IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO.27 OF 1979

B E T W E E N

ALPHONCE PHILIBERT.....APPELLANT

A N D

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Bukoba (Lugakingira, J.) dated the 21st day of April, 1978,

IN

Criminal Sessions Case No.27 of 1977

JUDGEMENT OF THE COURT

NYALALI, C.J.:

The appellant Alphonce Philibert was charged and convicted in the High Court at Bukoba for the offence of murder contrary to section 196 of the Penal Code and was sentenced to the only penalty allowed by law, that is, death by hanging. He is appealing to this Court against the conviction and sentence, and Mr. Rugarabamu, learned advocate, was assigned to represent him in this appeal. Mr. Kinabo, Senior State Attorney, appeared for the Republic.

It is evident from the proceedings in the High Court and in this Court that the following material facts are not in dispute between the parties: that one Andrea s/o Isack is dead and his death occurred through violence at night time on the 16th August, 1975, at Itongo village in Bukoba District; that prior to the death, the appellant visited the dwelling house of one Pastory Petro and that he was soon joined at that house by P.W.2, namely, Celestine Rogasian, who is a nephew of the said Pastory Petro; that the appellant went there in connection with a claim of money which he had given to the said Pastory Petro for the purchase of petrol; that the deceased later joined the appellant and P.W.2 at the house of the said Patory Petro, who however happened to be away; that the appellant later that night left and went

away leaving P.W.2 behind; that the deceased did not leave Pastroy's house but sustained a fatal stab wound while there; that thereafter a lot of people, including P.W.4 and P.W.5, gathered at Pastory's house; that the following day, the police, including P.W.1, arrived at the scene for investigations and to take the body of the deceased; that while the police were at the scene, a small blood-stained folding knife was discovered embedded in the grass carpeting the floor where the body of the deceased was found; that the appellant surrendered himself at the police station the day following the death of the deceased; that later a Post Mortem examination on the body of the deceased was made by a qualified doctor who prepared his Post Mortem Examination report which was admitted at the trial under the provisions of section 275 of the Criminal Procedure Code, as the doctor in question happened to be abroad; that the Post Mortem Examination report showed that the death of the deceased was due to a stab wound through the chest wall into the heart and that the stab wound was small and located on the left side of the chest.

From the same proceedings in the High Court and in this Court it is apparent that the following material facts are in dispute between the parties: According to the prosecution, it is alleged that while the deceased, the appellant and P.W.2 were in the house of the said Pastory Petro there was an argument between the appellant and the deceased which developed into a quarrel in the course of which the appellant, who was a school teacher in the area, threatened to dismiss the deceased's children from school allegedly on the ground that those children were infested with jiggers. The deceased retorted by telling the appellant to the effect that the jiggers in the deceased's children would disappear when the children grew up and began to wear shoes just in the same way that the jiggers which the appellant had during his childhood had disappeared when he grew up and began to wear shoes. Furthermore, it is alleged by the prosecution that the appellant was very much annoyed by the retort made by the deceased with the result that the appellant sprang upon the deceased and a physical struggle occurred between them in the course of which the appellant produced a small knife and stabbed the deceased with it in

On the other hand, it is alleged by the defence that throughout the period when the appellant was at Pastory's house there was only normal conversation between the appellant and the deceased, and that there was neither an argument, quarrel nor struggle of any kind between the appellant and the deceased before the former left Pastory's house.

The first point for consideration and decision in this case is whether the appellant stabbed the deceased with the small blood-stained knife which was discovered at the scene. The learned trial judge specifically considered this point in this judgement and stated as follows:-

> "The most crucial question in this case is where did the knife come from? I need not belabour the questions about the fact of death or the cause of it. As I have already indicated these were not in dispute. It was strongly argued by Miss Kimara, learned counsel for the defence, that the knife must have been in the grass and the deceased just fell on it. She based her argument on the fact that the deceased cried, 'You have killed me, Alphonce', when he fell down. I directed the assessors to give this argument due consideration. They rejected the theory and found unanimously that the deceased was stabbed by the accused. I have given this theory very serious consideration and I must admit, I at first considered it plausible. On a careful study of the evidence, however, I must also reject this theory. I do so because according to Celestine, whom I found to be a credible witness, when the deceased stood up, after being pushed by the accused, he was holding to his chest and showing pain. He had then not fallen on the grass. It follows that he must have been stabbed before he fell. Admittedly, Celestine did not see any weapon, either with the deceased or the accused. He did not see any weapon on the deceased's body when the deceased stood up for a brief moment. I believe that the weapon was covered in the deceased's hands as he held on to his chest. This is not inconceivable considering that the knife was a small one, three to four inches long, and its handle which remained outside is about half that size. I therefore find as a fact that the accused had the knife in his coat. In the confusion that ensued while the deceased and the accused were on the floor, he must have retrieved it and stabbed the deceased. I find, therefore, that it is the accused who killed Andrea Isack.".

Mr. Rugarabamu, learned advocate for the appellant, attacked the reasoning and finding of the learned trial judge on this point by submitting in effect that on the evidence the possibility that the knife did not belong to the appellant and that it was lying somewhere in the grass carpeting the floor in the house and the the deceased accidentally got injured by it in the course of the struggle between the appellant and the deceased cannot be reasonably excluded. We have carefully considered the submissions of learned advocate in the light of the evidence of P.W.2 who claims to have been an eye witness to the incident and was found to be

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credible witness by the learned trial judge. The testimony of P.W.2 as far as the point in question is concerned is to the effect that the appellant sprang upon and seized the deceased whom he then pulled towards him -- with the result that both the appellant and the deceased fell to the floor - the deceased being on top of the appellant. Subsequently, the appellant appeared to push away the deceased who stood up with both of his hands clutching on to his chest and with his face grimacing with pain before he fell down to the floor and stated to the effect that the appellant had killed him. We have taken note of the evidence of P.W.3 who was the wife of the householder, who testified to the effect that there was in the house a lighted wick lamp which however happened to have very little fuel. P.W.2 testified to the effect that he did not see the knife being used by the appellant at the material time. We are of the view that the failure of P.W.2 to see the knife is consistent with the undisputed fact that the knife happened to be very small and with the nature of the light emanating from the wick lamp.

Moreover, it is evident that the deceased sustained a stab wound before he stood up with his hands clutching on to his chest and his face grimacing with pain. In other words, he sustained the stab wound at some point of time when the deceased was still on top of the appellant on the floor where both the appellant and the deceased had fallen.

The question then arises whether the knife was lying somewhere in the grass carpeting the floor and whether the deceased was accidentaly injured by the knife before he was pushed away and before he stood up. We are of the view that if the knife had been lying on the floor where both the appellant and the deceased fell, the former would have been the person to be injured rather than the latter who was on top. Furthermore, the conduct of the appellant as revealed by the testimony of P.W.2 is consistent with the appellant being the person who stabbed the deceased and cannot be explained on any other reasonable hypothesis but that of the appellant being the assailant. It was deposed by P.W.2 to the effect that after the deceased had been pushed by the appellant and had stood up with his hands clutching on to his chest and with his face grimacing with pain, and after the deceased had fallen down and stated

"You have killed me Alphonce", the appellant reacted by standing up from the floor, rushing to the door where he hesitated for a while before running away. We are of the view that the behaviour of the appellant was abnormal. If he had not stabbed the deceased, he would not have rushed to the door but would have been surprised and would have inquired. The fact that the appellant was not surprised and made no inquiries means that he knew what had happened to the deceased and that he was the author of it. The learned trial judge advanced a theory to the effect that the appellant must have had the knife in the pocket of his coat and that the appellant must have retrieved it from the pocket while he was on the ground with the deceased and that the knife could not be seen as it was covered by the hands of the deceased. With due respect to the learned trial judge, we are of the view that this theory is too speculative in the light of the available evidence, and that it is not needed to support the learned trial judge's finding, with which we concur, that it was the appellant who stabbed the deceased with the small folding knife discovered at the scene.

The next point for consideration and decision is whether the appellant killed the deceased. The learned trial judge in that part of his judgement quoted above found as a fact that the appellant killed the deceased. Having found like the learned trial judge that the appellant stabbed the deceased, and taking into account the Post Mortem Examination report which shows that death was due to a stab wound through the chest wall into the heart, we respectfully agree with the learned trial judge that the appellant killed the deceased.

The next point for consideration and decision in this case is whether the appellant had malice aforethought. The learned trial judge specifically considered this point and stated in his judgement:-

> "I directed the assessors to consider drunkenness and provocation as possible defences. The assessors never touched on these issues but I will. It is admitted that the accused had a bottle with something like moshi in it. But according to Celestine the accused was not drunk. He only added that the beheviour of the accused was always like that of a drunkard. Drunkenness which induces temporary insanity if a defence to a charge of murder. Mere drinking does not count in law otherwise many killers would get off by arming themselves with alcohol when they go on their murderous missions. In this case I am satisfied that the accused had taken some alcohol. That accounted for his courage and unguarded language.

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> But it was not so much of it as to impair his sense of judgement. I am saying so because, clearly, the accused in this case had prepared himself to commit some murder. He hid in the banana plantation doubtlessly to ambush Petro if he had turned up. He then declared inside the house that he would kill Petro or be killed himself. He also told Celestine that he had four times looked for Petro long before. And when Petro could not be found he transferred his malice to Andrea. I therefore dismiss the defence of drunkenness. I similarly dismiss the defence of provocation. I do not think that an ordinary member of the accused's community would so lose his mind and kill by being answered in his own insult that he, too, once had jiggers. That is simply ridiculous in the extreme. I find, therefore, that this was case of transferred malice. Not only that, the accused had a grudge with the deceased. He believed that it was the deceased who occasioned his failure to secure nomination for a Party post. He therefore had a motive in killing Andrea. It was thus a combination of grudges that worked him into a heedless savage.".

Mr. Rugarabamu has attacked the learned trial judge's view that the appellant transferred his malice to Andrea when he could not find Petro. We respectfully agree with the submission of learned advocate as it is evident that the appellant when stabbing the deceased did not in any way have Petro in mind and cannot therefore be said to have transferred his malice from Petro to the deceased.

Furthermore, learned advocate has attacked the failure of the learned trial judge to specifically require the assessors to advise him on the issue of provocation. There was evidence given by P.W.2 to the effect that there was an exchange of insults between the appellant and the deceased in which the appellant began by telling the deceased that his children were infested with jiggers and the deceased replied by imputing that the appellant too had jiggers in his childhood. The testimony of P.W.2 shows that it was because of this imputation that the appellant got annoyed. Mr. Rugarabamu submitted that since it was this imputation which provoked the appellant to attack the deceased, the trial Court had to consider whether the imputation amounted to legal provocation. He further submitted that the question of legal provocation could not be resolved by the trial Court without the benefit of the opinion of the assessors who assisted the judge at the trial.

We note that provocation is defined under section 202 of the Penal code as follows:-

> "202. The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under

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> his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in such relation as aforesaid, the former is said to give the latter provocation for an assault.
>
> An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.
>
> An arrest which is unlawful is not necessarily provocative for an assault, but it may be evidence of provocation to a person who knows of the illegality.
>
> For the purpose of this section the expression 'an ordinary person' shall mean an ordinary person of the community to which the accused belongs.".

It is apparent that the term 'an ordinary person' is specifically defined as meaning 'an ordinary person of the community to which the accused belongs.' The question arises whether the reaction of an ordinary person of the community to which the appellant belongs could be determined by the learned trial judge without having the opinion of the assessors who assisted him at the trial.

Mr. Rugarabamu referred us to the case of Yovan v. Uganda (1970) E.A. at page 406, a case originating in Uganda but which was decided on the authority inter alia, of a case originating in what was then known as Tanganyika - that is the case of Chacha s/o Wamburu vs. R. (1953) 20 E.A.C.A. page 339. The Court of Appeal for East Africa in Yovan's case stated inter alia:-

> "Thus what might be a deadly insult to a member of one community might be a mere triviality to members of another community. In this respect the opinion of the assessors with their local knowledge of the customs of the people of the community can be of the greatest assistance to the trial judge although, of course, evidence can, and should (if necessary) be led as to the nature and meaning of a particular wrongfull act or insult and as to any relevant customs.".

In another case originating from Uganda, that is the case of Zakayo Itima s/o Birigenda (1948) 15 E.A.C.A. page 157 the Court stated:

> "The next question which we think we ought to attempt to answer is 'Assuming that a trial Judge in Uganda is satisfied that certain words were uttered by the victim of homicide to his or her slayer how should the Judge decide whether such words were sufficient provocation to reduce the crime to manslaughter? Should he act on his estimation of the effect such words ought to have on a person of the type of the accused or should he act on the advice of the assessors? If, as in the instant case, there were only two assessors and as

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here they were divided, would the Judge still act on his own view or should he, seeing that the assessors were divided, convict the accused of manslaughter only? There is, of course, another possible method, viz. that the accused should be expected to call evidence of experts or notables, such as Chiefs or Sub-Chiefs; if this course were adopted the Crown would surely be entitled to call rebuting evidence to show that the words were not of such a nature as to be likely to make an average man of the accused's type lose control of himself. There are obvious objections to this latter suggested method, namely, that of calling witnesses, and we at once rule it out. Should then the Judge be guided by the opinions of the assessors? The law as to the assessors is statutory. Section 277(2) Uganda Criminal Procedure Code states 'The Judge shall then give judgement but in doing so he shall not be bound to conform to the opinions of the assessors':

In our view the answer is a simple one, namely, the trial Judge, while he should pay attention to the opinions of assessors and give them due weight, must decide the point according to his own view. His own view will be founded on his knowledge and experience of the people as well as his own wisdom and knowledge of life as well as law. If the two assessors are divided, he should explain why he adopts the view of one in preference to that of the other while, if he decided in a manner contrary to the opinions of both assessors, he should similarly give reasons for so doing.".

We are of the view that the law in Uganda regarding the role of assessors in a trial as stated in Zakayo's case is the same as it is in Tanzania Mainland where the law of assessors is also statutory. Moreover Section 277(2) of Uganda Criminal Procedure Code is the same as section 283(2) of our Criminal Procedure Code which states:-

"283. - (1) .....
(2) The judge shall then give judgement, but in doing so shall not be bound to conform to the opinions of the assessors".

The effect of these authorities is that a trial judge sitting with assessors, though required to pay attetion to the opinion of assessors on the issue of provocation, is nevertheless entitled and duty bound to resolve that issue on the basis of "his own view ..... founded on his knowledge of life as well as of law". The question however still remains whether the trial judge can resolve the issue of provocation when the assessors express no opinion on it.

In the case of BHARAT vs. The Queen (1959) A.C. 533 the Privy Council, in a case originating from Fiji, considered the effect of a misdirection given to assessors by a trial judge on the issue of provocation and stated:-

> "What is the consequence of the misdirection given by the judge to the assessors? According to section 246 of the Criminal Procedure Code the trial is by the judge "with the aid of" "assessors". The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of the opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so. He has, in truth, by this misdirection, disabled the assessors from giving him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw.".

The main principle behind the views of the Privy Council is that under section 246 of the Criminal Procedure Code of Fiji, a trial is required to be by a judge "with the aid of" assessors and therefore where assessors are misdirected on a vital point, such a provocation, the trial judge cannot be said to have been aided by those assessors. We do accept this principle as sensible and correct.

There is a similar provision in our country, that is, section 248 of the Criminal Procedure Code which states:

> "All trials before the High Court shall be with the aid of assessors, the number of who shall be two or more as the court thinks fit.".

Since we accept the principle in Bharat's case as being sensible and correct it must follow that in a criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a non-direction to the assessors on a vital point.

In the present case the learned trial Judge did not record in full his summing up to the assessors but recorded notes of the points he put to the assessors. The case of Lute s/o Luzala (1934) E.A.C.A. p. 143 is authority for the procedure adopted by the learned Judge. With regard to the issue of provocation, the notes read:

> "Provocation - accused told by deceased he had jiggers during childhood - whether that would provoke an ordinary member of the accused's community into killing - if so manslaughter".

It is evident to us that there is no apparent misdirection or non-direction made by the learned trial Judge on the issue of provocation. This means, unlike in Bharat's case, the assessors here were not disabled from aiding the learned trial Judge. None of the assessors however expressed any specific opinion on the issue of provocation. It is apparent from the record however that both asseossors were aware of the issue of provocation when they found the appellant guilty of murder as charged. The first assessor stated inter alia:-

> "..... Then the accused threatened to expel deceased's kids from school for having jiggers. And deceased reminded accused that he had jiggers in his school days. It is this which angered the accused who then pulled the deceased .....".

And the second assessor stated, inter alia:-

> "..... It all started with abuses. When that verbal war was going on, the accused was preparing himself and removing the knife from his pocket .....".

Since the assessors had been specifically directed to find the appellant guilty of manslaughter if they were of the opinion that there was such provocation as would have induced an ordinary member of the appellant's community to kill, and since both assessors were aware of the issue of provocation while giving their opinions, it must follow that the assessors' failure to specifically advise the learned Judge on that issue, coupled with their specific finding about the appellant being guilty of murder, leads to only one reasonable conclusion - that is, the assessors must have been of the view that there was no legal provocation, and there was no need for them to give a specific advice on the issue.

We are fortified in this view by the decision of the Court of Appeal for Eastern Africa in the case of Mohamed Bachu vs. Regina (1956) 23 E.A.C.A. at page 399 where the headnotes read:

> "Held (19-10-55) - The Court must take the opinion of each assessor on the case generally, but is not obliged in addition to take their opinions on specific points which on their general view of the case do not arise.....".

That being the position, this trial with assessors, who held such view on the vital point of provocation and also held other views on other vital points after being addressed by the trial Judge on the merits of the case, is definitely a trial with the aid of assessors, and the learned judge was right in resolving the issue of provocation.

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Learned advocate for the appellant has also submitted that the learned trial judge should have taken into consideration the factor of intoxication in determining the issue of provocation and has argued that the appellant acting under the influence of alcohol was more likely to be easily provoked than would have been the case when sober.

The question arising from the submissions of learned advocate is whether account is to be taken of the influence of alcohol in determining whether the reaction of an accused is in keeping with that of an ordinary person of the community to which the accused belongs. Learned advocate has submitted that this Court, may extend the scope or factors relevant to the issue of provocation to include the influence of alcohol. The learned trial judge rejected that approach by stating:-

> "Mere drinking does not count in law otherwise many killers would get off by arming themselves with alcohol before they go on their murderous missions.".

We respectfully agree with the views of the learned trial judge. After all the law expects those who drink or those who are quick tempered or sensitive to exercise the discipline and self-control of an ordinary person in the community in which they live. In other words, an accused person who pleads provocation under the influence of alcohol must stand in the shoes of an ordinary person of the community to which the accused belongs and must thus be judged by the standard of such ordianry person. We are of the firm view that such standard can never be that of a dfunkard unless the community to which the accused belongs happens to be a community of drunkards - which is not the case here.

This objective test of an ordinary person appears to be recognized and applied in a number of Common Law jurisdictions, inluding in England, as evidenced by the case of Regina vs. Camplin (1978) Q.B. page 254 where the English Court of Appeal in reviewing the English Law of provocation cited the views of Viscount Simon L.C. at page 259 in the case of Mancini v. Director of Public Prosecutions (1942) A.C.1. where it was stated at page 259:-

> "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. Lesbin (1914) 3 K.B. 1116, 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.".

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Also, the same English Court of Appeal cited with approval the words used by the trial judge in that case at page 260 where he is recorded as addressing the jury as follows:-

> "Bear this in mind, ladies and gentlemen, that the definition of provocation is very important. It is not intended to give a licence to those who take too much drink; or a licence to those who are quick-tempered; or a licence to those who are over-sensitive; that would be disastrous and it would not be fair, if you think it for a moment, because it would give an advantage to the drunkard, to the quick-tempered and to the over-sensitive - an advantage over people who try to exercise proper self-control, as most of us do. That is why I say it would be unfair if provocation in this content were not strictly defined, and the definition strictly applied. It is not intended to give a free rein to the cruel, or the unrully or those who take too much drink.".

We are therefore, for good reason, unable to accede to the request made by the learned advocate that this Court should take into account the factor of drunkenness in determining the issue of provocation. On the basis of the objective test, we agree with the learned trial judge that an ordinary member of the appellant's community would not have been provoked by being answered back by the deceased in his own insult.

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From the evidence it is established that the appellant used a knife for stabbing the deceased in the chest and in the area where the deceased's heart was situated. That was a very dangerous place to stab with a knife and the appellant must have clearly intended to kill the deceased. He, therefore, had malice aforethought.

In the final analysis, therefore, the appellant was properly convicted and the appeal against conviction and sentence is dismissed.

DATED at MWANZA this 29th day of March, 1980.

(F. L. NYALALI)

CHIEF JUSTICE

(Y.M.M. MWAKASENDO)

JUSTICE OF APPEAL

(L. M. MAKAME)

JUSTICE OF APPEAL

I certify that this is a true copy
of the original

(G. A. RWELENGERA)

DEPUTY REGISTRAR