IN THE COURT OF APPEAL OF THE COOK ISLANDS CA 1/2000
HELD AT AUCKLAND

BETWEEN	TIATA ROBATI
	Appellant
AND	THE QUEEN
	Respondent
Coram:	Sir Graham Speight J A David Williams J N F Smith J
Hearing:	12 July 2000
Date of judgment :	24 July 2000
Counsel:	J Wiles for appellant K Raftery for respondent

JUDGMENT OF THE COURT

Solicitors

J Wiles, 2F/41 Albert St Auckland and Clarkes PC, solicitors, Rarotonga for appellant
Crown Solicitor, Auckland for respondent

[1] This is an appeal against a conviction for murder which was returned on 18 May 2000 after a two day trial before the Chief Justice and a jury. Consequent on that, on that date the appellant was sentence to imprisonment for life. Subsequently on 6 June, leave to appeal was granted.

[2] There are two grounds stated in the appeal papers:

[a] Alleged misdirection by the trial Judge, the learned Chief Justice on the question of manslaughter and its elements, and in particular on the basis that it is alleged that the summing up failed to adequately direct the jury on issues of intent;

[b] That it had been an unfair trial by virtue of allegedly unfair tactics on part of the prosecuting counsel at the empanelling stage. The allegation is that the Crown required an undue number of witnesses balloted to stand aside and that in particular, women were singled out in undue proportion. It is suggested that this was aimed at undue sympathy by virtue of genders of the jurors in a trial of a female accused.

Before these two grounds are discussed, a brief summation of the evidence available at trial can be given.

[3] There was no typewritten record of evidence available to us as apparently the only recording was by way of tape which has not been transcribed. Both counsel however accept that, for present purposes, adequate factual material as to the relevant events can be gathered from the summary of events contained in the Chief Justice's summing up; copies of a very detailed police interview of the accused two days after the fatality, and summaries of evidence of other witnesses - material prepared by the police prior to trial and apparently used by counsel as outline of the case to be presented. All of this material was placed before the Court.

[4] In particular we have carefully examined the very detailed record of police interview, with much question and answer. This was read by the accused as part of the evidence that she gave, supplemented as to some minor details, and she was cross-examined. It is agreed by counsel that this additional material did not change the meaning of the narrative given by her to the interviewing police officer and the appeal proceeded, despite the absence of a verbatim transcript, on the basis that the statement was a reasonably accurate version of the accused's account of what had transpired. There was no other evidence given as to the events of the fatal evening immediately prior to the killing.

[5] The accused and the deceased lived in a de facto relationship of some standing, in a house occupied by the accused, and it was said that they had recently become engaged to be married. On the night in question they had both been to a nightclub, where they had consumed excess quantities of alcohol. The accused admitted to the police that she was drunk but "knew what she was doing". She described the deceased as being more intoxicated than she. He went "off his face". There were some angry exchanges between them at the nightclub. She says that part of the trouble was an accusation by him that she was on the verge of an improper relationship with his brother. The couple returned to the house at a time approaching midnight. She said that there the argument continued and escalated. Two other women were present at the house and witnessed some, if not all, of the exchanges there, but neither of them was called as a witness.

[6] The accused said that at the house matters turned to violence on the part of the deceased. He is said to have grabbed her hair and started beating her and tried to damage her face. She says that she tried to run out of the house but found he had locked the door. She was able to open it and went outside. He followed and was told by her to leave the house and not come back. She then went into the house and she says that she was going to ring the police but he followed her and came after her again. She said she grabbed a kitchen knife. He ignored her warning to stay away from her but he approached so she stabbed him "in the shoulder". He moved back for a moment but then came at her again so she stabbed him again "on his stomach". She spoke of a total of three stabs, after which he fell to the ground.

[7] Further questioned by the police, she said that she did not think he would have suffered serious injury. She agreed that she knew it was unlawful to stab, but she was trying to get him away from her. She did not mean to hurt him but she says, she thought it was "either him or me". She added that she did not mean to cause bodily injury, she did not mean to take his life. She did it because she was scared of him beating her up.

[8] There was medical evidence from the doctor who attended the scene when called. He spoke of two wounds in the chest and one on the left side of the back near the shoulder. Death had been due to penetration of a lung.

[9] There was no dispute between counsel but that the above was the only evidence before the Court of the crucial events.

Grounds of Appeal

[10] As already mentioned, the first of these relates to the summing up and the question as to whether or not the option of manslaughter was properly put to the jury. In that regard the submission is that there was no adequate direction on the question of intent or absence of intent. The summing up of the learned Chief Justice was comparatively brief, in straight forward and conventional terms covering the relevant issues. The transcript covers four and a quarter pages of the record. Examining it and its sequence, one finds on p.1 that the Judge explained in the usual way the respective roles of Judge and jury. Further, that although the accused had given evidence on her own behalf there was no onus on her of proving anything and she need not have given evidence. The onus of proving the case was on the Crown in each part of the case beyond reasonable doubt before a guilty verdict could be entered. There was the usual discussion of the meaning of reasonable doubt and indication that the Judge's brief summary of facts was for the purpose of refreshing their memory, but that the decision was for the jury. On p.2 there is a long paragraph in which the jury were reminded of the evidence which had been given and in particular the evidence of what the accused had told the police, which she affirmed to be true, details of which have been set out above. This brief summary was concluded by saying the Crown's allegations were that the blows were deliberately

struck, in circumstances that amounted to murder but that the defence said that when those blows were struck she was fearing for herself and acting in defence.

[11] At the bottom of p 2 the learned Chief Justice explained briefly the law defining murder, covering the concept of homicide, culpable homicide and non-culpable, and that non-culpable was not an offence and he discussed the concept of an unlawful act particularly in relation to the use of a knife. There followed a discussion of the question of self-defence, returning again to the subject of homicide, culpable homicide and the further ingredient of meaning to cause death and meaning to cause bodily injury known to be likely, as being required to bring culpable homicide to murder. Then at the top of p.3, immediately following his discussion of meaning to cause death or injury, he said:

> "If there is culpable homicide which does not amount to murder, that is manslaughter. And so the Crown says here that when the accused picked up the knife and struck the deceased, she either meant to kill or was reckless. And in answer to that as you have heard defence has raised the defence of self-defence."

[12] He reminded the jury of the evidence that the woman had given, again reminding them that there was no onus upon her to prove and that their examination of the evidence was to consider whether what she had said raised a reasonable doubt.

[13] He then proceeded at some length on p. 3 to discuss self-defence in terms which we regard as entirely proper. He again emphasised that, despite what the accused had said although she had raised the defence the onus, remained upon the Crown. He said:

> "Although it is for the Crown to prove beyond reasonable doubt if the accused used more force than was necessary to protect herself from the danger she believed she was in. If the Crown failed to prove that then she is entitled to be acquitted."

[14] There is a passage on p 4 reminding the jury of the liquor that the parties had consumed and the resort that the accused had to the knife, and explained that the test was whether, when she struck those blows, she believed she had to do so to protect herself. He mentioned, of course, that there were three stabbings. Again, reminding the jury that at all times that the Crown was required to prove its case.

[15] So far, as we have said, the summing up appears to us to be immaculate and Mr Wiles so conceded. The Judge then went on to discuss the very large amount of alcohol which had been consumed and commented adversely upon that sort of situation. However, he said it had no direct bearing on the case, except as possibly impinging on the ability to recollect.

[16] He then moved to a passage which in the submission of the appellant's counsel is crucial and, so it is claimed, defective in so far as the possibility of manslaughter was not, it is submitted, adequately explained. It is necessary to recite exactly what the Judge said.

> "There are three possible verdicts which are open to you. One is a verdict of guilty and that means guilty of murder. That will be the correct verdict if you are satisfied that the accused meant to cause Papa's death, or at least meant to cause him bodily injury which she knew would be likely to cause death and did not care whether he died or not."

Again no complaint is made of this. The Judge then continued:

> "The second possible verdict is not guilty of murder but guilty of manslaughter. That would be the correct verdict if you do not consider self-defence was the reason, but that still the accused killed Papa by an unlawful act. And the third possible verdict is not guilty. That means not guilty of anything and that would be the correct verdict if you are satisfied that the accused acted in self-defence when she stabbed Papa. For that the Crown have not proved beyond reasonable doubt that she did act in self-defence."

[17] We think that Mr Wiles, as counsel for the accused, has concentrated exclusively on the passage which has just been referred to. It is true that the summing up arrives at the possibility of manslaughter by an elimination process, and that of course is common and proper in such cases. The possibility of finding a verdict of murder, based upon the intention of the accused, would clearly bring the jury's mind to an examination of the question of any intent ingredient which had been earlier explained.

[18] A different sequencing might have been to discuss murder first, followed by the alternative to that of acquittal if there was a reasonable possibility of self-defence as had been discussed and then the third alternative that if self-defence was not

available and if intention to kill or do bodily harm had not been proved, then manslaughter was the appropriate verdict based upon culpable homicide without intent. However, that is merely a question of style and we do not think there is any room for the contention that the grouping of these three alternatives, taken in conjunction with the earlier definition of murder with the discussion of what the accused "meant" could lead to any misunderstanding but that, manslaughter was an alternative verdict in the cases of absence of proof of the requisite intent for murder and in the absence of a sustainable self-defence contention.

[19] Before concluding on this part of the appellant's case we will refer briefly to two cases upon which Mr Wiles relied. Both of these are well known. The first was *R v Stuck* [1949] NZLR 108, and the other was *R v Aberhart* [1978] NZLR 266. Each of these are merely supportive illustrations of the proposition that it is obligatory for a trial Judge, in cases such as this, to instruct the jury on the possibility of the lesser verdict of manslaughter if they have not been satisfied that there was the fatal intent, either direct or constructive.

[20] In *Stuck's* case the Court of Appeal quoted from the summing up of the trial Judge, that there was the alternative and lesser verdict available of substituted manslaughter if the evidence

> "is not strong enough to bring in a person guilty of murder. In that case a jury can substitute manslaughter. That only occurs in cases where a killing has taken place and the jury thinks, or at any rate has doubts, that it was not premeditated. That is, if one man kills another and the evidence comes out that there was a disagreement and possibly a fight and the thing was done on the spur of the moment, the jury will reduce it to manslaughter. If it was done in anger it is not murder, it is manslaughter."

[21] It is apparent from an examination of the Court of Appeal's judgment that this is the passage which was regarded as a crucial failure. At p 112 l.40 the judgment says:

> "It might appear from the above quotation as well as from what follows in the summing up, that this was a reference to reduction from murder to manslaughter where there had been provocation. If we are right in treating it as a direction upon provocation, we do not for

> reasons which appear later, stop to consider its correctness or adequacy."

Shortly afterwards it says the Judge :

> "left it to the jury to reduce the verdict to manslaughter, if they should take the view that there was provocation. This was the only reference to manslaughter... The question however, is whether there should have been a further direction by the Judge as to a possible verdict of manslaughter, not by way of reduction from murder by reason of provocation... but as a verdict open on the indictment if a jury took the view of the evidence which it was open for them to take."

[22] This is a very clear finding by the Court of Appeal that to suggest to the jury that the only basis of reducing murder to manslaughter is in a case such as the one there being dealt with of provocation is an obvious misdirection, and that, given the nature of the evidence the possibility of a reduction of murder to manslaughter should always be given and be based upon the question of absence of the necessary intent. We take no issue with Mr Wiles' submission that this is necessary in all cases, but in our view, unlike the case of *Stuck* the passages in the Chief Justice's summing up which we have already referred to show that on a number of occasions he had emphasised the ingredient for murder was very much dependent on intent, and that the final quotation from his summing up at the foot of p.4 on which Mr Wiles relies cannot be taken in isolation but must be understood, and we are sure it would have been understood, as being a reference back to the very careful definition which had already been given of the intent ingredient.

[23] Similarly, although with a somewhat different factual context, in *Aberhart* there was an adequate initial section of the trial Judge's summing up in which he had said that the question for the jury was whether the accused struck the blow with the intent that would take culpable homicide to the level of murder. He also said that if that intent were not proved, the verdict must be manslaughter. Such a summary, of course, is beyond criticism, but unfortunately in *Aberhart* the matter being dealt with was a defence of insanity and the trial Judge spent considerable time dealing with the medical evidence; and the words of the Court of Appeal are as follows:

> "With all respect to the Judge, that matter and other evidence to which reference has been made, was not put to the jury as a possible basis for a verdict of manslaughter. We think the reference to

> medical evidence in the manslaughter context, may have left them with an understanding that the independent and unrelated issues of intent and medical condition were somewhat inter-twined, or perhaps the only basis for manslaughter was related to the psychiatric evidence."

[24] It was upon this basis that it appeared to the Court of Appeal the absence of intent had been confused by the consideration of the psychiatric evidence, just as in *Stuck* case it had been confused by a consideration of provocation evidence. The Court found there to be a misdirection for that reason. In the present case we see no such flaw. It was of course necessary for the self-defence issue to be dealt with, and it was. But absent a conclusion favourable to the accused on that issue, the trial Judge clearly put the lesser alternative of manslaughter to the jury based upon the words which he had just used wherein he had described the ingredient of murder as basis intent and that the lesser verdict was available as an alternative. On this ground therefore we do not accept the submissions made by Mr Wiles in support of misdirection.

[25] No mention was made by counsel of any other circumstances requiring consideration. Even though the defence has not canvassed it, a trial Judge must always consider whether other issues should be put. Here there had been conduct by the deceased that could be considered to amount to provocation. That alternative can sometimes require reference even if the defence, for tactical reasons, has not referred to it. But in such cases it is also necessary for there to be evidence that the accused *was* provoked. No such evidence appeared in the material before us. Accordingly we explored with Mr Wiles what his attitude to this might have been. He appreciated the point involved and had obviously considered it, but he advised us that the evidential basis for provocation was absent and he elected to make no submission on the point at trial or on appeal He cannot be criticised for his decision on the matter. We accept that there was no evidence of the accused claiming that she was provoked, within that legal concept, so the matter requires no further mention.

[26] We can deal somewhat more briefly with the other ground advanced by Mr Wiles, namely his claim that there was an unfair trial based on the conduct by the prosecution counsel in standing aside some 18 jurors, allegedly being a discriminatory tactic against having women on the jury in a trial of another woman.

We are obliged to Mr Raftery for his comprehensive discussion where he contrasted the history of challenge and stand aside procedures previously available in England and New Zealand as against the continuing position in the Cook Islands. As he has demonstrated there has been no peremptory challenge available in England for many years, either for the Crown or for an accused person. There the challenge for cause is the common practice, followed in appropriate cases by interrogation of potential witnesses. In New Zealand there was, until 1981, unlimited stand aside available to the Crown, but that has been repealed so that it is now necessary to challenge peremptorily or for cause. The Cook Islands continues to have the stand aside procedure which was availed of in this case.

[27] Doubtless there could be cases where Crown counsel on a discriminatory basis was guilty of breach of that privilege, but for ourselves we are not of the view that that is a matter reviewable by judicial process. The elimination of improper practice would be a matter of administrative direction, or if necessary, appropriate legislation. Be that as it may, we accept that even if there was power for us to intervene, there is no evidential basis here to suggest that improper motives were followed leading to the rather large number of "stand asides" which were used. (We are informed that two of the members who sat on the jury were indeed women.)

[28] In addition there is much to be said for the submission by Mr Raftery that this matter needs consideration against the background of the Cook Islands. There has been in England an administrative direction by the Attorney General as a result of which prosecuting counsel, as one understands it, do behave in the appropriate manner and only stand aside in cases which could be justified. Again in New Zealand the situation is somewhat different, but in the Cook Islands, one must grapple with the fact that there is a population of about 8000 people with a strong possibility that in a panel drawn from a small community which, as one is aware, has large family groups, the likelihood of inter-relationship or close knowledge by potential jurors of accused persons, of victims or of relatives, can be high.

[29] We are well aware that counsel for both sides will study a jury panel of potential jurors with some care and take instructions and it is entirely proper in our view for the purpose of obtaining an independent jury, that counsel, behaving in an

appropriate manner, should nevertheless be entitled in this jurisdiction to exercise a substantial number of stand-aside procedures for the purpose of obtaining as best they can, a jury without prior knowledge of or relationship with the parties involved.

[30] Against that context and against the fact that there is no evidential basis of impropriety, we believe that the challenge of unfair trial upon this basis is ill-founded.

[31] For the reasons set out above therefore we are of the view that neither ground is sustainable and the appeal is dismissed.