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IN THE SUPREME COURT OF SIERRA LEONE

C.R. 1/82

CORAM:

The Hon. Mr. Justice E. Livesey Luke, C.J. - Presiding

The Hon. Mr. Justice C.A. Harding, J.S.C.

The Hon. Mr. Justice O.B.R. Tejan, J.S.C.

The Hon. Mrs.Justice A.V.A. Awunor-Renner, J.S.C.

The Hon. Mr. Justice S. Beccles Davies, J.S.C.

DUMBUYA KOROMA - APPELLANT

Vs.

THE STATE - RESPONDENT

SOLICITORS: E.A. Halloway, Esq. for Appellant

A.K.A. Barber, Esq. for Respondent

JUDGMENT DELIVERED ON THE 14TH DAY OF JULY, 1982

Awunor-Renner, J.S.C.:- The appellant was convicted at the High Court Moyamba on the 7th day of November 1979 and was sentenced by Williams J. to death. He appealed to the Court of Appeal and judgment was delivered on the 21st day of January 1982 dismissing the appeal and affirming the conviction and sentence of the High Court. It is against that decision that the appellant has now appealed to this Court on the following grounds, viz:-

(1) That the Court of Appeal erred and/or misdirected itself in holding that "In any event upon a careful review of the evidence in this case, there is no evidence to support the issue of provocation being left to the jury".

(2) That the trial judge usurped the functions of the jury as judges of facts in assessing the weight of the evidence in this case substantially in the summing up.

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the appellant and his wife. At that point the appellant left the house and said that he was going to a village called Bandabama to buy kerosene. He returned late in the night without having bought any kerosene and told Fatu that he had met up with her boy friend the man she had been boasting about. His shorts were wet and he had his matchet with him. On the following day the corpse of the deceased was found floating at the wharf by Tamu and one Biareh Bangura another prosecution witness. The Town Headman who was the second accused in this case was informed about it. He came down to the wharf and after he was shown the corpse of the deceased he instructed one Pa Allie to tie a rope round it and throw it into the river again. Three months later when the police came to investigate Henry Gbemoh a Detective Police Sergeant claimed that he took the appellant to Mano Wharf and that the appelant showed him a place along the river bank where he said that he had attacked and stabbed the deceased to death and that as they walked along the edge of the river some bones were discovered which looked like human bones.

One William Roberts a pathologist attached to the Bo Government Hospital also gave evidence before the trial judge and stated as follows. I quote

> "I recall the 16th January 1979 I was on duty on that day I had cause to perform a post-mortem examination on the skeleton remains of one Joseph Minah alleged, to have died on the 12th October 1978. The remains were identified to me by one Ansumana Kpaka uncle of the deceased of Mokumba Village. My examination was carried out at the Moyamba Police Station. On examination the skeleton remains were:

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The skull

Parts of lower and upper limbs

Few ribs

There were few soft tissues on the base of the skull. There were few soft tissues left in the pelvic area. There were few pieces of rags which were alleged to be the clothes which the deceased was wearing when he died.

Cause of death: Fracture base of skull, consistent with either the victim falling on a hard surface from a height or a blunt object administered with force on the skull."

At this stage I would not be amis if I were to mention that the appellant made two statements which were tendered in evidence in the High Court. No objection as to the voluntariness of the statements were made in that Court. The only point raised was that the statements offended against the Hearsay Rule as they had been taken through an interpreter who had not been called to give evidence of this. However both statements were eventually admitted in evidence. In the first statement which was tendered in evidence the appellant had this to say.

"It is true that I am the one who killed the deceased Joseph Minah on the road leading to Baoma Village on a certain day sometime in the month of October 1978.

The reason why I killed the deceased was that my wife Fatu Gbla had earlier confessed him to me. I had all the time been after the deceased for my woman palava but in vain. The deceased Joseph Minah did not make any settlement to me. This caused me to attack him and kill him on his way to Baoma Village, from my village Mano Wharf.

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Town Chief Alusine Sesay is well aware of the woman palava between myself and the deceased Joseph Minah. This dispute had been between myself and the deceased for about a year now as he did not pay no heed to it this made me to have attacked and kill him on his way to Baoma village where he was going to pass the night."

The statement continues as follows:

"It is true that I am the one who stabbed the deceased Joseph Minah to death with my cutlass by giving him four stabs on his neck and shoulder blades before he finally died. After he had died I then pushed or dragged the deceased's body to the river where I threw it before I returned to the village. It is true that I am the one who killed the deceased Joseph Minah sometime in the month of October, 1978 on his way to Baoma village. It was jealousy which tempted me to do so. I am only asking for mercy. That is all."

In the second statement appellant said and I quote.

"It is true that I am the one who killed the deceased Joseph Minah on the road between Mano Wharf and Baoma Village sometime in October 1978 about three months ago. I am only asking for mercy. That is all."

The appellant, during the course of his trial, when asked if he had anything to say or whether he wished to give evidence elected to make an unsworn statement from the dock which conflicted with the two previous statements. He stated as follows:

"My wife confessed the name of the deceased and in all six persons names. My wife afterwards fell ill and I refused to give her treatment because we were many after her. She sent to the Town Chief to beg me to give her treatment. After the Town Chief had begged me I forgave her. This was after three years. Later on the deceased used to come to my house and play with my wife. When the deceased passed I was not there I went to Bandabama to buy kerosene. Bandabama and Bumpetoke are in opposite direction. As I came and passed people said they suspected me and I don't know anything. People suspected me of the murder of the deceased. If I had wanted to I would have issued a summons against the deceased. I was arrested by the Police and brought here that is all."

I must say at this stage that counsel for the appellant has put forward everything that he could to induce this Court to say that the verdict was unreasonable. Several grounds of appeal were argued by him but I only propose to deal with the main issue involved which in my view raises the points of substance. The first point taken deals with the learned trial judge's direction on the question of provocation. Counsel contended that it was the duty of the trial judge where there is some evidence of provocation to put the issue of provocation to the jury. If there is none he said then he should not do so. He however stated that there was evidence to support the issue of provocation and referred to the evidence of Musu Gbla where she said:

"Towards dusk on that day Joseph Minah travelled from Shenge to our village. I was sitting in front of our house when I saw Joseph Minah walking past the house. He went down to the wharf where he met some children. First accused the appellant was sitting on the verandah of our house when Joseph Minah walked past. After Joseph Minah walked past 1st accused left to go and buy kerosene from a village called Bandabama travelling via the wharf."

He also referred to the portion of Fat Gbla's statement where she said that her relationship with the deceased continued until the time of his death and also to the statement of the appellant from the dock when he said that the deceased used to come to his house and play with his wife. All these pieces of evidence he claimed were ignored by the Court of Appeal when Short J.A. said in his judgment and I quote.

"In any event upon a careful review of the evidence in this case, there is no evidence to support the issue of provocation being left to the jury."

Counsel for the appellant submitted further that Provocation could only be a defence in such situations if the adulterers were caught red-handed and that we should not ignore our own enviroment but should remember that adultery with a wife and a third party can so infuriate the husband as to provoke him to do harm. Now let me examine what the trial judge had to say about provocation in certain portions of his summing-up and I quote:

"Turning back to the 1st accused I am to remind you that after trying to impress on you that there would appear to be some doubts in the evidence as far as the 1st accused is concerned his counsel went one stage further by saying that -

if you are convinced that the killing was done by 1st accused it was done by what in law is described as provocation and that if you are satisfied that he was suffiently provoked to kill Joseph Minah then the verdict against 1st accused cannot be one of guilty of murder: it would be one of guilty of something else, namely manslaughter; but if you are convinced that there was not sufficient provocation before killing Joseph Minah then your verdict must be one of murder. Firstly provocation is no defence in a charge of murder. All that provocation does if satisfactorily proved is to reduce a charge of murder to that of manslaughter. That is why counsel for 1st accused told you quite clearly that if you are convinced that it was the first accused who killed Joseph Minah then 1st accused might have done so because he was provoked and that if you are satisfied that he was sufficiently provoked then you should reduce the charge from murder to manslaughter which means that you should return a verdict of not guilty of murder but guilty of manslaughter --------

Provocation must be such that it is enough for a reasonable man to lose control of his temper."

He continued further by saying

"If you are able to say on the evidence that it was the 1st accused who killed Joseph Minah, then ask yourself whether the love affair which lasted for three years was provocation enough to have excited a man like the 1st accused to

the extent of killing the paramour of his wife bearing in mind that the 1st accused had other remedies to which he could have had recourse if he wanted to get his own back from Joseph Minah. So members of the jury if you are conviced that it was the first accused who killed Joseph Minah then ask yourselves in the light of the evidence whether the provocation pleaded is of a kind which is sufficient to let 1st accused lose his temper and kill Joseph Minah the way the evidence has pointed out.

---------The question of provocation is one for you to consider. It is my duty as judge to point out to you aspects of provocation. It is your duty to consider whether such provocation is sufficient to let 1st accused lose the balance of his mind and kill Joseph Minah."

In my view the law on the question of provocation is quite clear. In Archibold Thirty-sixth edition at paragraph 2499. "Provocation is defined as an act or a series of acts done by the deceased to the accused which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self control rendering the accused so subject to passion as to make him for the moment not master of his mind. No provocation whatsoever can render homicide justifiable, or even excusable, but provocation may reduce the offence from murder to manslaughter."

In the case of Mancini V D.P.P. reported in 1942 A.C. at page 9 Viscount Simon had this to say:

"It is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result must be such as to temporarily deprive the personprovoked of the power of self control, as a result of which he commits the unlawful act which causes death."

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In the case of Helmes V D.P.P. reported in 31 Criminal Appeal Reports at page 123. It was held that a confession of adultery without move can never constitute a provocation sufficient to reduce murder to manslaughter. It is however different where a man actually discovers his wife in the act of adultery and there-upon kills her or him directly on the spot. It is well established that in a case where the evidence does not support the defence of provocation, it is the duty of the judge to direct the jury that the evidence does not support a verdict of manslaughter see Mancini V D.P.P. supra. Where however there is evidence to support this it is the duty of the judge to put the issue of procation to the jury and for the jury to decide whether the accused killed the deceased as a result of provocation.

In the present case after having reviewed all the evidence including the statements of the appellant which I have narrated above and his statement from the dock, together with the evidence of Fatu Gbla and after considering all the authorities referred to supra I find myself in agreement with the Court of Appeal that there was no evidence to support the defence of provocation. Here was a man who knew that the deceased had been having an affair with his wife for three years and yet did nothing about it. In fact the wife admitted that she had been forced to confess to the appellant that she had been having an affair with the deceased. The appellant himself admitted that he could have issued a summons against the deceased but did not do so. I think that the trial judge went out of his way to direct the jury on provocation when there was no evidence to support that defence. I find no merit in this ground of appeal. The next point taken by counsel for the prosecution was that the trial judge substantially usurped the functions of the jury as judges of facts in assessing the weight of the evidence in this

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case in his summing-up. He made particular reference to corroboration and referred this Court to certain portions in the summing-up and I quote.

> "Can you say that the boy was lying or that you are convinced that all he said was the truth, having regard to the fact that what he said was corroborated by PW3 another boy. PW3 from the witness box narrated to you almost exactly what he said, except the piece of evidence about the 1st accused remarks. It could be that the reason why PW3's evidence did not corroborate that of PW2 on this piece of evidence is because PW2 resided with his father and mother. But apart from this bit of PW2's evidence PW2's evidence was corroborated by the evidence of PW3 in every particular ---------
> If you believe him (PW2) then his evidence is sufficient corroboration about the utterances of the 1st accused and such utterances ought to assist you to make up your minds as to the guilt or otherwise of the 1st accused so far as the killing of Joseph Minah is concerned."

In this case PW2 Tamu Koroma the son of the appellant and Fatu Gbla have given evidence on oath. PW3 Biareh Bangura had affirmed. There is nothing wrong with a witness affirming. Any person who objects to taking an oath because of his religious beliefs or because he has none is allowed to affirm, provided reasons are given for this. No evidence was given of the age of Tamu Koroma or Biareh Bangura and neither was any objection raised to their giving evidence on oath or in affirming in the instant case. As a general rule the Courts may act on the testimony of a single witness though uncorroborated if satisfied with such evidence. Corroboration is required by law and in practice in certain cases. In law however corroboration is

required when a child of tender years gives unsworn evidence. The jury should be warned of the danger of accepting the uncorroborated evidence of a child of tender years; See the case of R V Pitts reported in 8 Criminal Appeal Reports at page 126. There is no evidence to show that both PW2 and PW3 were children of tender years and as such that their evidence needed corroboration. Even in cases where corroboration is necessary this need not be by another witness it may even be by an admission of the accused and it is the duty of the judge to point out instances of corroborative evidence as I think the trial judge was doing in the passages referred to supra. On this same ground Counsel for the appellant complained about the identification of the body of Joseph Minah and how the learned trial judge dealt with it in his summing up and I quote.

> "There can be no doubt that he is dead, and indeed we have portions of his remains in this Court; they were identified positively as belonging to the body; there were no attempts to query the identification, they are the factual remains of Joseph Minah".

I must however disagree with the learned trial judge's direction in the above passage. I have come to this conclusion because of the evidence of the following people one Stanley Kaillie who said as follows:

> "I had first visited 1st accused's house where I found a black juju bag hanging on the wall of his room. From there I took him to Mano Wharf by the river. Reaching a certain point 1st accused told me that it was at that point, that he attacked and stabbed Joseph Minah to death. We walked along the river edge where I found bones which looked liked human bones. I collected the bones and brought them to the Moyamba Police Post."

Dr. Roberts also gave evidence for the prosecution and said and I quote:

> "I had cause to perform a post mortem examination on the skeleton remains of one Joseph Minah. The remains were identified to me by one Ansumana Kpaka. On examination the skeleton remains were:
>
> The skull
>
> Parts of lower and upper limb
>
> Few ribs.
>
> Soft tissues at the base of the skull. There were soft tissues left in the pelvic area. There were few pieces of rags which were alleged to be the clothes which the deceased was wearing when he died."

I entirely agree with Counsel for the appellant's submission about the identification of the body of Joseph Minah in the passages referred to supra. In my opinion all that was seen were the skull and some bones. I cannot understand how the identification was carried out and how they came to the conclusion that the bones and skull were those of Joseph Minah. There was however another passage in the summing-up in which the trial judge referred to the identification of the deceased. In this passage he said and I quote:

> "Again after confirming the evidence of PW2 the third witness for the prosecution said that when he and PW2 saw the floating corpse in the river they went and reported the matter to his father the second accused. The second accused went with them and some other people also. Second accused saw the corpse and

identified it to be that of Joseph Minah and instead of ordering the corpse to be brought ashore he gave instructions that the corpse should be pushed further up the river."

I do not see how it can be said in this instance that the judge usurped the function of the jury. All the learned trial judge was doing in my view was to narrate and confirm the evidence of the prosecution witnesses. In any case there is ample evidence to show that the deceased Joseph Minah was dead. The statements of the appellant confirm this and so does the evidence of Tamu Koroma and Biareh Bangura both of whom actually testified to seeing the dead body of Minah floating on the river. Even in cases where neither the body nor any trace of it has been found and the prisoner has not made any confession of any participation in the crime, the death is provable by strong circumstantial evidence which renders the commission of the crime certain and leaves no ground for reasonable doubt: See the case of R V Michel Onufrejizyk reported in volume 39 Cr.App. Report at page 1. In the present case the body was actually seen floating in the river by several persons who identified it and the appellant himself has confessed to the killing of Joseph Minah. As stated earlier the point that the statement was not made voluntarily was never raised. The statements as quoted above speak for themselves. In my view Counsel for the Respondent adequately and succintly dealt with all the criticisms put forward by Counsel for the appellant.

Finally in my opinion I have come to the conclusion that the facts as proved at the trial were fairly and accurately put by the judge to the jury in his summing up. I therefore do not agree with Counsel for the appellant that the decision of the Court of Appeal was unreasonable or could not be supported having regard to the evidence. There was no misdirection and

I am therefore unable to allow the appeal. I would dismiss the appeal.

A. Awunor-Renner
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Hon.Mrs.Justice A. Awunor-Renner, J.S.C.

I agree ....
Hon. Mr. Justice E. Livesey Luke, C.J.

I agree ....
Hon. Mr. Justice C.A. Harding, J.S.C.

I agree ....
Hon. Mr. Justice O.B.R. Tejan, J.S.C.

I agree ....
Hon. Mr. Justice S. Beccles Davies,J.S.C.