

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 7
SCA CR 27/2019
(Appeal from CR 05/2019)

Francis Bakas
(rep. by Mr. Guy Ferley)

Appellant

and

The Republic
(rep. by Mr. Hemanth Kumar)

Respondent

Neutral Citation: *Bakas v R* (SCA CR 27/2019) SCCA 7
Before: **Fernando P, Twomey JA, Robinson JA**
Summary: Appeal from a conviction for murder
Heard: 6th April 2021
Delivered: 30th April 2021

ORDER

Conviction for murder and the sentence of life imprisonment quashed. A conviction for manslaughter substituted and a sentence of 10 years' imprisonment imposed on the Appellant.

JUDGMENT

FERNANDO P, (ROBINSON JA Concurring)

1. The facts in this case have been correctly set out in the Summing Up of the learned Trial Judge. That the deceased died at the hands of the Appellant as a result of an assault on her cannot be disputed on the basis of the medical evidence.
2. The Appellant's version that the injuries on the deceased had been caused by a fall had been rejected by the doctors who testified in the case and it had been their view that the deceased had been hit with a hard object or her head hit against a wall. The Appellant's conviction shows that the Jury had placed reliance on the

evidence of the doctors. The unlawful act on the part of the Appellant can only be inferred from the medical evidence as there are no eye-witnesses to the incident.

3. An interesting question that arises in this case is, does the rejection of the Appellant's version of the incident automatically make him guilty of murder. I am of the view that the burden continues to remain on the Prosecution to prove its case beyond a reasonable doubt, that the Appellant is in fact guilty of murder as a result of all the elements of murder being proved and that there being no other factors which would reduce the offence from murder to manslaughter.

4. This was a case based entirely on circumstantial evidence. The circumstantial evidence in this case points to the fact, that the Appellant by an unlawful and wilful act, with malice aforethought, caused the death of the deceased. However, I find that the learned Trial Judge, the Prosecutor, and the Defence Counsel, had completely overlooked one essential fact in this case, namely, whether there was any form of provocation which could have made the Appellant act in the way he did. It is to be emphasized that there are no eyewitnesses to the incident and the only persons present in the house at the time of the incident were the deceased and the Appellant. The circumstantial evidence in this case does not necessarily lead to the inescapable conclusion that this was an unprovoked attack. The inculpatory facts are not necessarily incompatible with some form of provocation at the hands of the deceased and are not incapable of explanation upon any other reasonable hypothesis than that of guilt of the Appellant for the offence of murder. An explanation that it was one of manslaughter is always a reasonable hypothesis. In this case in view of the absence of evidence as to what took place in the house of the deceased between 1.30 and 2.00 am, there are co-existing circumstances which weakens the inference that the Appellant is guilty of murder based on the circumstantial evidence that is available. It had not been possible for the Prosecution to exclude the possibility of some form provocation from the deceased

in the circumstances of this case as emerges from the evidence, which could be considered in favour the Appellant.

5. There is no evidence whatsoever that the Appellant had attacked the deceased with whom he had been in concubinage for 11 years on the day of the incident, in the way the Prosecution argues he did. I am not unmindful of the fact that there is no burden on the prosecution to prove motive but in the circumstances of this case, is it possible to conclude that this was a totally unprovoked attack?

6. According to PW Sherin Andre, whose evidence has been summarized by the Trial Judge in his summing up; around 2 in the morning on the day of the incident she had heard the deceased and the Appellant arguing but was unable to say, what they were arguing about or saying. This would have been about 44 minutes before PW Jane Fred, the Emergency Medical Technician, the paramedic who received a call that the deceased had fallen down, was bleeding and had passed out. According to PW Denis Barbe, it was around 2 in the morning that the Appellant had sought his assistance to take the deceased to the hospital. According to PW Andre it was usual for the Appellant and the deceased to argue. She had also said that when she went to the house of the deceased around 5 in the morning she had found, as stated in the Summing Up: “there were broken things, small pieces of things that were broken under the bed, fridge and sofa. There was broken glass which was a china ornament about 21 cms high on the floor”. PW Betty Jean and Christopher Nanon had also spoken of having seen broken pieces of glass and an ashtray on the floor. There is no clear evidence how these items came to be broken and who broke them, save the speculative assumption of the Prosecution that they were broken as a result of the Appellant hitting the deceased with them. The medical evidence is inconclusive in this regard, for according to medical evidence, the deceased had been hit with a hard object or her head had been hit hard against the wall. Thus, the only conclusion one could arrive at from these pieces of broken glass or ornaments certainly cannot be that they were used by the Appellant in causing

injuries to the deceased. According to PW Betty Jeanne, the deceased returned home from the street party around 1.30 in the morning and the Appellant was at home at that time. The only prosecution evidence that is available as to what happened in the house of the deceased between 1.30 to 2.44 on the morning of the incident is that of the arguments heard by PW Sherin Andre and the broken pieces of glass and ornaments. It had been the Appellant's uncontroverted evidence that he and the deceased had consumed Johnny Walker and J&B whiskey when the deceased came home at 1.30 am.

7. In my view the evidence that both the Appellant and the deceased were drinking, the arguments that PW Andre states she heard without evidence of what was said and by whom; the evidence of broken glass or ornaments, without evidence of how these items came to be broken and who broke them was indicative of something more than a mere speculative possibility of provocation and the learned Trial Judge should, in my view, left the issue of provocation to the Jury.
8. The following items of evidence which the Prosecution relied on to prove malice aforethought on the part of the Appellant, is also indicative of a person's behaviour on coming to the realization of what he had done under provocation and was remorseful.
 - ❖ The Appellants uncontroverted evidence that it was he who took steps to call for assistance from Denis who called for the ambulance, within a matter of minutes from the alleged incident.
 - ❖ It was the Appellant who carried the deceased to the ambulance in his arms and accompanied her in the ambulance to the Victoria hospital.
 - ❖ It was he who called the deceased's daughter to come to the hospital to sign the consent paper for surgery on the deceased.

9. It is to be noted that provocation is a partial defence to murder and the burden of proving provocation is not on the defence. The Jury must be clearly told that once, there is evidence capable of supporting a finding that the accused was provoked, the burden is on the prosecution to prove beyond reasonable doubt that the case is not one of provocation. See the cases of **Cascoe [1970] 2 All ER 833** and **R V McPherson, 41 Cr.App.R 213, CCA**. As Lord Tucker said in **Bullard V The Queen [1957] AC 635 at 642**:

“It has long been settled 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” (emphasis placed by me)

10. At **B1.23 of Blackstone’s Criminal Practice 2010**, it is stated: *“that the above statement is true whatever the main defence run by the accused, whether it be one such as accident, self-defence, lack of intent or diminished responsibility which acknowledges that the accused caused the death or whether it be one such as alibi or act of another which denies even that the accused caused the death (see **Lord Taylor CJ, in Cambridge [1994] 1 WLR 971 at p. 976**), It even appears to be true where counsel for the accused has indicated to the judge that provocation should not be put to the jury (**Burgess [1995] Crim LR 425 and Dhillon [1997] 2 Cr App R 104**).”*

11. In the case of **Julien Barra (SCA 21/2012) [2014]** this Court dealt with the issue of provocation as defined in the Penal Code at paragraphs 16 – 19 of the judgment, thus:

“16. Section 197 of the Penal Code states:

“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 sudden provocation as herein after defined, and before there is time for his passion to cool, he is guilty of manslaughter only.”

17. Section 198 then goes on to define “provocation” and we have set out here in the provisions relevant to this case. As per section 198, provocation means and includes any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. An ordinary person shall mean an ordinary person of the community to which the accused belongs. (emphasis added)

18. The following elements have to be present before one could say that the killing was on provocation:

- i. The accused acted in the heat of passion, before there is time for his passion to cool;
- ii. Caused by sudden provocation;
- iii. Provocation was as a result of any wrongful act or insult of such a nature as to be likely, when done to an ordinary person; (‘An ordinary person’ shall mean an ordinary person of the community to which the accused belongs.)
- iv. To deprive him of the power of self-control and
- v. To induce him to assault the person by whom the act or insult is done.

19. The words “in the heat of passion and before there is time for his passion to cool” necessarily connotes a subjective test and the words “any wrongful act”

or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control” brings in the objective element. The words “acted in the heat of passion, before there is time for his passion to cool.” are not a matter of degree but is absolute and there is no intermediate stage between icy detachment and going berserk. Our law of provocation does not state that the retaliation must be proportionate to the provocation or in other words the mode of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter. To do so would be to introduce a third condition to the law on provocation... As to what the nature of the assault should be has not been specified. This is more so because, as to what happened moments before the killing, comes out only from the confession of the Appellant... Common sense and the facts and circumstances of this case dictates that something ought to have happened on the evening of the of the 4th of June 2012 for the Appellant to have attacked his stepfather whom he knew for the past 21 years and with whom he had lived for several years... In this regard we have only the confession of the Appellant to rely upon.” (emphasis placed by me)

12. In this case too, there are no eyewitnesses to the incident and the only persons present in the house at the time of the incident were the deceased and the Appellant. This coupled with the evidence that both the Appellant and the deceased were drinking, the arguments that PW Andre states she heard between the two of them, the evidence of broken glass or ornaments, without evidence of how these items came to be broken and who broke them indicates that something may have happened during the period of 1.30 to 2.00 am, for the Appellant to have attacked his concubine with whom he had lived for 11 years, in a manner different to the normal fights they may have had. As stated at paragraph 4 above, it had not been possible for the Prosecution to exclude the possibility of some form provocation from the deceased in the circumstances of this case which could favour the Appellant.

13. The rejection of the Appellant's evidence by the doctors, that he did not attack the deceased but that she fell and sustained the injuries, does not necessarily prove that he 'murdered' the deceased. A causing of death by an unlawful act may amount to murder or manslaughter. The learned Trial Judge had gone to great lengths to emphasize to the Jury and warned them to bear in mind that the Appellant had "made various changes to the crime scene by wiping away blood, washing items and removing items for the purpose of interfering with the crime scene, when he came home after dropping the deceased at the hospital to pick up her clothes" in order to deliberately cover up what he did. The use of the word 'crime scene' at 11 places in the paragraph the learned Trial Judge makes reference to the Appellant's subsequent conduct in arriving home, and more so the warning given to the Jury, in my view was improper as it gives the impression that the learned Trial Judge had directed the Jury that the Appellant was trying to cover up something. It is equally possible that any person on returning to his bed room would always want to clean the blood that had spilled therein and clean up any mess, without intending any cover-up. I also fail to understand how the wiping away of the blood by the Appellant confirms the prosecution version of the deceased being assaulted by the Appellant or supports the defence version of the deceased falling and sustaining the injuries, for in both instances there would be blood on the floor. It is also stated at **Archbold 2009 19-64** that: "*Lies and attempts to cover up a killing are not necessarily inconsistent with provocation. In directions about lies, when the issue was murder or manslaughter, the jury should be alerted to the fact that, before they could treat lies as proof of guilt of the offence charged, they had to be sure that there was not some possible explanation which destroyed their potentially probative effect. A failure to give such a direction, coupled with an indication that the jury might regard lies as probative of murder rather than manslaughter, amounted to a material misdirection.*" **R V Richens, 98 Cr App R 43, CA; R V Taylor [1998] 7 Archbold News 3, CA.**

14. It must be said that the Appellant had not raised the issue of provocation not having been placed for the consideration of the Jury by the learned Trial Judge as a ground of appeal. In my view when an appeal is lodged, the entire matter is before the court to which the appeal is brought and the court can entertain any matter however arising according to **rule 31(1) of the Seychelles Court of Appeal Rules 2005**, which shows that the decision of the court appealed from is erroneous. An appeal having been lodged, it is the duty of this Court to so hold, notwithstanding the limited nature of the grounds of appeal. In the **Australian case of Davies and Cody V The King (1937) HCA 27 as quoted in Gipp V R (1988) HCA 21**, it was held “that the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers not only cases where there is affirmative reason to suppose the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court’s view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.”

15. “In **R VS Coutts [2006] UKHL 39** it was said “*The public interest is that, following a fairly conducted trial, defendant should be convicted of offences which they are proved to have committed and should not be convicted of offences of which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to a greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he*

and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge” (Von Stark VS The Queen [2000] 1 WLR 1270; Hunter and Moodie VS The Queen [2003] UKPC 69).

16. In **Von Starck VS The Queen [2000] 1 WLR 1270 Lord Clyde** said: *“The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial...It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them.”*

17. In the **Australian case of Pemble VS The Queen [1971] 124 CLR Barwick CJ** said: *“Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury in the circumstances of the case upon the material before them find or base a verdict in whole or in part. Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused.”*

18. In the case of **R V Cooper (1969) 53 Cr. App R 82** it was said an appeal court *“must in the end ask itself a subjective question, whether we are content to let the*

matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.” In this case there is more than a lurking doubt and a general feeling in our minds as to whether an injustice has been done.

19. In view of the non-direction and mis-direction on the law of provocation, I quash the conviction of murder and the sentence of life imprisonment imposed on the Appellant and substitute in place a conviction for manslaughter. Taking into consideration the circumstances of this case, I impose a sentence of 10 years' imprisonment on the Appellant. The time spent on remand and after conviction in prison shall be deducted from the 10 years.

Signed, dated and delivered at Ile du Port on 30 April 2021.

Fernando, President

I concur

Robinson JA