MUNSAMI AND ANOTHER

v.

REGINAM

[COURT OF APPEAL, 1963 (Finlay V.P.; Marsack J.A.; Hammett J.A.) 9th July, 22nd August]

Criminal Jurisdiction

Criminal law—provocation—defence not raised by accused—duty of court to consider if supportable on the evidence.

Even though no defence of provocation is put forward by the accused in a capital case, the court of appeal will scrutinize the evidence to ascertain whether any aspect thereof should have been left to the assessors as a possible basis for such a defence. Nevertheless it is not the duty of the judge to invite the assessors to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence.

Cases referred to:

Lee Chun-Chuen v. Reg. [1963] 1 All E.R. 73; [1963] A.C. 220: *Mancini v. D.P.P.* [1941] 3 All E. R. 272; [1942] A.C. 1: *R. v. Letenock* (1917) 12 Cr. App. R. 221: *R. v. Brown* 168 E.R. 177: *R. v. Roberts* [1942] 1 All E.R. 187; 28 Cr. App. R. 102: *Holmes v. D.P.P.* [1946] A.C. 588; 31 Cr. App. R. 123.

Appeal against conviction.

Falvey and *Lloyd* for the appellants.

Palmer for the Crown.

The facts appear from the judgment.

Judgment of the court [22nd August, 1963]—

These are appeals against conviction for murder on the 25th of March, 1963, and at the request of the appellants they were heard together. The appellants were tried before the Chief Justice and five assessors. All five assessors gave their opinion that each of the accused was guilty of murder. The Chief Justice gave judgment in accordance with this unanimous opinion, convicted both accused of murder and pronounced sentence of death.

The facts leading up to the killing of deceased are briefly these.

On the 28th of October, 1962, Diwali Day, a football tournament was held at Nairuku. The first appellant Munsami was captain of the Chinakoti Sangam " A " team and second appellant Narayan was acting as linesman. During the morning trouble arose between deceased Tej Ram, who was a spectator, and second appellant which ended in an attempt by deceased to assault second appellant. Further trouble was avoided by the intervention of the police.

There that incident as an incident closed. This was at approximately 11.15 a.m. There were games again in the afternoon. When they were concluded some time after 3 p.m. the Chinakoti players began their return home. As a result of what he had just previously heard of a conversation between the two appellants in which the first appellant said to the second appellant " Hit him to-day and don't let him get away (or off) " and the second appellant replied " That's all right. Let's go and hit him ", one

Kishor Chand warned the deceased of the possibility of trouble from the appellants. Deceased, who had been drinking, ignored the warning, and sought and secured contact with the party accompanying the appellants. This was at about 3.30 p.m. A struggle ensued during the course of which the first appellant stabbed the deceased in the chest with a knife and the second appellant stabbed him also with a knife in the back. Deceased fell to the ground and shortly afterwards was found to be dead.

A number of other people—some of them little more than spectators and one of them a would-be peacemaker—became involved in the affray; in fact three people who approached the Chinakoti party from the direction of the sports ground were seriously injured by either stab wounds or blows from stones—one in fact (Moti Chand) by both.

If the evidence of Kishor Chand is accepted, as it was by the Chief Justice and probably also by the assessors, the assault upon the deceased was intended by the appellants and was the result of a preconcerted design. In that respect it might be pertinent to notice that not one of the Chinakoti party, so far as the evidence shows, was injured; that is, if the minor injuries suffered by the appellants are excluded.

The medical evidence showed that the immediate cause of the death of the deceased Tej Ram was a stab wound which penetrated the heart. He had suffered four stab wounds in all, some of them serious and dangerous to life. The deceased also had a fractured skull and a broken left arm.

Both appellants have consistently denied striking the deceased at all whether with knife, stone or otherwise; and each in verbal conversations after the affray complained—if that word can with complete appropriateness be employed—of having been struck by stones thrown by the party which accompanied the deceased. They did in fact receive slight injuries which the Assistant Medical Officer who examined them described as superficial. Those injuries could have been caused by a stone except that the second appellant had a swelling on his right arm probably caused by a blow from a stick. That injury seems to be accounted for by a blow struck by Moti Chand who, seeing the deceased being stabbed, ran to the scene picking up a piece of sugar cane on his way. With that stick he struck the second appellant on the arm. Moti Chand was himself struck by a stone on the head and lost consciousness.

There was an abundance of evidence that the stab wounds suffered by the deceased were inflicted by the two appellants. This was not challenged upon the hearing of the appeal.

On the contrary counsel for the appellants expressed themselves as primarily seeking the entry of a verdict of manslaughter by this Court in lieu of the verdicts of murder, which, of course, postulates an acceptance of the fact that the stab wounds were inflicted by the appellants.

Four grounds of appeal were set out in the notices of appeal:

(1) Misdirection on the onus of proof.

(2) Misdirection on the issue of provocation.

(3) Failure to put to the assessors the whole of the evidence as to provocation.

(4) That the verdict in each case is unreasonable and cannot be supported having regard to the evidence.

Argument upon the hearing of the appeal was confined, or almost exclusively confined, to the second and third grounds.

The appellants contended that the trial Judge was in error in directing the assessors that the only evidence of provocation was that which related to the challenge issued by the deceased to the appellants when on their way home after the afternoon game to fight him separately. That, indeed, was the only evidence of provocation the Judge left to the assessors.

It was contended that this was a misdirection in that it completely ignored two other sources of provocation which could properly be considered, either separately or in conjunction with each other and with the challenge, as evidence upon which a finding of provocation could be based.

The incidents referred to were:

(1) The attempted assault on the second appellant during the morning game.

(2) The asserted attack on the appellants on their way from the sports ground after the afternoon game.

The first incident may well have relation to the appeal of the second appellant alone, for there is no suggestion in the evidence, even that of the first appellant himself, that he had any knowledge of the incident of the morning.

However, no reference was made to that feature on the hearing of the appeal and we propose to disregard it in consequence and to deal with both appeals upon the same footing.

At the trial neither appellant advanced any plea of provocation. Their defence was that they did not strike the deceased in any way. This is a position they maintained throughout the trial and it was, so far as they were concerned, exclusively upon that footing, despite the fact they both gave evidence, that the cases against them went for adjudication by the assessors and the Chief Justice.

Counsel for appellants, however, submitted to us that notwithstanding the evidence of the appellants that they committed no assault upon the deceased and did not advance any plea of provocation, it was obligatory upon the trial Judge to appreciate, and to give proper legal effect to the appreciation, that upon a consideration of the whole of the evidence from the point of view most favourable to the appellants there was at least a possibility that the assessors might have held that the appellants were provoked. In this relation we were referred to the recent Statement of Reasons given by Their Lordships of the Privy Council in *Lee Chun-Chuen v. Reginam* [1963] 1 All E.R. 73 at p. 79 where Lord Devlin is reported as saying:

> " Their Lordships agree that the failure by the accused to testify to loss of self-control is not fatal to his case."

The case with which Their Lordships were there concerned had reference to a trial in which the defence was founded on accident or self-defence, and in respect of those specific defences it was pointed out that an admission of loss of self-control would be bound to weaken if not to destroy the primary defences. The law it was said did not in those circumstances place the accused in a fatal dilemma.

Neither of those particular defences is involved here for, as has been said, the defence was in each case a categorical denial that any blows had been struck by either of the appellants. There seems, however, no reason to think that what was said in *Lee Chun-Chuen* is limited to cases involving the specific defences with which Their Lordships were there concerned. We think that case enunciates a principle of a more general character and

application and that it extends, at least where any dilemma is involved, to all cases in which the tribunal responsible for the findings of fact might on the whole of the evidence reasonably find a state of facts inconsistent with or even opposed to the specific defences raised by the person accused. The purpose is no doubt to ensure that justice according to law is in fact done irrespective of any choice of defences by the person accused and irrespective of his personal credibility or lack of it.

The present case comes within the ambit of that principle for there was a dilemma facing the appellants in that, in face of a denial of the infliction of any injury, a defence postulating the infliction by them of those injuries must almost inevitably weaken if not destroy the primary and sole defence raised.

In short authorship of the injuries was denied and a plea of provocation, involving as it does an admission of authorship, would be inconsistent with and perhaps dangerously destructive to the defence advanced.

We conclude therefore that as an appellate tribunal we are concerned to determine whether the evidence as a whole disclosed such provocation as the assessors acting reasonably might have thought sufficient to warrant a finding of manslaughter instead of the findings of murder upon which they were unanimously agreed.

If it does, then the summing-up of the learned Chief Justice was unquestionably erroneous for he in effect, as we have said, excluded from consideration by the assessors on the subject of provocation everything except the challenge to individual fistic combat which immediately preceded the killing. What is involved is in consequence a review of the whole of the evidence in so far as it has any application to provocation and a determination whether such of the evidence as is relevant in that relation could by reasonable men be held to amount to provocation within the legal meaning of that term.

The attempted assault by the deceased upon the second appellant during the morning was too long separated in time from the killing to be of itself provocation.

During the period of about four hours immediately following, including the interval for lunch, although all parties were at the sports ground, there was no suggestion of any resumption of the incident. Besides, apart from what seems to have been the momentary and fugitive exhibition of hostility, nothing that occurred in the morning would warrant a finding of provocation in respect of an assault so murderous as that committed by the appellants upon the deceased.

Taken by itself as an isolated incident therefore, we can find in it none of the elements which in law constitute provocation. Any cumulative effect it may have had will call for consideration later.

Meanwhile the involvement of " stoning " in the later phases of the events calls for consideration. The evidence concerning it can perhaps best be presented by examining what every witness who made any reference to stoning said concerning it.

Kishor Chand says that when the deceased issued his verbal challenge to individual fight both the appellants picked up stones, and that as he ran to warn the deceased that appellants had knives and stones, the stones started to fly from the direction of the group containing the two appellants. Speaking as it were in summary he says that, apart from Moti Chand's piece of sugar cane, he saw no weapons on any but the Chinakoti (that is the appellants') group and that he saw stones thrown by no one but by members of that group.

In cross-examination he says that, after he put deceased "on the track"—that is on a route away from the appellants — he held the second appellant by the hand after the latter had picked up a stone and that when " these people "—that is the Chinakoti group or the appellants, it is not clear which—picked up stones he ran to get deceased away. He makes it clear that at this stage deceased and the crowd were approaching each other and that as they did " they ", which means either the appellants or their group or both, started throwing stones.

All this must be read subject to his previous evidence that he saw no one except the Chinakoti group throw stones.

Vijendra Pratap says that stones were thrown by the crowd towards the deceased and that it was not the deceased's party which threw the stones.

Moti Chand says the stones were thrown by the Chinakoti group and that neither he nor any of his party threw stones. Later he denies that his party attacked the Chinakoti party with stones.

Jawala Prasad says he did not throw any stone and saw none thrown.

Kushi Ram is specific in his assertion that any stones thrown were thrown " from the culvert side ", that is, by the Chinakoti group. Later he again denies that his group threw any stones at Chinakoti.

Ram Dayal says stones were thrown, but they were thrown towards his group. He meant of course to convey that the Chinakoti group threw them. In cross-examination he says " we did not attack the Chinakoti crowd with stones ".

Chet Ram says that a stone was thrown at him by one Naressa, a member of the " Chinakoti crowd ". In cross-examination he denies any attack on Chinakoti with stones.

Filimone Raure made some reference to stone throwing but to the Judge, although in another relation, he admitted prevarication and the assessors were invited to disregard his evidence. We do not advert to his evidence in consequence.

All the foregoing witnesses gave evidence at first hand. They were present and testified to what they saw. The remaining witnesses speak (except of course the appellants) of what one or other of the appellants told them some time after the killing and when away from the scene.

Thus Eroni Rokovesa says the first appellant told a solicitor in his presence that after the match the deceased was waiting for them, that they started to fight and the other party threw stones at them. The story is repeated in cross-examination when an admission was made by the first appellant that he had used a knife and that four of his opponents were wounded.

Rislam Ali who was at the scene says stones were being thrown and sticks whirled but he did not know who threw the stones.

Junispal gave evidence of a conversation with the appellants on the day of the occurrence but some time after the material incidents had come to an end. To him the first appellant said that the deceased had picked up a stone and started to hit them, that they had retaliated with stones but hearing a cry " Hit the Madrassis " had run away. The second appellant, speaking in the plural and so presumably for both, denied that they had stabbed the deceased. There is a later reference to this conversation but it adds no information of moment.

As against these references to stone-throwing, there is the reference only to a punch in the admission of the second appellant to the nurse Mehrul Nisha. This is a striking inconsistency.

At this point it may be said that there was evidence that at some point in the final affray during which the deceased was killed some stones were thrown, but that all the evidence that was positive in character from those who were present was that the stone throwing was done, and done exclusively, by the associates of the appellants. The only evidence to the contrary was evidence of what the appellants themselves said some little time after the affray and when they were away from the scene of it.

The appellants in their evidence adhere to what they had previously said. But both did so imprecisely and as if it were of no significance. The first appellant speaks of it merely as part of his recitation of events. He speaks of reaching the scene, going ahead and then, as if he had continued on his course, adds " after I had gone a short distance a stone hit me on my right calf. They yelled out ' Maro Maro ' and I galloped my horse ". He makes no other reference to stones.

The second appellant in his evidence does much the same. He speaks of seeing a crowd ahead apparently fighting; of hurrying towards them to pacify them. He then continues " It took some time to reach the crowd. I was 30 feet from crowd when I was hit by a stone. I did not see what individual members of crowd were doing—the crowd was thick—there were 25 to 30 people there. I did not see who threw the stone. I didn't see size of stone. It hit me on the knee ".

In the atmosphere of a trial this failure to attach significance to what the submission of counsel for the appellants suggest was a vital feature of the case must in any context have had its effect on the minds of the assessors. But that apart, the evidence of any hostile action in relation to stone-throwing by any one except by members of the Chinakoti party to which the appellants were attached is slight indeed. It consists of no more than what the appellants said conversationally to others some time after the crucial incident, plus what they said in their passing reference to stone-throwing in the course of their evidence. From it all it obviously was impossible for the Chief Justice to construct any narrative of provocation. It exhibited in crucial respects imprecision and uncertainties and some inconsistencies when measured against the test of what is necessary to establish a valid defence of provocation. Reference will have to be made to that later. In the meantime, it is pertinent to observe that such evidence of hostile stone-throwing as there was, when associated with the untruth of their denial of having stabbed the deceased and opposed by the direct and positive evidence of the witnesses for the Crown who were present at the incident, is unlikely to have influenced the mind of any reasonable assessor into any state of doubt as to where the truth lay. The creation of any such doubt would not be aided by the fact that there was unshaken testimony that the assault upon the deceased was pre-arranged by the appellants and therefore the result of their design; and that so far as the evidence shows all the injuries, many of them serious, suffered in the affray—except the minor injuries suffered by the appellants—were suffered by the deceased and those associated with him. Any reasonable assessor might well conclude that, like the arm injury suffered by the second appellant, the superficial injuries the appellants suffered were incurred in the course of resistance to a murderous attack and that it was the appellants themselves who made that attack and so were the persons guilty of any provocation there was. Any conclusion to the contrary would seem unreasonable.

We are disposed to conclude therefore that there was no evidence of a provocative incident fit to be submitted to the consideration of the assessors or requiring consideration by the Chief Justice.

Be this as it may, other phases of a possible finding of provocation must also be made the subject of determination.

Provocation in the legal context requires that there must be evidence—

(*a*) that the provocation was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control;

(*b*) that the accused was by such provocation deprived of self-control;

(*c*) that accused reacted to the provocation on the sudden and before there was time for his passion to cool.

Then too what Lord Simon in *R. v. Holmes* [1946] A.C. 588 described as " the degree and method and continuance of (the) violence " which produced the death must be such as a reasonable person could be driven to by the provocation. In other words, there must be a reasonable proportion between the provocation and the method of retaliation.

Assuming (as we do not think a reasonable assessor would think) that as an initial proceeding the people with the deceased threw stones at the appellants and their party, there might conceivably be a question of fact answerable by the assessors under (*a*). But there is nothing in the evidence suggesting, and no evidence from which it could be in any way deduced, that the appellants or either of them ever lost their self-control. Taken overall the circumstances would not seem such as to invoke any loss of self-possession. On this account alone one essential condition to the establishment of a plea of provocation was absent.

Then too the evidence that the stabbings followed—as they must to sustain the plea—the commencement of the stoning is imprecise and vague. It may even be unsatisfactory. We do not however advert to that topic at any length because there is such a gross disproportion between the alleged provocation and the degree and method of violence which produced the death that any finding of provocation would be unreasonable and unjustified. This comment applies alike whether the provocation was the alleged stone-throwing alone, or a combination of the incidents of the morning, the challenge to fight and the stone-throwing.

As to that combination, this must be said: as a provocative act the incidents of the morning were exhausted. They could not be regarded as in themselves composite elements of any subsequent acts of provocation. But their occurrence and their nature could we think be considered as an incident in the relationship of the persons concerned and they could in consequence be considered as a relevant feature in any subsequent happening and so brought into account in any determination as to the occurrence, character and nature or otherwise generally of any subsequent events.

The association between the alleged stone-throwing and the challenge to fight issued by the deceased seems to have been satisfactorily dealt with in the circumstances by the Chief Justice in his judgment.

As is said by Lord Devlin in *Lee Chun-Chuen v. Reginam* (*supra*) quoting from *Mancini v. Director of Public Prosecutions* [1941] 3 All E.R. at p. 279:

> " . . . it is not the duty of the judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is upon the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it."

There was no evidence that any of the injuries sustained by appellants were inflicted by deceased, or by members of deceased's party, that is, apart from the swelling on the arm of the second appellant which is fully accounted for. Counsel for appellants invited us on the authority of Letenock (1917) 12 Cr. App. R. 221 to hold that even if deceased did not throw the stones, the mistaken belief that he did would be provocation provoking retaliation; that a mistaken belief in provocation is equivalent to provocation itself.

This in view of what we have said lacks point. There is no evidence that deceased threw any stone. It is unlikely that he did; it is likely that any stones thrown at the appellants were thrown to deter them from their deadly assault on the deceased. There is no evidence, and no basis for a reasonable inference from the evidence, that appellants were provoked by the minor injuries which they received. Their own evidence is that they made off immediately after being struck with a stone. That may well be correct.

Counsel also referred us to the old and somewhat ambiguous case of *R. v. Brown* 168 E.R. 177. But we can find no parallel between that case and the present.

It is further contended for the appellants that by his summing-up on the subject of provocation the learned trial Judge removed from the mind of the assessors things which they should have considered, and that in particular he should have explained to the assessors that manslaughter was a possible verdict. In this connection he referred to *R. v. Roberts* [1942] 1 All E.R. 187 at 193 per Humphreys, J.:

> " The prisoner was entitled as a matter of law to have the jury properly directed as to what verdicts were open to them to return. In our view they were misdirected because manslaughter was a verdict open to them as a matter of law and they were prevented from considering their verdict or returning it."

For these reasons the Court of Criminal Appeal quashed the verdict of murder and substituted a conviction of manslaughter.

We have before us only the notes upon which the trial Judge based his summing-up and not a verbatim record of it. It is clear, however, that he explained to the assessors the requirements of provocation necessary to reduce a verdict from murder to manslaughter. As to that his note reads:

> " Was this provocation within definition? Onus on prosecution to disprove and that beyond reasonable doubt. If doubt on all evidence that there was, find manslaughter . . . If satisfied as to killing and intent but reasonable doubt as to provocation—manslaughter."

His judgment is an accurate statement of the law of provocation and it is impossible to imagine that his judgment and his summing-up varied on such an issue.

We conclude that the assessors had the issue of manslaughter put to them and they had the onus of proof, when the defence of provocation is raised, carefully and accurately explained to them.

In the result we can find no foundation for the grounds of appeal based on misdirection to the assessors on the issue of provocation or failure to put to the assessors, and to take into consideration himself, all the evidence from which it might be possible to infer provocation.

The other two grounds of appeal relating to directions on the onus of proof and to the usual general ground of the unreasonableness of the verdict were not argued before us and in any event, in our opinion, have no substance.

For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellants: *Cromptons.*

Solicitor-General for the Crown.