IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 48 of 1986

Between:

TAJ MOHAMMED
s/o Jan Mohammed — Appellant

- and -

R E G I N A M — Respondent

Mr. M. Krishna for the Appellant
Mr. J. Semisi for the Respondent

Date of Hearing: 24th February, 1987

Delivery of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted of murder by the Supreme Court sitting at Labasa.

An ardent Muslim, training for priesthood, he had for some time been deeply disturbed by a certain rumour allegedly spread in the settlement by the deceased who was then living in a house on her mother's land and was a few months pregnant. The appellant, the rumour had it, was responsible for the pregnancy. When questioned by him she would deny he had anything to do with it but, so he believed, persisted in repeating the allegations to others.

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On 8th August, 1985, when his mother and other members of the family were away he decided to pay her a visit and question her further. During the confrontation he held her by the neck, put her veil around it and pulled upon it until she collapsed. He then locked the door and left. He made no mention of what had occurred to any one. At midnight, when everyone in his mother's house was asleep, he returned to the deceased's hut, cut the body into two, placed it in a bag and threw it down an unused well some distance away.

Some days later when the police mounted a search for the deceased, who had been reported missing, the appellant admitted his involvement in her death and led the police to the well where her body, in a state of decomposition, was recovered.

These facts were not in dispute.

The only issues at the trial, as here, were the cause of death and the state of the appellant's mind at the relevant time.

Cause of Death -

The doctor who had conducted the post mortem was unable, due to the decomposed state of the body, to ascertain the exact cause of death. There were marks around the neck but it could not be said with certainty if they were ante or post mortem.

The deceased had been attending an ante-natal clinic and her medical record indicated anaemia and heart disease. In such a condition according to medical evidence at the trial, a severe shock could bring on a fatal heart attack.

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Learned Counsel for the appellant submits that if the unlawful act of strangling the deceased with her veil had merely caused shock followed by a subsequent heart-attack of which the deceased died after the departure of appellant it would, owing to the absence of the necessary mens rea, be only manslaughter, not murder. Failure to so direct the assessors has, he says, resulted in miscarriage of justice.

In his statement to the police the appellant had said :-

> "I pressed her neck firmly with both by hands around. She yelled out loudly and tried to free herself by struggling. Her veil was hanging towards the front on her shoulder I quickly got hold of that veil with my both hands and wrapped it around her neck and pulled both corners to each side with strength. She stopped yelling and collapsed on her back towards her left. She struggled for a short while and then she was dead."

At the trial the defence did not challenge the contents of the statement. The appellant, however, stated in his evidence that while he did commit the act described by him he had no intention of killing the deceased; nor did he realise that anyone could die or come to serious harm as a result of such an act.

The Learned Judge drew the assessors' attention to both: the act committed and the denial of intent and knowledge. His directions as to the state of mind required to constitute murder were impeccable.

He then said :-

> " Only if you are satisfied beyond reasonable doubt that he had the necessary state of mind can you find malice aforethought. "

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And again -

> " If you are sure of the first two namely that the accused caused the death and by an unlawful act, but are not sure of the third, namely, that the accused had the necessary state of mind to intend to cause death or grievous harm or the knowledge that his act would probably cause death or would probably cause serious harm, you may not find the accused guilty of murder but you will return the alternative verdict of manslaughter. "

We consider the directions proper and adequate. The evidence of the deceased's physical condition was fully dealt with by the Judge who, quite correctly, told the assessors that it would make no difference whether she died of suffocation or of a heart-attack provided they were satisfied that it was the appellant's act of strangulation that had brought it about. The fact that she succumbed to death more easily than a normally healthy person might was irrelevant. Once the unlawful act causing death was identified all the assessors had to consider was the appellant's state of mind at the relevant time and, in this regard, the Judge's directions were correct.

On the issue of provocation objection is taken to the statement "Manslaughter is said to be unintentional or inadvertent killing" in the following passage of the summing-up :-

> " Manslaughter is committed when a person by an unlawful act or omission causes the death of another. There is no malice aforethought required for manslaughter. Manslaughter is said to be unintentional or inadvertent killing. "

We consider the objection misconceived. The passage occurs immediately after the two passages quoted earlier in this judgment where the Judge dealt with the ingredients of actus reus and mens rea, the directions at

that stage having nothing to do with defences available to the charge of murder. After the above statement, the Judge went on to tell the assessors to find the appellant not guilty even of manslaughter if they were not satisfied that he was the perpetrator of the act or that the act was unlawful.

He dealt with the issue of provocation later in his summing-up when he told them in very clear terms that they had first to be satisfied that "actus reus" and "mens rea" had both been established. "You will then (emphasis ours)", he said, "go on to consider the question of provocation. Provocation is not a complete defence as such. Its effect is to reduce murder to manslaughter." We are satisfied that there could have been no doubt in the assessors' minds as to the nature and the effect of provocation as a defence.

The last ground also relates to provocation. It questions the correctness of the Learned Judge's direction that the assessors should reject the defence of provocation if they found "that strangling was not a reasonable reaction for the provocation". This, however, was not the only matter he adverted to and it would be wrong, in our view, to treat it in isolation. Dealing with the law on the subject he said :-

> "You will, therefore, have to consider three questions:-
>
> (i) Did the deceased's conduct cause the accused to lose his self-control, if so,
>
> (ii) would the deceased's conduct have caused a reasonable man to lose his self-control; if so,
>
> (iii) Did the retaliation by the accused bear a reasonable relationship to the provocation by the deceased."

This is in keeping with what the Privy Council said in Lee Chun-Chuen (1963 1 All E R 73 at 79) :-

> " 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. They are not detached. "

These element are interrelated and have to be viewed together to decide if provocation as a defence has been established. We find nothing erroneous in the directions given by the Learned Judge in this regard.

On the other hand, we find a great deal of force in Mr. Semisi's submission that in this case the evidence failed to produce a narrative of events suggesting the presence of the three elements. To bring the matter under section 204 of the Penal Code (which defines provocation), evidence must show the wrongful act or insult alleged to constitute the provocative act to have been done or offered by the deceased to the appellant. The latter's own evidence shows that, during the investigation into the rumours conducted by the local committee of the Muslim League at the appellant's own house, the deceased denied that he was the father of the child she was carrying. Nor did she admit being the source of the alleged rumours.

As for what happened on the day the deceased died the following appears in the appellant's examination-in-chief :-

> "Q: What happened then?
>
> A: When I questioned her she put her head down and remained silent.
>
> Q: Did you ask her again?
>
> A: She said - no the child is not yours.

(7)

Q: Did you believe her?

A: Yes.

Q: What did you do then?

A: I was so annoyed and ashamed. "

The assault and strangling followed immediately afterwards. Here, again, there was no allegation of paternity or suggestion of being the source of false rumours that might possibly amount to a provocative act.

Considering the paucity of evidence, the elaborate treatment that the Learned Judge accorded to the issue of provocation was, in our view, very much in the appellant's favour.

The ground, therefore, must fail.

There is one matter, however, which, though not a ground of appeal, does call for comment. The Learned Judge, while dealing with mens rea said :-

> " If you are of the opinion that she did not die of strangulation then you must also consider whether death was caused by the accused leaving her in a state of collapse. That is if the accused had left her when she had stopped struggling and has collapsed, and then left her unattended without rendering or bring any help and she died as a result of the omission of the accused to bring help, that omission could also be said to be a cause of death occasioned by the accused. "

We consider this direction inappropriate and uncalled for in the circumstances of this case. No legal duty lies on a person who deliberately assaults or strangles another to obtain for him medical or other

help and failure to do so, by itself, does not amount to an unlawful omission for the purposes of section 198 and 199(1) of the Penal Code. His culpability arises from his earlier unlawful act, regardless of whether he does or does not attempt thereafter to obtain help to repair the harm. This was purely a case of causing death by an unlawful act and no directions on unlawful omission were necessary.

The appeal is dismissed.

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VICE-PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL