

7

IN THE COURT OF APPEAL OF KIRIBATI
CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 1 OF 1995

BETWEEN

THE REPUBLIC
Appellant

AND

BERETIA BAKAATU
Respondent

Date of Hearing: 19 February 1996

Delivery of Judgment: 23 February 1996

Mr D Sim for the Appellant

Mr D Lambourne for the Respondent

JUDGMENT OF THE COURT
(Gibbs V.P., Reynolds and Connolly JJ.A)

Beretia Bakaatu was tried in the High Court before Cory A.C.J., on a charge that he murdered Tokantetaake Iheato. He was acquitted of murder but found guilty of manslaughter. The Attorney-General, acting in intended exercise of section 20 of the Court of Appeal Act, has now referred to this Court for its opinion a number of points of law which are said to arise in the case.

The facts of the case were as follows. The deceased was the wife of the accused. The death occurred on 28 June 1994 at Fanning Island, where the accused lived with his wife. About a week before that time the accused began to suspect that his wife was committing adultery with one Tomitiana, a neighbour. He became jealous. On 28 June the accused saw some marks in the bush near his home which he believed were signs of sexual activity. He went to the scene with his wife and Nei Arouea, the wife of Tomitiana, and repeatedly asked his wife whether she had had sexual activity there but she denied it. The wife then ran away to Tomitiana's house; the accused was already

angry and this made him more angry. He went after her and brought her back to his own house. He again repeatedly asked her whether she had committed adultery. Eventually she admitted that she had. This increased his anger. His wife ran away again; this made the accused very angry and he commenced to beat his wife with an iron coconut grater. One Kantemeteuea intervened and took the grater from him; he told Kantemeteuea that he would not hit his wife again. After Kantemeteuea left, the accused went to get a bush knife - he said to cut tobacco for a cigarette. When he appeared with the knife his wife ran away. This made him even more angry than before. He chased her and stabbed her in the neck and stomach causing the wounds from which she died.

The learned Acting Chief Justice said that under s.197 of the Penal Code murder is reduced to manslaughter if it is proved on behalf of the accused on the balance of probabilities that the accused was deprived of the power of self control by such extreme provocation given by the person killed as mentioned in s.198. He went on to say that he was satisfied that the accused was deprived of the power of self-control at the time he chased and struck his wife with the bush knife and that he was also satisfied that the accused was "provoked into losing his self-control by his wife's admission of adultery together with her final running away, having run away and been brought back twice before". He accordingly found her not guilty of murder but guilty of manslaughter.

The Attorney-General has referred the following questions to the Court of Appeal:

- (a) Where the defence of provocation is raised must the prosecution exclude its operation beyond reasonable doubt or does the burden rest with the defence on a balance of probabilities?
- (b) Where the Court is considering provocation must the things said or done or a combination of both be:
 - (i) a wrongful act or insult in a taunting, teasing or mocking manner by the deceased; or
 - (ii) can the things said or done be constituted by an act of fleeing in terror and also self defence?

- (c) Does the defence of provocation apply where the accused's loss of self control is self induced?
- (d) Where provocation is being considered and there is no evidence of the reaction of an ordinary I-Kiribati man, how does the court assess the actions of a reasonable I-Kiribati man?
- (e) Where the defence have raised provocation does the extreme provocation required to be present involve a retaliation proportionate to the things said or done or a combination of both?
- (f) On the defence of provocation where the victim's adultery is admitted but there is an intervention can that circumstance be considered a part of all the things said and done?

Since the decision in Woolmington v. D.P.P. [1935] A.C. 462 it has been established that at common law in a trial on a charge of murder the onus of proof of lack of provocation remains throughout on the prosecution. However the prosecution need not negative provocation if no question of provocation is raised by the circumstances of the case. As was said in the judgment of the Privy Council in Len Chun-Chuen v The Queen [1963] A.C. 220, at 232-3: "*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*". There is ample authority supporting this view: see Van der Hoek v The Queen [1986] 161 C.L.R. 158, at 161-2.

However s.197 of the Penal Code provides, as follows:-

"Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely -

- (a) *that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section*"

The succeeding section, s.198, is in all material respects the same as s.3 of the Homicide Act 1957 of the United Kingdom. That section

which placed the burden of proof of provocation upon an accused was in conflict with a section in the same terms as s.10(2)(a) and that the section should therefore be construed to bring it into conformity with the Constitution. If their Lordships' reasoning is applied to s.197, that section should be construed as though its prefatory words read:

"Where a person by an intentional and unlawful act causes the death of another person, the offence committed shall not be of murder but only manslaughter if there is such evidence as raises a reasonable doubt as to whether -

(a) he was deprived of the power of self control"

A decision of the Privy Council, not given on an appeal from Kiribati, is not binding, but only of persuasive authority: see Laws of Kiribati Act 1989, s. 13(1). However the decision in Vasquez v. R. although it admittedly puts a generous construction on the Constitution, should, in our opinion, be followed. As the Privy Council pointed out, it was established, by Woolmington v. D.P.P., that in a murder case the prosecution must establish malice, namely, that the voluntary act of the accused was intentional and unprovoked. In other words, the lack of provocation is an essential ingredient of murder - see Vasquez v. R., at 678-9, 682. It follows that a statutory provision which places the burden of proof of provocation on the accused is contrary to s.10(2)(a) of the Constitution and void to the extent of the inconsistency.

Cory ACJ was therefore wrong in thinking that the onus of proving provocation lay on the accused.

It should be made clear that provocation need be considered only if there is some evidence, whether introduced by the prosecution or the defence, which raises a reasonable doubt on the point. Further, s.10(2)(a) applies only to the essential ingredients of an offence, and does not apply, for example, to a case where a statute makes it an offence to do something without a licence, and puts the onus of proving the existence of a licence on the accused: see Vasquez v R, at 682-3 and s.2(10) of the Constitution. It is unnecessary to discuss that aspect of the matter in the present case.

As will be seen from the following remarks, the other questions put for the opinion of the Court are really questions of fact, which depend on all the circumstances of the case.

It is established that there is a dual test for provocation. First, was the accused actually provoked into losing his self control as a result of which he committed the act which killed the deceased? Secondly, was the provocation such that it was capable of causing a reasonable person to lose self-control and to act in the way that the accused did? When the law speaks of a reasonable person in this context, it refers to an ordinary person - a person having the power of self control to be expected of an ordinary person of the sex and age of the accused. The test is an objective one, in that the jury or judge trying the facts has to consider whether an ordinary person would have reacted as the accused did. However the gravity of the conduct said to constitute the provocation must be assessed by reference to the relevant characteristics of the accused. In the present case, the only relevant characteristic seems to have been that the deceased was the wife of the accused.

Sometimes it is said that the retaliation must be proportionate to the provocation. That simply means that the reaction of the accused must not have exceeded what would have been the reaction of a reasonable man, or, in the words of s.198, that the provocation was enough to make a reasonable man do as he did.

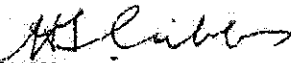
In applying these tests it is necessary to have regard to the entire factual situation - the whole of the deceased's conduct. Acts and words which considered separately could not amount to provocation may, in combination, or cumulatively, be enough to cause an ordinary person to lose his self-control and resort to the act of violence that caused the death.

The above principles have been established by many cases including, in England, Director of Public Prosecutions v. Camplin [1978] A.C. 705 and Reg. v. Morhall (1995) 3. W.L.R. 330 and in Australia Masciantonio v. The Queen (1995) 183 C.L.R. 58.

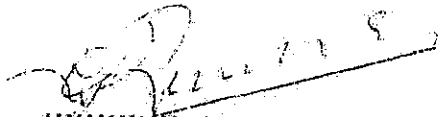
The questions asked by paras (b) to (f) of the reference cannot be answered in the abstract. They are questions of fact, to be decided in each case in the light of the foregoing principles as applied to all the circumstances of the case.

The questions in the reference are answered as follows:-

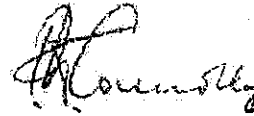
- 7
- (a) Where the defence of provocation is raised the prosecution must exclude provocation beyond reasonable doubt.
 - (b) to (f) These are questions of fact to be decided having regard to all the circumstances of each particular case.



.....
Vice President



.....
Judge of Appeal



.....
Judge of Appeal