(10)

IN THE SEYCHELLES COURT OF APPEAL

SCA: 4 of 2005

ANDY MONDON *Appellant*

v.s

REPUBLIC *Respondent*

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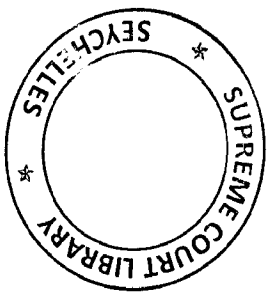
Before: SJ Bwana, Ag. P; JM Hodoul, JA and B. Renaud, JA

Date of hearing: 10 May 2006
Date of judgment: 19 May 2006

Counsel: Mr. F. Bonte for Appellant
Mr. R. Govinden for Respondent



JUDGMENT

BWANA, AG P

1. The Appellant was charged with the offence of Murder contrary to section 193 and punishable under section 194 of the Penal Code. He was sentenced to life imprisonment. He now appeals against both conviction and sentence.

2. The facts of this case as distilled from the record may be stated as follows. The 27th day of February 2004

was a birthday anniversary of one Therese Zaccarie, a grandmother of the Appellant. Close relatives and friends were invited to a birthday party. Those attending included the Appellant and one Mervin Anette, the man alleged to have been murdered by the Appellant. Both the Appellant and Mervin, (the deceased) are said to have been good friends and according to the evidence of Salma Nourrice, pw 10, both are said to have come together to Therese's party at Frichot Estate, La Louise, Mahe, in a pick-up.

3. It is in evidence that during the party, a lot of alcohol was consumed. The Appellant admits to have taken several bottles of beer. Around 11 p.m., Therese Zaccari asked for a birthday song to be played for her because she wanted to dance. Both the Appellant and the deceased were the music operators. It is during this time that a quarrel developed between the two, each blaming the other for messing up the music system. Shortly thereafter the two were involved in strong and obscene exchange of insults. During this time the deceased is said to have been sitting on a loudspeaker in the living room of Therese's house. The Appellant, who was seated nearby, left the place, went to the kitchen, collected a knife, came out and stabbed

the deceased in the left side of the neck. The death of Mervin is thus said to have been a result of that stabbing. A medical report tendered in court by Dr. Zhao Peng (pw 16) states inter alia, the following:-

"...injury is 165 cm length ... on the left side of the neck. Kind of injury: puncture wound on the left side of the neck 9.5 cm from the sterno-clavicular joint and 8 cm from tip of the mastoid. It was 1 cm in diameter and had a tail of 1.5 cm long going outwards and upwards ... sharp nick in the left common carotid artery just above the clavicle."

4. When cross examined, Dr. Peng described the carotid artery as "a very important artery." Further that, "if it is cut it will cause bleeding and bleeding very quick because it is a high pressure inside and such bleeding can cause death. It is a very big artery."

Dr. Peng stated further that the medical report revealed the following particulars:-

"Inside the wound, there was a 2000 ml and blood clots found in the left pleural cavity. The lung was collapsed. Both lungs were pale. The brain was edematous and pale. All the internal organs were pale."

Therefore, the cause of death is said to be "hypovolaemic shock due to massive bleeding due to stab injury to the neck."

4. The Appellant was apprehended a few hours later. He was taken to the police station where he gave a Cautioned Statement at 1:15 a.m. Although he confesses in the statement to have committed the offence, it was argued by the defence counsel that the said statement was not voluntary and further, that the Appellant's rights were not explained to him. We will revert to this issue later herein.

5. The prosecution called 16 witnesses (pws). The Appellant opted (in the court a quo) to give an unsworn statement from the dock. He called no defence witnesses (dws). In his brief statement from the dock, this is what the now Appellant had to say:

"I wish to say that Mervin and I were best friends. This argument happened because we were drunk. I had no intention to do this to Mervin. I would like to ask for excuse from the court and from the family of Mervin. I wish to say to his family very sorry for what has happened and that it was not my intention."

6. The jury entered an unanimous verdict of guilty of murder. He was subsequently sentenced to life imprisonment, as prescribed under the law.

7. In his grounds of appeal, the Appellant raises the following issues -

7.1 That the sentence is against the weight of the evidence.

7.2 That the learned judges' direction to the jury was highly prejudicial on crucial points of law and the jury being so misdirected, entered the wrong verdict.

7.3 That the learned judge was wrong in admitting the statement of the Appellant and his direction to the jury was highly prejudicial to the Appellant.

8. We will consider all the three grounds of appeal together. We start with the cautioned statement given to the police at 1:15 a.m., that is, a few hours after that incident. After carefully considering the circumstances leading to the giving of that statement, we are of the firm view that it was not voluntarily

given. It was not given by the Appellant's own free will and the trial judge should have held so and addressed the jury accordingly. We say that the statement was not freely given, when we particularly observe the following uncontroverted facts. First, is the timing. The stabbing of the deceased is said to have taken place around 11:00 p.m. The Appellant's statement indicates that it was recorded from 1:15 a.m., onwards, hence, about two hours later. It is noted that the guests at the birthday party including the Appellant had been consuming alcohol for several hours. It is in evidence that both the Appellant and the deceased had taken several bottles of beer by the time the stabbing took place. Therefore by the time the Appellant was arrested and his statement taken, we strongly believe that he was still under the influence of alcohol. If so, then, it is our view that he could not have given his statement with a free mind expected. Again concerning time, one wonders why the hurry in taking such a statement at such a late hour of the night. What prevented the police from waiting for the following morning or at least to give the Appellant time to cool down or have a sleep until later in the morning? We tend, therefore, to agree with the defence case that the statement was taken at a time when the Appellant

was still tense and in a state of confusion. Second, is the likelihood of the Appellant having not been informed of his Constitutional Rights. Such rights include the right to have a lawyer present; to remain silent and the like. No one would seriously expect a lawyer to attend duty at such a late hour of the night – if at all the Appellant was informed of that right and whether he intended to get the services of a lawyer at that material time. We are doubtful, therefore, whether all the procedures as outlined in the "Judges Rules", were followed.

The aforestated factors could therefore affect the ability of a person leading him to make a voluntary and self-incriminating statement. The trial judge should have in our view, considered those factors and directed members of the jury accordingly, allowing them to come to their own conclusion on the statement's. The trial judge's express views on the reliability of the statement and that it was given voluntarily, may have influenced the jury to return a verdict, as they did. Since we are of the view that the statement was not voluntarily made, within the strict legal interpretation of the word, we expunge it as a document to be relied upon in evidence.

9. In the absence of the said statement we ask ourselves whether the jury would have returned a different verdict if so properly directed. We hold the affirmative view that they would have. What appears to be apparent is that the stabbing that led to the death of Mervin is clearly verified by the eye witnesses who attended the party. These include Allan Isaac (pw 6); Luna Hertel (pw 7); Sandra Auguste (pw 8); Prsicilla Juliette (pw 9) and Salma Nourrice (pw 10). All these witnesses testified that it is the Appellant who stabbed the deceased, using a knife that was later recovered and identified.

Equally, these witnesses to aver that the stabbing occurred following a quarrel between the Appellant and the deceased, a quarrel that included exchange of obscene insults coming from both directions. Our analysis of their evidence leads us to an irresistible conclusion that the period between the quarrel and the stabbing left no time to cool on the part of the Appellant and control his reason and movements. If properly directed therefore, the jury would have taken into consideration this factor and entered a less serious verdict, that of guilty of manslaughter, as we do find.

10. Therefore, for reasons stated hereinabove, the Appellant's appeal is partly successful to that extent. The conviction for murder is set aside and substituted with one of manslaughter. The sentence of life imprisonment is equally substituted with one of fifteen years' imprisonment.

It is accordingly ordered.

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Dr. S. J. BWANA
AG. PRESIDENT

1. I concur:

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J. M. HODOUL
JUSTICE OF APPEAL

2. I concur:

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B. RENAUD
JUSTICE OF APPEAL