GBENYEH v THE STATE

CA

COURT OF APPEAL FOR SIERRA LEONE, Criminal Appeal 5 of 1975, Hon Justice Awunor-Renner PJ, Hon Justice S Beccles Davies JA, Hon Justice S C E Warne JA, 14 October 1976

[1] Criminal Law and Procedure – Appeal against conviction – Judge's summing up – Misdirection to jury on the defence of provocation – No substantial miscarriage of justice when evidence considered in all its entirety – Jury would have reached same verdict if misdirection had not occurred – Courts Act No 31 of 1965 s 58(2)

[2] Criminal Law and Procedure – Murder – Defence – Provocation – Proper direction – Manslaughter not murder

The appellant was tried for murder and did not call any witnesses or give any evidence apart from relying on the statements he made to the police for his defence. In the first statement he admitted hitting the deceased with a matchet but claimed the deceased attacked him first. In the second statement he admitted stabbing the deceased and claimed he did not think that would kill him. He was convicted and appealed on a number of grounds.

Held, per Awunor-Renner PJ, dismissing the appeal:

1. The judge misdirected the jury in his summing up on the effects of malice on provocation. However, the court could only quash the conviction if, having regard to the circumstances, a substantial miscarriage of justice occurred as a result of the misdirection. No such miscarriage had occurred in this case. Based on all the evidence the jury would have reached the same verdict had they been properly directed.
2. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self control by reason of provocation. Applying this principle, it was clearly a misdirection for the trial judge to have directed that if the appellant did not intend to kill the deceased then he was not guilty of murder or manslaughter. If he had intended to kill or cause grievous bodily harm but his intention to do so arose after he had been provoked so as to lose all self control then it would be manslaughter. However the misdirection complained of was not such that a reasonable jury if properly directed would have come to a different conclusion and this was another instance when s 58(2) of the Courts Act No 31 of 1965 could properly be applied. *AG for Ceylon v Kumarasinhedge Don John Perera* [1953] AC 200 and *Lee Chun-Chuen v The Queen* [1963] AC 220 applied.

Cases referred to
AG for Ceylon v Kumarasinhedge Don John Perera [1953] AC 200
Brima v R [1968-69] ALR (SL) 220
Lee Chun-Chuen v The Queen [1963] AC 220
R v Bah [1968-69] ALR (SL) 30

Legislation referred to
Courts Act No 31 1965 s 58(2)

Other sources referred to
Archbold 36th Edition paras 931, 939, 2487, 2508

Appeal

This was an appeal against the Judgement of the High Court at Moyamba, convicting the appellant of murder and sentencing him to death. The facts appear in the following judgement.

Mr J B Jenkins-Johnston for the appellant.
Mr Bankole Thompson for the respondent.

AWUNOR-RENNER PJ: The appellant in this case was tried in the High Court at Moyamba on the 10th day of January 1975 for the offence of murder. He was accordingly convicted and sentenced to death and it is against this conviction that he has now appealed to this court.

The facts in this case are very simple. According to the prosecution, one Luseni Sheku said he had gone to a village called Kanga with his bag of rice and his matchet. He placed his matchet and bag of rice on the ground and the appellant picked up the matchet. When he asked him why he had picked up his matchet and asked him to return it to him the appellant attempted to wound him with the matchet. One Kaloko who was around then advised Sheku to go and report the matter to the Chief. He left to go and do so but as he was going he heard a noise. He then retraced his steps to where the noise was coming from and found that one Brima Sheriff, the deceased in this case, had been wounded; the appellant was also at the scene and the matchet, which had been taken from him, was lying on the ground. The deceased then told Sheku that the appellant had wounded him and the appellant admitted this. The deceased was then taken away. Another witness for the prosecution, one Kpanahum Kaloko, who was dead at the time of the trial in High Court but whose deposition had been tendered in evidence, had stated that he was ill at the time and was in his veranda when he saw the appellant coming slowly with a matchet and stabbed the deceased but since he was ill and was unable to do anything he shouted and people came to the scene.

The appellant did not give any evidence at the trial and neither did he call any witnesses but instead relied on two statements which he had made to the police and which were tendered in evidence by the prosecution at the trial as exhibits B & C. In the former statement Exhibit 'B' the appellant said,I quote:

> "It is not true that I was the one who wounded the deceased. On the date of the incident 30.1.73 I left my address at Njayahun village enroute to Bondahun village to pay a visit to my younger brother. On my way going, on reaching Kanga village it was then the deceased banged himself against the matchet that I was carrying thereby he received the wound on his forehead. I now say that the deceased man saw me passing through their village Kanga he then rushed on me and gripped me; it was during the struggle he received the wound on his forehead. Before the deceased rushed on me I heard the villagers saying get hold of him. I am not the owner of the matchet that I was carrying on the date of the incident 30.1.73. I am now saying that I collected the matchet from the ground when I saw the villagers coming towards me. It was then I stabbed him on the forehead. The deceased was the first person who confronted me. The villagers then arrested me."

In his second statement Exhibit 'C' appellant states I quote:

> "It is true that I stabbed the deceased on the date of the incident 30.1.73. I was not expecting that the stab wound would kill the deceased. I do not know what actually tempted me to do so. I am only asking for mercy."

As stated earlier the appellant was convicted on the charge of murder and has now appealed on the following grounds.

1. That the learned trial judge seriously misdirected the jury on the effect of malice on the defence of provocation.
2. That the learned trial judge misdirected as the jury in treating the offences of murder and manslaughter as the same.
3. That there was no evidence of malice to have justified a verdict of guilty of murder.
4. That the learned trial judge erred in failing to put to the jury the possibility of a reduction to manslaughter in the light of the evidence.
5. That the verdict is unreasonable and cannot be supported having regard to the evidence before the court.

Ground 1

On the first ground of appeal, counsel for the appellant argued that the learned trial judge seriously misdirected the jury on the effect of malice on the defence of provocation. The relevant passage complained of in the summing-up is as follows.

I quote:

"It is also my duty to tell you that even if you find provocation, it is still murder, it is still murder if there is malice either express or implied however grave the provocation may be, that is to say although there is no evidence of provocation but if you find there is provocation but in considering the evidence in its totality you also find malice express or implied then that provocation has no leg to stand on because it is shrouded with malice, malice negatives provocation – once there is malice provocation ends because malice is intention".

He further argued briefly that the misdirection was a serious one as there was evidence of provocation and the jury may well have come to a different conclusion had they been properly directed and referred the court to the case of *Lee Chun-Chuen v The Queen* [1963] AC 220. He also referred to the case of *Brima v R* [1968-69] ALR (SL) 220 at p 23.

The question I must now ask myself is whether the passage complained of alone is in fact a misdirection. The answer is yes in my opinion. However in *Archbold*, 36th Ed at paragraph 931 it is stated as follows:

"Where a misdirection as to the law is established by the appellant, the conviction will be quashed unless the prosecution can show that on a right direction a reasonable jury would inevitably have come to the same conclusion …",

and there are a host of authorities to support this provision. Again in *Archbold*, 36th Ed at p 343 para 939 it is stated as follows:

"By the proviso to section 4(1) of the Criminal Appeal Act 1907 (which is equivalent to s 58(2) of our Courts Act Number 31 of 1965), notwithstanding that the court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, they may also dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Applying the principles as stated above to this case, can it be said that the jury properly directed could have come to the same conclusion or that this is a fit and proper case in which to apply the proviso to section 58(2) of the Courts Act No 31 of 1965? The answer is in the affirmative to both questions. There is ample evidence against the appellant. The appellant himself relied on two of his statements, which were tendered in evidence by the prosecution. In those two statements the appellant gave three different versions as to what happened on the day in question.

In his first statement, Exhibit 'B' he denied that he was the one who wounded the deceased. Again in the same statement he said that he was going to a village called Kanga and it was then that the deceased banged himself against the matchet that he was carrying and thereby he received the wound on his forehead. He also said that when he was passing through the village the deceased rushed on him and gripped him and that it was during the struggle that he received the wound on his forehead and that before the deceased rushed on him he heard the villagers saying that they should get hold of him. He finally said in Exhibit 'B' that he collected the matchet from the ground when he saw the villagers rushing towards him and as the deceased was the first person who confronted him he stabbed him on his forehead.

In Exhibit 'C', his second statement, the appellant said I quote:

> "It is true I stabbed the deceased on the date of incident 30.1.73. I was not expecting that the stab wound would kill him. I do not know what actually tempted me to do so. I am only asking for mercy".

A prosecution witness also deposed how he saw the appellant walking slowly behind the deceased and then stab him. On the whole, the appellant's version of what happened is most conflicting and coupling this with the evidence adduced by the prosecution one fails to see how any reasonable jury properly directed would have come to a different conclusion and, furthermore, this court is of the opinion that the misdirection complained of could not have caused any miscarriage of justice.

Ground 2

The second ground of appeal raised by the appellant was that the learned trial judge misdirected the jury in treating the offence of murder and manslaughter as the same. The passage complained of states as follows:

> "But it is up to you to decide that you are not sure and satisfied that he intended to kill or cause grievous bodily harm. If so, say that the accused is not guilty of murder or manslaughter. If you say that the accused took that matchet, somebody else's matchet as he himself said and he stabbed Brima Sheriff but he the accused did not intend to kill, then say I repeat he is not guilty of murder or manslaughter."

The case of *Lee Chun Chien* mentioned above was a murder case from Ceylon, which came before the Privy Council. It was held that the defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self control by reason of provocation and, therefore, there had been a misdirection on the part of the trial judge at the trial of the appellant on a charge of murder when he directed the jury that if the provocation relied on by the defence caused in the mind of accused an actual intention to kill or cause grievous bodily harm then the killing would be murder. In giving the opinion of the board in the case of *Lee Chun Chen*, Lord Devlin thought it fit to reaffirm the law as stated by Lord Goddard in the case of *Attorney General for Ceylon v Kumarasinhedge Don John Perera* [1953] AC 200 at p 206 when he said, I quote:

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self control by reason of provocation."

Applying the above principle in the two cases mentioned above, ie, the case of *Lee Chun Chuen* and the case of *Attorney General for Ceylon v Kumarasinhedge Don John Perera* then it was clearly a misdirection for the learned trial judge in this case to have used the words complained of for it would be manslaughter if he had intended to kill or cause grievous bodily harm but his intention to do so arose after he had been provoked so as to lose all self control.

Having come to the conclusion that there was a misdirection can it be said that the misdirection was such that a reasonable jury would inevitably have come to the same conclusion if properly directed? The answer in my opinion is yes in the in the present case. Although he misdirected the jury in the passage referred to above yet in several instances in his summing up it would clearly be seen that he was treating the offences of murder and manslaughter as two distinct offences.

At page 55 of the record lines 24 to the end and on to page 56 the judge said:

> "If however you can find that because of the conduct of the deceased the accused was led to such passion at that moment to render him not to be master of his mind as a result of which he inflicted that dastardly wound on the deceased then you are to say that the accused was provoked and so is not guilty of murder but manslaughter."

Again in his summing up the judge said:

> "You must consider whether the accused was provoked because in one of his statements he said the villagers were chasing him and as the deceased was the first to approach him he used his matchet to defend himself."

In another paragraph in his summing up the judge had said again I quote:

> "It is the duty of the prosecution to prove the ingredients of the definition to murder. They must show in evidence that the person intended killing whether in the case of murder or manslaughter, etc."

As stated earlier the misdirection complained of is not such that a reasonable jury if properly directed would in my opinion have come to a different conclusion and this is yet another instance in this appeal when section 58(2) of the Courts Act No 31 of 1965 could properly be applied.

Ground 3

Counsel for the appellant complained that there was no evidence of malice to have justified a verdict of guilty of murder. I propose to deal with this point quite briefly. There are two types of malice in a charge of this nature. There is express malice and implied malice. In *Archbald*, 36th Ed para 2487 implied malice is defined as follows:

> "In many cases where no malice is expressed or openly indicated the law will imply it from a deliberate cruel act committed by one person against another. It may be implied where death occurs as the result of a voluntary act of the prisoner, which was intentional and unprovoked."

I think that there is ample evidence to support this. The evidence of Kaloko who watched what was happening from his veranda. He saw the appellant walk slowly behind the deceased and then stab him.

In Exhibit 'C' the appellant said, "It is true that I stabbed the deceased. I was not expecting that the stab wound would kill him ... I do not know what actually tempted me to do so."

I cannot find any merit on this ground of appeal.

Ground 4

Counsel for the appellant's fourth ground of appeal was that the learned trial judge erred in failing to put to the jury the possibility of a reduction to manslaughter in the light of the evidence. In the case of *R v Bah* [1968-69] ALR (SL) 30, a Court Of Appeal decision, Sir Samuel Bankole Jones in his judgment at page 31 said, I quote:

"Now whilst it is true that a judge ought to direct a jury on the question of manslaughter if the evidence warrants it and whether raised by the defence or not, it is equally true that he ought not to do so if the evidence does not disclose anything relating to that offence".

In the present case the judge did direct the jury on the question of a reduction from the charge of murder to manslaughter even though there was no evidence to support this when he said in his summing up:

"If however you come to find that because of the conduct of the deceased the accused was led to such passion at that moment as to render him not to be master of his mind as a result of which he inflicted that dastardly wound on the deceased then you are to say that the accused was provoked and so is not guilty of murder but of manslaughter".

In *Archbold* 36th Ed at paragraph 2508 it is stated as follows:

"Even where the substantial defence is that of self-defence the summing up should deal adequately with any other view of the facts which might reasonably arise out of the evidence and which would reduce the crime to manslaughter."

Although there was not sufficient evidence for the judge to direct the jury on this point, the judge in his summing-up said again I quote:

"Counsel for the defence is not denying that Brima Sheriff was wounded. He says that the accused acted in self-defence. What is self-defence? Where one man attacks another the person attacked is entitled to defend himself . The person attacked must demonstrate by action that he does not wish to fight before resorting to the use of force. If he kills his assailant then such killing would be excusable. You must examine the evidence and the statement of the accused and ask yourself the question as to whether he was attacked".

This ground of appeal however I feel also has no merit.

In our view, for all the reasons given above, we feel that the verdict arrived at was the correct one and accordingly dismiss the appeal.

Reported by Victoria Jamina