TOLOVA'A (AGAFILI LA'AU) v POLICE
(NO. 2)

Court of Appeal Apia
10 October 1974
Henry P, Beattie and Scully JJ

CRIMINAL LAW - Murder - Provocation - Whether issue of provocation should have been left to assessors - Plea of automatism rejected - Court proceeding on basis that appellant fully conscious of his acts - Question of law whether there was any evidence of provocation which might have induced a reasonable doubt in the minds of the assessors as to whether or not the killing was provoked - Necessary that such evidence suggest a provocative act or incident likely to cause a reasonable man of appellant's racial and cultural society to be suddenly but temporarily deprived of self-control and retaliate in the manner which led to the killing - Such evidence must also suggest that appellant was in fact deprived of his self-control at the time of the killing and that the period of time between the alleged provocation and the killing or the manner of the killing was not inconsistent with loss of self-control - Evidence that appellant ran to his house after all of the provocative acts alleged had ceased, procured a rifle, waited at a vantage point for his unsuspecting victim to pass on his way to his own home, and fired on him when he was about thirty-five yards past appellant's house - Time and manner of such retaliation negativing provocation in law - Trial Judge under no duty to leave the issue to assessors as there was no evidence fit for their consideration:

Holmes v DPP [1946] AC 588, Kwaku Mensah v The King [1946] AC 83, Mancini v DPP [1942] AC 1, Lee Chun-Chuen v R [1963] AC 220, Parker v R [1964] AC 1369 applied.

- (Appeal) - Appeal against conviction of murder on ground of failure to leave issue of provocation to assessors - Difference in practical approach of trial judge and appellate court - Trial judge "likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit.": vide Lord Devlin in Lee Chun-Chuen v R [1963] AC 220 at 230.

APPEAL against conviction of murder.
Appeal dismissed and conviction affirmed.

Ryan (New Zealand Bar) for appellant.
Slade for respondent.

Cur adv vult

The judgment of the Court was delivered by HENRY P. The appellant was convicted of the murder of Tuato Liko at Sala'ilua on the 19th day of July, 1973 and sentenced to death. The five assessors unanimously returned a verdict of guilty. The Chief Justice concurred. At the trial a plea of automatism was rejected. The question of provocation was not put to the assessors. The present appeal against conviction is based on the sole ground that there may have been a miscarriage of justice in that provocation was not put to the assessors. This ground is available to

the appellant although it was conceded at the trial after the learned Chief Justice had expressed an opinion that the means of retaliation resorted to by the appellant were so unreasonable as to rule out provocation.

The appellant and the deceased were fellow school teachers. With three others they played poker at the house of Faiumu Pale during the afternoon. Whisky was consumed by the appellant and the deceased and some of the others. Disputes arose between the appellant and the deceased and assaults took place. The game broke up. The deceased set out for his home, which was some distance away. Shortly afterwards, the appellant left for his home, which was not so far away, but was in the same direction of travel. On the way, near the house of Matapula Atoaga, they confronted each other, and further assaults took place. There were others present. The deceased left first in the company of others. His route of travel took him past the home of the appellant, which was some 110 yards from the scene of the last assaults. The appellant ran home, and just after deceased had walked past the appellant's home, the appellant fired a .22 rifle from a window and shot the deceased in the left shoulder. The bullet passed through the left lung and into the heart of deceased, who died some time later from a massive haemorrhage.

The question which this Court has to determine is whether, on a view of all the evidence most favourable to the appellant, there is sufficient evidence for reasonable assessors to form the view that a reasonable person could be so provoked that he could be driven, through transport of passion and loss of self-control, to the degree and method of continuance of violence, which produced the death: Holmes v. DPP [1946] A.C. 588 per Viscount Simon at p. 597:-

> If, on the other hand, the case is one in which the view might fairly be taken that (a) a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the deceased was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict.

In Parker v. R. [1964] A.C. 1369 it was said at p. 1392:-

> If the evidence given in a case contains some reasonable evidence of provocation, i.e., some evidence fit for the consideration of the jury, then the issue of provocation must be left to the jury even though the issue has not been raised by the defence . . . . Whether in any case there is evidence fit for consideration by a jury on a particular matter is a question of law. A judge may, therefore, in some cases properly withdraw any question of provocation from the jury . . . .

Lord Devlin in Lee Chun-Chuen v. R. [1963] A.C. 220, in delivering the reasons of the Judicial Committee of the Privy Council said at p. 229:-

> If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not, of course, for the defence to make out a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt.

And at p. 230 his Lordship said:-

> But their Lordships must observe that there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in

favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit.

The appellant gave evidence. There was a conflict between him and other witnesses on some of the details of the assaults. However, the appellant's version insofar as it goes must be accepted by this Court as it is the most favourable for him. As will later appear, the appellant claimed he had no knowledge of events after a certain point of time and for this period the defence of automatism was put forward. Since such plea was rejected, this Court must proceed, as, indeed, would the assessors in that event, on the basis that the appellant was fully conscious of his actions: Mancini v. DPP [1941] 3 All E.R. p. 272. For the narrative of events after this stage reference must be made to the evidence of other witnesses.

The appellant first dealt with the incidents at Faiumu Pale's house where the game of poker took place. He said:-

Q. Coming to the argument with Tuato how did that start?
A. Then we had this game and in that game we had high card as well as spades, highest spades. I won the high card. Tuato won the spades, but Tuato scooped up the whole pool. And in raking in the pot by Tuato I stopped him and told him that I had won the high card but Tuato did not listen. Tuato grabbed the money from me and he was very angry. What I knew was that Tuato was angry with me because he has lost a lot of money as well as the whisky, most of it I had consumed; that was the reason.
Q. What happened over this quarrel?
A. We continued arguing, Tuato and myself, and then we sort of started to fight.
Q. What was said before you started to fight?
A. It was after I had seated myself that this argument again started and Tuato stood up and said, "You will be the second person I will kill".
Q. What do you understand by Tuato's threat?
A. Now to my understanding Tuato had related an incident to me some time before.
Q. What was that incident?
A. That at Malua he, Tuato, had shot another youth. When Tuato had uttered these words whilst standing I stood up also, and then we fought.
Q. Did you say anything to Tuato after Tuato mentioned you will be the second person he will kill?
A. I cannot recall whether I said anything at all to Tuato. Perhaps even while we were fighting I may have said something, but I can't recall.
Q. Did you receive anything from this fight?
A. That is so.
Q. How did you get the injury and what was it?
A. I was drunk, and it was not long after we had fought when Tuato punched me and I fell. I remember that fall, that I fell down cross-legged on the mat in a sitting position. I then stood up, but before I was properly upright Tuato struck me with a blow with a stone.
Q. Did that blow strike you on anywhere of your body?
A. That is so. With that blow I got struck on the right side near the eye, and when that blow landed I saw sparks. After that blow Tuato left. I sat down with Afoa. I felt great pain with this blow, but Afoa tried to cool me down with words, as well as using chiefly language to me. I was in grievous pain, but even so I reached the stage where I was also in the forgiving spirit towards Tuato.

The appellant next dealt with the incidents outside Matapula's house. He said:-

A. I told Afoa, very well, nothing more would have happened; I am going home. So I left the schoolhouse and walked on

the slope towards our home. As I was walking homewards I noticed that Tuato had not gone home, but was standing near a concrete path of the school.

Q. Why did you not dodge your way, or go off away from him?

A. Why I did not take another way home was that I noticed that the features of Tuato he seemed to be smiled and happy to see me. To me was the thought that perhaps he was waiting for me, and we would have a reconciliation before we went home, but on arrival to where Tuato was standing I never expected anything else to happen so all of a sudden Tuato punched me. And that blow of Tuato's when it hit me again I felt that sensation of stars, seeing stars, and then I fell down, and with that blow and that feeling I just went obliviate, or lost conscious of what was going on. As I was losing consciousness I heard Tuato saying that you will be killed now. So I lost conscious of everything until the Friday when I woke up at the hospital. That Friday morning when I woke up this was a different place where I was lying. I tried to sit up, but was unable to do so. I looked around. There were many other patients, but I was not acquainted with any of them.

We turn now to the evidence of events from other witnesses. We have the evidence of Faimasasa who says:-

> When I got there Matapula Atoaga was holding on to Agafili La'au, and soon after I arrived there I went towards Agafili, but Agafili told me to get away. So I went away and walked towards Tuato, who was on his way along the school road towards the main road. So I caught up with Tuato and walked together with him along the school road. Then we left that road and walked along in front of Leulua'i Pu'e's house. When we reached the front of Leulua'i Pu'e's house I noticed that Agafili had been released from a hold. Then I saw Agafili La'au took hold of stones. This was near Leulua'i Pu'e's house at the western side. So I left Tuato and walked back towards Agafili La'au and before I said anything to Agafili La'au, Agafili La'au told me to get away in case he would punch my mouth with a stone, so I went back to Tuato and on reaching Tuato Fa'atagā was there. So I walked together with Fa'atagā and Tuato to the front of the Methodist Church. We were heading towards the main road, and we reached the front of Mele's house. After we had got to the front of Mele's house we almost reached the western side of Agafili La'au's house; so I saw Agafili La'au running from the school road passing the front of the Methodist Church and heading towards his house. When Agafili reached his house he opened the door that is to the western side of his house and entered the house. We kept on walking and I did not know what Agafili was doing, what time he took hold of the gun.

Mrs Fa'atagā, who witnessed the last episode, said she spoke to the appellant who did not respond. She said he had blood running down one ear. When asked about the condition of the appellant she said, "Only anger I noticed". After this the appellant was seen running to his home, which he entered by a door on the western side. He later stationed himself at a window on the southwestern side, and after the deceased had walked past the front of the house, fired the fatal shot at a distance of about thirty-five yards. Mrs Faima Mapu said she saw the appellant with a gun standing inside the house. She walked towards him and spoke to him asking him not to do this thing, but got no reply. She could not say if the appellant heard her. She was some six to eight feet away. The shot was fired shortly after she called out to the people on the road. It is clear now that the appellant used a .22 rifle, which belonged to his brother, who said the rifle was usually left in one of the rooms and was not locked away. The

brother was away at the time. He said he had three live bullets which were locked in his trunk. All three live rounds were later found intact. A further live round was also later found. No explanation was forthcoming to account for the bullet which the appellant fired. He admitted that the rifle was usually unloaded. When loaded, the mechanism of the rifle automatically applied a safety catch. If the appellant loaded the rifle he would have to release the safety catch before firing. If the rifle was already loaded the appellant would either have to release the safety catch or see that it was released ready for firing.

It is clear that the deceased left the scene of the second assault with the intention of continuing his walk home. He was accompanied by Mrs Fa'atagā and Mrs Faimasasa, both of whom gave evidence. Matapula was also present at some stage. The deceased walked past the front of the Methodist Church onto the main road and along that road past the appellant's home. The deceased had reached a point near a powerline pole when he was shot. He would at this stage have the appellant on his left but somewhat to his rear. The target, which the deceased then presented to the appellant was a victim some thirty-five yards off, walking away from him.

Constable Fa'aloto was called to the scene shortly after 5.30 p.m. All the doors and windows of the house were locked. Through a window the Constable saw the appellant with a machette in his hand. The Constable was in full uniform. The appellant opened the door and then slammed it shut. The appellant then went to the window where the Constable was, opened it and threatened the Constable, who had to jump back to safety. The Constable tried to reason with the appellant. His evidence reads:-

> And while he was brandishing this machette he said to me if you want to live remain outside, but if you want to die enter the house. This very moment anyone who enters my house this would be what he would get. I still tried to reason with Agafili saying to him to try and control himself, I had not come to aggravate matters but merely to settle this matter peaceably and find out what was irritating him. And Agafili then walked to the door and opened it and then said to me, I have indicated to you everything that will happen so it is entirely up to you, if you want to come in to the house come in, come in right now. I then said to Agafili, very well if this be my judgment day let it be so, but I am coming in to the house. I walked to the steps leading in to the house and Agafili was standing sideways in the doorway his right into the house and his left shoulder towards the door. When I took the first step - the foundation of the house, incidentally, is rather high - when I reached the first step, Agafili changed the holding of this machette from his right hand to his left. There was some space between us and then I took the second step, and I gaged that we were close enough, and it was possible for me to jump in. I had held the rifle crosswise, holding the butt in one hand and the barrel in the other, and threw this rifle at Agafili aiming for his left side. After throwing this rifle at Agafili, I jumped him immediately the rifle struck the left hand of Agafili, and when the rifle fell to the ground by that time I had my hand round Agafili. I had hold of Agafili all his arms enclosed; the machette was facing downwards; the blade was entangled between my legs. Therefore there was little if any movement could be made of the machette.
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> Q. Did you finally disarm Agafili?
> A. I was able to disarm Agafili, and also was able to get him to sit down, and tried to quieten him down with soothing words.
> Q. Did you manage to quieten him down?
> A. That is so.

This evidence may not be of great weight so far as concerns the appellant's actual condition at the time of retaliation. It does, however, indicate that at this stage the appellant's conduct was violent, and his attitude one of general belligerence, and not that of a person who had temporarily lost his self-control. It closely parallels the course of action and type of conduct he exhibited against the deceased. In view, however, of the narrow question we have to determine we put this to one side. In its nature it is really a matter for assessors to evaluate, which is not our task.

The principles of common law as to provocation were stated in the following passage in Mancini v. D.P.P. [1942] A.C. 1, at p. 9:-

> It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death . . . The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in Rex v. Lesbini (1), so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for the retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.
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> (1) [1914] 3 K.B. 1116.

In Parker v. R., supra, the definition of provocation was concisely stated at p. 1387, where it was said:-

> The provocative act had to be such as was likely to arouse passion in the breast of a reasonable man and which did in fact arouse it in the accused so that his conduct resulted from his being suddenly though temporarily deprived of his power of self-control and rendered him not master of his mind.

We accept the submission made by Mr Ryan that the proper test is that laid down in Kwaku Mensah v. The King [1946] A.C. 83, which test made it clear that the test may be modified to one of a reasonable man in the social, racial and cultural context of the accused, or a reasonable Samoan. And that is the test which we apply in this case.

The last reference which we wish to make is a further passage from Lee Chun-Chuen's case, supra, where it was said at p. 231, 232:-

> Provocation in law consists mainly of three elements - the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasise is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct.

The appellant's conduct has in it elements of the formation and

carrying out of a plan to ambush and shoot the deceased as he continued on his way home. This is hardly consistent with the concept of "being suddenly deprived of the power of self-control and rendered not the master of his mind": Parker v. R., supra. However, be that as it may, this appeal may properly be disposed of on the question whether it can be said that a reasonable tribunal of fact (in this case the Chief Justice and assessors) might, on the evidence most favourable to the appellant, hold that the retaliation was proportionate to the provocation: Lee Chun-Chuen's case, supra. To put the question in another form, Could a reasonable person, in the circumstances, be so provoked that he would be driven through transport of passion and loss of self-control to the degree and method of continuance which resulted in the appellant shooting deceased? Holmes v. D.P.P., supra. The assaults had discontinued and the deceased had commenced walking away and was on his journey home. The deceased was, to the knowledge of the appellant, unarmed. The deceased was, at the time of shooting, walking in the company of others and posed no possible present threat to the appellant. The deceased had actually passed the appellant's house and was facing away from that house when shot. The appellant, after the deceased left the scene of assault, ran to his house and procured a lethal weapon and either loaded it or found that it was loaded and ready for firing. He stationed himself at a vantage point and, when a suitable target presented itself, took a deliberate shot at an unsuspecting victim, who, it appears, was warned of danger practically at the time of shooting. The appellant was able at a distance of some thirty-five yards to shoot deceased in a vital spot. Such a deliberate procuring of and resort to and use of a lethal weapon on an unsuspecting victim cannot, in our opinion, be held by a reasonable tribunal to bear any reasonable relationship to the provocative incidents alleged by the appellant. Such a form of retaliation is entirely disproportionate to such incidents. We find, therefore, that there was no duty on the learned Chief Justice to leave provocation to the assessors. The appeal is dismissed, and the conviction is affirmed.