

IN THE SEYCHELLES COURT OF APPEAL

JUSTIN SIRAME

APPELLANT

VERSUS

THE REPUBLIC
RESPONDENT

SCA NO. 06 OF 2012

Counsel for the Appellant – Mr. Basil Hoareau

Counsel for the Respondent – Mr. Jayaraj Chinnasamy and
Mr. Ananth Subramanian

JUDGMENT

MSOFFE, J.A.

1. The Appellant stood trial for murder under section 193 of the Penal Code which is punishable under section 194 of the said Code. The trial was before a jury who returned a verdict of

guilty. He was sentenced to life imprisonment. He is appealing against conviction.

2. The case for the prosecution was basically that on the 4th day of June, 2011 the Appellant waited for Tessia Mousbe (the deceased) close to his house and after an exchange of words stabbed her with a knife. The stabbed wounds were critical and led to her death.

3. On the other hand the defence case was that the Appellant was not the person who attacked the deceased on the fateful night. The Appellant's defence was essentially an *alibi* to the effect that in the late evening hours of the fateful day he was in his house when the stabbing of Tessia Mousbe occurred.

4. A total of 24 witnesses testified on behalf of the prosecution. Briefly, PW1 Bernadette Suzanne Esparon, the deceased's elder sister, stated that on 4/6/2011 she visited Foret Noire to take the deceased and her father to North East Point. The deceased was not at the house; she met her on the

road coming up. PW22 France Morel, who also happened to be at the vicinity at that time, had seen the deceased and the Appellant on the road. She went down to where the deceased was and heard her scream "**Ahh.**" She heard her saying "*Justin ou pik mwan liki ou manman*" (Justin you stab me cunt of your mother) and then fell on the ground. She did not see anything on the hands of the deceased or the Appellant. Then she said "*Justin ou pa onte pou lager ek en fanm.*" (Justin you are not ashamed to fight with a woman.) The Appellant did not say anything but somebody present at the vicinity said "*Depi bomaten ou ser pe zour manmi manman.*" (Since morning your sister is swearing at my mother.) In the meantime, PW6 Dimitri Fransisco was screaming "*manman pa mor mon kontan ou manmi pa mor.*" (Mother don't die I love you mummy don't die.) She went down to help the deceased and the Appellant had left the scene by then. An ambulance was called and the deceased was taken to hospital. In the next morning she was informed that Tessia Mousbe had passed away. The respective testimonies of other witnesses like PW2 Guliana Lesperance, PW3 Clement Mousbe, PW7 Kendla Boniface, and PW10 Ronnel

Fanny, were basically to the effect that they saw the Appellant going up and down the road on that day. PW10 in particular saw the Appellant, France Morel and Lindy Esparon. He saw the Appellant approaching the deceased, and saw her falling to the ground. He knew the Appellant since he was a child. In the evidence of PW11 Robin Omblime, he and other policemen, visited the scene and took a number of photographs. On 6th June at about 2.00 o'clock when Sirame's house was searched he was also present when Constable Allisop of CID Mont Fleuri Police Station showed him a stainless steel knife of about 29½ cm placed on the outer ceiling of Mrs. Fernande Sirame's bedroom. He photographed and took possession of the knife before it was eventually handed over to PW13 Dr. Muhapatra in India for profiling and analysis. A cut torn piece of white t-shirt with reddish brown stains belonging to the deceased was also sent to PW13 for the same purpose. In his testimony in court PW13 was positive that the blood on the knife and the blood on the t-shirt came from the same person.

5. It is also in evidence that in the hospital before she died the deceased was attended by PW20 Dr. Sanchez and PW21 Dr. Alexander Bona. According to PW21 at page 338 of the record, *the deceased "got two major stabbed wounds in the chest and in the abdomen and some of them on her body"* The autopsy on the deceased's body was conducted by PW19 Dr. Marija Zlatkovic who opined in both his evidence in court and in the post mortem examination report (exh. P5) that the cause of death was hypovolemic shock due to internal bleeding.

6. As intimated above, the Appellant's defence given in a statement from the dock, as a result of which he was not cross-examined, was that he did not commit the offence. He testified briefly to the effect that on the material day he went back home from work. He heard a cry outside. His brother went out and came back to tell him that Tessia Mousbe had been stabbed. His mother DW 1 Fernande Sirame warned him not to go outside lest people would say he was responsible for the

stabbing in issue. The Appellant's testimony was generally supported by DW1.

7. In the Notice of Appeal filed on 11/4/2012 the Appellant has raised four grounds of appeal. All the grounds essentially seek to fault the learned trial Judge in his summing-up to the jury. The complaint in the first ground is that the Judge did not direct the jury properly on the law regarding manslaughter. In the second ground the Judge is sought to be faulted in the manner he addressed the jury on provocation. The third ground is to the effect that the Judge erred in law in failing to warn the jury on the issue of identification and/or recognition in terms of the Turnbull direction. In the fourth and final ground of appeal the complaint is that the Judge erred in law in directing the jury that the defence case ought to be considered only if the jury is satisfied that the prosecution had proved its case beyond reasonable doubt.

8. At this juncture, it is instructive and quite in order to take inspiration from an Article titled **“Summing up – a suggested structure”** by the Judicial Studies Board for Northern Ireland, on the functions of a Judge and Jury. Briefly, the functions are as follows:-

1. *The Jury:*

To decide on the evidence what the facts are: to decide which evidence they accept and which they reject: they alone are judges of facts:

2. *The Judge:*

To tell the jury what the law is – directions which the jury must accept and apply to the facts; and to remind the jury of such evidence as he thinks may help them, but the jury to take into account anything omitted by him they consider important and to ignore if they think fit to do so any view of the facts which the judge expresses which the jury thinks he holds.

9. Therefore, in a trial by jury it is expected that the Judge will direct the jury on, among other things:-

- (i) the burden and standard of proof.
- (ii) **the definition and an explanation of the ingredients of the offence.**
- (iii) where relevant, give other directions on corroboration, identification, admissions/confessions, circumstantial evidence, etc.
- (iv) the law relevant to the defence, e.g. *alibi*, drunkenness/influence of drugs, provocation, self defence, etc.
- (v) summary of evidence for prosecution and defence.

[Emphasis added.]

10. In fairness to the Judge in this case, inspite of one basic shortcoming that will be pointed out hereunder, he generally directed the jury properly on the law and the evidence. He did his utmost best in this regard and in the circumstances of the case for which he should be commended.

GROUND 1

11. This ground relates to the alternative offence of manslaughter. The Appellant is seeking to fault the Judge where under paragraph 49 of his summing-up he stated:-

*..... The law generally differentiates between levels of criminal culpability based on the state of mind of the accused. Murder requires either the intent to kill – a state of mind called malice aforethought – or the knowledge that one’s actions are likely to result in death; **manslaughter, on the other hand, requires a lack of prior intention to kill or to create a deadly situation ...***

[Emphasis added.]

12. Before addressing the complaint in this ground it is important and instructive to state the law on manslaughter. Section 192 of the Penal Code provides:-

192. Any person who by **an unlawful act** or omission causes the death of another person is guilty of the felony termed "felony". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

[Emphasis added.]

13. In **BLACK'S LAW DICTIONARY**, Ninth Edition, by Bryan A. Garner manslaughter is defined as:- "*The unlawful killing of a human being without malice aforethought.*"

14. And in **TEXTBOOK ON CRIMINAL LAW**, Fifth Edition, by Michael J. Allen, it is stated that manslaughter covers all unlawful homicides which are not murder.

15. The offence of manslaughter is usually divided into two generic types - voluntary and involuntary. Voluntary manslaughter is committed where the accused has killed with malice aforethought, and could be convicted of murder, but there are mitigating circumstances present reducing his culpability. In other words, voluntary manslaughter consists of those killings which would be murder because the accused has the relevant *mens rea* but which are reduced to manslaughter because one of the defences, like diminished responsibility, provocation, etc., exists in the case.

16. Involuntary manslaughter is an unlawful killing committed by an accused who did not have malice aforethought but who, nevertheless, had a state of mind which the law treats as culpable. **BLACK'S LAW DICTIONARY** (*supra*) defines it as a "*Homicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony - murder rule. involuntary manslaughter is a "catch-*

all” concept. It includes all manslaughter not characterized as voluntary.”

17. It is evident from the above definition in the Penal Code and in the cited authorities that one of the essential ingredients of the offence of manslaughter is the existence of an unlawful act. As observed in **BLACKSTONE’S, CRIMINAL PRACTICE**, 2012, at page 207:-

*The accused’s act must be unlawful, **in that it constitutes a criminal offence in its own right** (independently of the fact that it has caused death) The phrase “unlawful act” connotes an act as opposed to an omission....*

[Emphasis added.]

Then at page 208 **BLACKSTONE** (*supra*) goes on to state what is otherwise trite law that although a person accused of manslaughter lacks the *mens rea* for murder, the prosecution

must normally prove that he has the *mens rea* appropriate to the unlawful act which caused the victim's death.

18. Going back to the first ground of appeal it is clear that in the above passage the Judge correctly stated the law on what constitutes murder. That is, *"the intent to kill - a state of mind called malice aforethought - or the knowledge that one's actions are likely to result in death."*

19. However, regarding manslaughter the Judge did not state the law quite correctly. Going by the law, as propounded above, to constitute manslaughter there is nothing to do with *"lack of prior intention to kill or to create a deadly situation."* All that is required is the unlawful act or omission and an intention to commit that unlawful act or omission.

20. It follows that the Judge ought to have stated the law on manslaughter as we have attempted to show above. In the process, he should have made a clear distinction between

voluntary and involuntary manslaughter and leave it to the jury to decide whether or not either of these was available in the case. As it is, it is apparent that the Judge did not mention anything about involuntary manslaughter. We think that the failure to properly direct the jury on the law on manslaughter was an irregularity of such a nature that can be cured by an appreciation of what the verdict the jury would have returned if they had been properly directed on the law regarding manslaughter.

21. From our own analysis and appreciation of the evidence on record we are satisfied that the circumstantial evidence in the case shows that the Appellant was responsible for the death of the deceased. The evidence is clearly borne out by the witnesses who were within the vicinity of the scene of crime shows that no other person, save the Appellant, was responsible for the death in question. As already observed, PW10 Ronnel Fanny in particular saw the Appellant approaching the deceased and saw her falling down to the ground. In our considered view, in the circumstances of the

case, the act of falling down must have been a direct result or consequence of the stabbing in issue.

22. In view of the position we have taken on the first ground of appeal there is no need to address, or rather discuss, the other grounds of appeal.

23. In the end result, for the above reasons, we hereby allow the appeal to the above extent and amend the sentence imposed to fall in line with the evidence adduced. Accordingly, the conviction of the Appellant for murder contrary to section 193 of the Penal Code is substituted for a conviction for manslaughter contrary to section 192 of the said Code. The sentence of life imprisonment meted on the Appellant is hereby set aside, subject to a sentence for manslaughter.

24. In sentencing the Appellant for manslaughter we take note of the overall circumstances under which the offence was committed. We also take into consideration that according to PW21 (*supra*) the deceased sustained only two major wounds in consequence of the stabbing in issue. Also there is no

evidence by anyone as to what actually happened at the time of incident. Having done so, we are of the view that a sentence of 5 (five) years imprisonment from the date of the Appellant's arrest will meet the justice of the case; and we hereby so sentence him accordingly.

S. Domah

Justice of Appeal
Appeal

A. F. T. Fernando

Justice of Appeal

J. H. Msoffe

Justice of

Dated this 11th day of April 2014, at Palais de Justice, Ile Du Port, Mahé, Seychelles