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MAERERE TAMARO

v.

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REGINAM

[COURT OF APPEAL, 1970 (Gould V.P., Marsack J.A., Tompkins J.A.), 20th, 27th July]

Criminal Jurisdiction

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Criminal law—homicide—evidence and proof—proof of intent—trial within a trial—no reasons given for judge's ruling—drunkenness—provocation—Penal Code 1965 (*Gilbert and Ellice Islands Colony*) *s.* 13 (1) (4).

Criminal law—defence—drunkenness—provocation.

At the trial of the appellant for murder it was given in evidence that the appellant, after drinking a quantity of sour toddy, entered a building where dancing D was in progress with his toddy knife in his hand and attached to his wrist by a string. He went straight across the floor to the deceased, who was dancing with a girl, and tapped him on the arm. Words passed between the two and the deceased punched the appellant in the face; the appellant then stabbed the deceased in the chest with his knife and the latter died in a few minutes.

The appellant answered " Yes " to a question by a police officer, " Have you E killed a man ? " and later said " I did not intend to kill him but he was asking for it ", in each case without a caution having been administered.

Held : 1. There was ample evidence from independent witnesses that the deceased died as a result of action taken by the appellant. The oral statements by the appellant did not amount to confessions of murder and there was nothing in the judgment to show that the judge relied on them as such.

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2. There was nothing unfair to the appellant in the way proceedings on the *voir dire* were conducted, and no miscarriage of justice arose from the fact that the judge did not give his reasons for ruling that the appellant's statements were admissible.

3. The inference by the trial Judge that the intention of the appellant was to pick a quarrel with the deceased, and that he approached the deceased with hostile G intent, was amply justified.

4. On the question of drunkenness in relation to intent the trial Judge's finding that, " He did what he did intentionally though no doubt to some extent influenced to rashness by drink," was fully justified and indicated that the judge had the correct test in mind.

5. The trial Judge's finding that any provocation the appellant received was H brought upon himself by his own deliberate conduct was amply justified by the evidence and there was no reason for holding that the crime should be reduced to manslaughter on account of provocation.

Cases referred to:

A *Hassan v. R.* [1959] E.A. 800.
Mancini v. Director of Public Prosecutions [1942] A.C. 1; [1941] 3 All E.R. 272.

Appeal from a conviction of murder by the High Court of the Western Pacific at Tarawa in the Gilbert and Ellice Islands Colony.

M. S. Sahu Khan for the appellant.

B *T. U. Tuivaga* and *Q. Bale* for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by MARSACK J.A.): [27th July, 1970]—

This is an appeal against conviction for murder by the High Court of the Western Pacific sitting at Tarawa in the Gilbert and Ellice Islands Colony entered on the 12th February, 1970.

C Appellant was charged with the murder at Nonouti Island on the 26th August, 1969, of one Taba Kaewaka. He pleaded not guilty and was not represented by counsel. He was convicted by the Chief Justice sitting alone, and was sentenced to life imprisonment.

The relevant facts may be stated very briefly as follows. Early in the evening of the 26th August, 1969, appellant started drinking sour toddy. According to his own statement he drank four shells of this in his house and then went to his toddy D tree where he drew off more toddy which he drank while up in the tree. He then came down from the tree and went to a building referred to as a maneaba where a dance was in progress. He was still holding his toddy knife in his right hand with a string attaching the knife to his wrist. He went straight across the floor to deceased who was dancing with a girl named Maria. Appellant tapped Taba on the arm with his left hand. Words passed between deceased and appellant, and deceased punched appellant on the face. Both men were then angry. Appellant E retaliated by stabbing deceased in the chest with his knife. Deceased collapsed and died within a few minutes.

Three grounds of appeal were set out in the notice of appeal drawn by appellant himself without legal assistance. Counsel for appellant filed in this Court seven additional grounds, and these latter formed the basis of his argument in this Court. We do not find it necessary to set these additional grounds out in detail. Two of them, under which Counsel submitted that the facts proved were consistent with F either accidental death or death resulting from excessive self-defence, we found to have no substance, and Crown Counsel was not called upon to reply to the submissions put forward in support of them. The grounds requiring consideration by this Court may be summarised as under:—

(1) that the learned trial Judge erred in ruling that the verbal statement made to the Police by appellant on 27th August, 1969, and the written statement made on 30th August, were admissible in evidence in that the statements were not made voluntarily and the Judges' Rules were not complied with;

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(2) that the evidence of Constable Itua Tebukei and Corporal Teikauea Teoti given on the *voir dire* was used against appellant, although not given in the trial proper;

(3) that the evidence did not establish intent on the part of appellant to kill or H do grievous bodily harm;

(4) that the learned trial Judge did not properly direct himself on the issue of drunkenness or give proper consideration thereto;

(5) that the verdict was unreasonable and cannot be supported having regard to the evidence. A

It will be convenient in this judgment to refer to these by number as the grounds of appeal.

In his argument under ground (1) Counsel for appellant submitted that the verbal statement made by appellant to Police Corporal Teikauea Teoti on the 27th August, 1969, should not have been admitted in evidence, as the Police Officer had not complied with the Judges' Rules in that he gave appellant no warning before putting to him the first question asked of him concerning the incident at the dance hall. The Corporal's evidence on this point is as follows:— B

> " I then looked for the person who had done this thing. I found him early the next morning. I found him in the same village beside a house near the beach. He was standing up. I knew whom I was looking for from information I had received. I arrested the accused at once. I did not know the accused before this. I saw him and went up to him and said " Have you killed a man ". He said " yes ". I then immediately arrested him. I did not caution him." C

In the truck on the way to the station appellant said to the Corporal, according to the Corporal's evidence:—

> " I did not intend to kill him but he was asking for it." D

Counsel contended that appellant's first admission to the Corporal that he had killed a man should not have been received in evidence; he did not ask that the statement made in the truck should be rejected, notwithstanding the fact that no caution had up till then been administered.

In our opinion the first admission by appellant that he had killed a man does not amount to a confession that he had committed murder. There was ample evidence E from independent witnesses that deceased had met his death as a result of action taken by appellant; and there is nothing in the judgment of the learned trial Judge to show that he relied on the statement made to the Corporal in reaching the conclusion that appellant had been guilty of murder. The whole verbal statement made to the Corporal merely amounts to this: " It is true that deceased died through my act, but I did not mean to do it.". In his evidence in the trial proper appellant said, with reference to this verbal statement:— F

> " I only remember crying and saying I did not mean to do what I did."

The fact that the learned trial Judge admitted the verbal statement did not in our view in any way affect the decision reached by the Court as to appellant's guilt.

With regard to the written statement made on the 30th August, this was shown to appellant at the trial when Police Officer Itua Tebukei was tendering it in G evidence. Appellant said:—

> " I have no objection to its being read. But I was still in a state of shock and it was not voluntary."

The learned trial Judge immediately proceeded with what is referred to in the Record as the *voir dire* investigation. When that had been concluded the learned H trial Judge ruled that the statement was admissible in evidence, and in our view there were ample grounds to support that ruling. At the hearing of the appeal Counsel for appellant contended that the trial Judge should have given reasons for

his decision; but in the circumstances we can see no necessity for him to have done so. In any event there was nothing in the evidence given on the *voir dire* to show that appellant had in fact still been in a state of shock four days after the incident had occurred.

Counsel contended that appellant was not given the opportunity of giving evidence himself at the " trial within a trial " in support of his assertion that his written statement was made when he was still in a state of shock and that it was not voluntary.

With regard to the general procedure to be followed on the *voir dire* we accept what is stated in *Hassan v. R.* [1959] E.A. 800 at p. 803:—

> " When the court follows the procedure of a ' trial within a trial ', the accused may elect to give evidence and may call witnesses limited to one particular issue of admissibility and, in such case, neither he nor his witnesses can be cross-examined on the general issue."

It appears from the record that the accused cross-examined the prosecution witnesses who gave evidence on the *voir dire*, and then stated:—

> " I have no witnesses to call on this matter but I want to put a further question to this witness."

The Record is silent as to whether appellant's right to give evidence, limited to the question of the admissibility of the statement, was fully explained to appellant; but it is, we think, a fair inference from the extract quoted that appellant was made aware of his rights in the matter.

In the result we can find nothing unfair to appellant in the proceedings by way of *voir dire ;* nor can we agree with Counsel's submission that injustice had been done to appellant by the fact that the learned trial Judge did not give any reasons for his ruling that the statements made by appellant to the Police were admissible.

A further point made by Counsel with regard to the *voir dire* is that the learned trial Judge has taken into account in the trial proper, evidence which was given only in the *voir dire.*

It is of course well established that evidence given in the course of what is referred to as a " trial within a trial " affects only the question of the admissibility of a statement to which exception had been taken, and in no sense forms part of the testimony against the accused person in respect of the offence with which he stands charged. If, then, evidence which is given at a " trial within a trial " were relied on by the Court of proof of the guilt of the accused person, an appellate tribunal would have to rule that such evidence be completely disregarded; but in the present case we are unable to find that any evidence given on the *voir dire* was accepted by the learned trial Judge as forming part of the proof of appellant's guilt.

Ground (2) was not argued separately by Counsel for appellant, but was dealt with in his argument under ground (1). As we have already given consideration to all that Counsel submitted in respect of ground (1), we do not consider it necessary to make further reference to ground (2).

In his argument on ground (3) Counsel submitted that a reasonable inference from the evidence would be that appellant, after coming down from his toddy tree, was walking along, carrying his knife, with no definite object in mind; that, hearing the music coming from the maneaba, he decided to go there to join in the dancing; went across to deceased for the purpose of dancing with the girl who was then deceased's partner; was, after some angry words had passed, struck violently on

the face by deceased, and immediately retaliated with his right hand, not realising that his knife was still in it. If this were accepted as a reasonable outline of the facts disclosed by the evidence, in Counsel's submission no necessary inference could be drawn that the use of the knife fully established an intent to kill or do grievous bodily harm. Counsel argued that the evidence of intent is purely circumstantial, while there is direct sworn evidence from appellant that he had no intention at all of doing what he did.

Evidence of intent is very often purely circumstantial, and in those cases it is possible to conclude what a person had in mind only by his actions and the surrounding circumstances. Leaving the question of drunkenness out of account for the moment, we think that the learned trial Judge was amply justified in drawing the inference that the intention of appellant was to pick a quarrel with deceased, and that when he approached deceased on the dance floor he did so with hostile intent. A man whose intentions are peaceable does not enter a dance hall with a lethal weapon like a toddy knife tied to his wrist; and the use of that knife in the manner disclosed by the evidence leads inevitably to the inference that appellant intended to inflict injuries which could properly be described as grievous bodily harm. In our view the whole of the evidence establishes this intent beyond reasonable doubt.

The question of proof of intent may of course depend upon the determination of the issue of drunkenness which was strongly urged by the defence under ground (4). There is no ground, in our opinion, for the submission that the learned trial Judge did not give proper consideration to the issue of drunkenness. In the course of his judgment the Judge says:—

> " Was he so drunk as not to know what he was doing ? I find that he was not. He was quite capable of climbing up and returning down to his toddy tree without falling off. That he admits. His state of drunkenness is variously described by the witnesses. Iaokiri says he was " slightly " drunk. The two girls in their evidence are more outspoken and use the word " drunk " unqualified. Certain it is that he was quite capable of walking on and off the maneaba floor without assistance and of seeking hiding in the village which he admits also. According to his own evidence he remembers where he went and substantially what he did."

Although Mr. Sahu Khan contends that the learned trial Judge relies for his finding to some extent on the evidence given on the *voir dire*, we cannot agree that this is so. It is perfectly clear that he refers mainly to the cautioned statement given to the Police by appellant that was held to be admissible, and to his evidence given at the trial.

If an accused person, as a result of indulgence in alcoholic liquor, becomes so bad-tempered that he is thereby impelled to commit an assault, he is not excused by the fact that in a completely sober state he would not have so acted. There are specific provisions with regard to the defence of drunkenness in the Penal Code (No. 7 of 1965) for the Gilbert and Ellice Islands Colony. Section 13 (1) of the Penal Code is in these terms:—

> " Save as provided in this section intoxication shall not constitute a defence to any criminal charge."

Counsel relied on subsection (4) of section 13 which reads:—

> " Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

A Counsel for appellant submitted that the learned trial Judge had not applied the correct test when he said in his judgment:—

> " Was he so drunk as not to know what he was doing ? I find that he was not."

In Counsel's submission the test should have been, not whether appellant knew what he was doing, but whether he was capable of forming the specific intention B required to justify a conviction for murder, an intention to kill or inflict grievous bodily harm. If, on account of intoxication, appellant was incapable of forming such an intention, then subsection (4) would apply and the offence would necessarily be reduced from murder to manslaughter.

We are unable to find that the learned trial Judge misdirected himself as to the law on this point. The question whether the degree of intoxication was such that C it impaired the faculties to the extent of preventing the formation of the specific intention needed for a conviction of murder, is one of pure fact. The learned trial Judge traversed the evidence as to intoxication, with particular reference to the actions of appellant in that regard. He then made a finding of fact expressed in these terms:—

> " He did what he did intentionally although no doubt to some extent influenced to rashness by drink."

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This finding of fact in our view was amply justified on the evidence and indicated that the learned Judge had the correct test in his mind. Accordingly the ground of appeal based on the alleged drunkenness of appellant at the material time must fail.

In his argument on the 5th ground of appeal Counsel for appellant referred particularly to the question of provocation. He emphasized the admitted fact E that the first blow was struck by deceased, and that it was a heavy blow to the face which would almost inevitably involve immediate retaliation by the person struck. In Counsel's submission appellant reacted immediately to the undoubted provocation given, and did so without consciously reflecting that he held a knife in his hand. He argued that the blow in the face would cause any reasonable man to retaliate with a blow; and that is all that appellant did. It was, urged Counsel, an unfortunate accident that the hand with which appellant retaliated held a knife, and that there was no deliberate intention on the part of appellant to use a lethal F weapon in reply to a blow with the fist.

In this connection we do not find it necessary to cite the judgments to which we were referred on the subject of the relationship between what are referred to in *Mancini v. Director of Public Prosecutions* [1942] A.C. 1 as the provocation and the mode of resentment. In the present case the learned trial Judge found, on evidence which in our view fully justified the finding, that the intervention at the dance by G appellant was not a friendly one but was obviously hostile in intent; that any provocation which he received from the deceased was brought upon himself by his own deliberate conduct. The Judge then proceeded to examine the question whether, notwithstanding this fact, the appellant had received such provocation as might lead a reasonable man to resort to the use of a knife in retaliation. He answered that question in the negative.

H It is in our opinion important to consider, with reference to provocation, the finding of fact in the Court below that the accused went armed on to the maneaba floor with the intention of picking a quarrel with the deceased, and that the incident was intentionally brought about by himself.

In all the circumstances we are unable to find any reasons for holding that the crime committed by appellant should be reduced from murder to manslaughter because of provocation. We have perused all the judgments to which we have been referred by counsel on this aspect of the case, but can find nothing which would compel us to come to a different conclusion. A

In the result we can find no merit in any of the grounds of appeal submitted to this Court, and the appeal is therefore dismissed. B

Appeal dismissed.