsel contending that as it had not been definitely proved that deceased was dead

when his body was put on a horse the offence of 2nd appellant would be merely that of accessory after the fact of grievous bodily harm. In the course of his summing up the learned trial Judge did not explain or direct the assessors specifically upon the issue but stated that there was not sufficient information to establish the exact time of Balwant's death. He proceeded to quote the medical evidence as to the injuries caused to the deceased, and the doctor's opinion that the deceased would die within an hour of the infliction of the injuries. In his judgment he referred to the medical evidence that death was due to asphyxia arising from the injury to the windpipe and not to drowning. It follows, said the learned trial Judge, that Balwant was dead when he was thrown into the river. He also pointed out that in their statements to the police both appellants stated that before deceased was loaded on to the horse he was not breathing, and that he was dead. The first appellant's statement was not evidence against the second appellant but he referred to the body in relation to this episode in his evidence in Court.

While we fully agree that the learned Judge's findings on the facts are justified, there remains the further fact that he did not leave or explain this issue to the assessors. He thereby deprived himself of the benefit of their advice and disabled them from giving the aid which they might. As the case of Bharat v. R. (supra) shows, this could result in the conviction being quashed but, in the particular circumstances of the present case we are satisfied that only a technicality was involved, and are prepared to apply the proviso to section 23(1) of the Court of Appeal Act (Cap.12 - 1978 Ed.).

Nevertheless in view of the reduction of the conviction of 1st appellant from murder to manslaughter, it is clear that the conviction of 2nd appellant of being accessory

after the fact to murder cannot stand. The conviction is therefore quashed; and in its place we substitute a conviction for accessory after the fact to manslaughter. With regard to the sentence to be imposed upon this conviction we are fully in agreement with the judgment of the learned trial Judge that a term of imprisonment was not called for. Accordingly on the amended charge the 2nd appellant will be convicted and discharged.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

SUVA,
25th November, 1981.