MBOMENA v THE PEOPLE (1967) ZR 89 (CA)

COURT OF APPEAL

DOYLE AG CJ, PICKETT AND RAMSAY JJ

11th JULY 1967

Flynote and Headnote

[1] **Criminal procedure - Evidence of potential defence not raised by accused - Duty of court to consider**.

Where there is evidence supporting a defence not raised by the 35 accused, that defence must be considered by the trial court.

[2] **Criminal procedure - Record on appeal - Depositions at preliminary inquiry not included.**

The depositions taken at a preliminary inquiry do not form part 40 of the record in the Court of Appeal.

Appellant in person.

State Advocate, for the People

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DOYLE AG CJ

Judgment

Doyle AG CJ: In this case there can be no doubt that the appellant killed his wife by a blow or blows from an axe. A villager, Peyala Jileya, found the woman lying dead with a big wound on the back of the head. An axe was lying over her neck. Shortly after that he met the appellant 5 walking in the direction of the local court. He spoke to the appellant who admitted killing his wife and said he was on the way to the court to report it. He said he had killed her because of adultery.

At the trial the appellant made an unsworn statement. He told a story of a conversation with his wife which included mutual recriminations 10 about sexual matters. This led to his wife abusing him by reference to his mother's private parts, and then to a scuffle. The appellant alleged that his wife struck him on the chest with a pot of mealie meal and then seized and twisted his testicles. Appellant had been carrying an axe over his shoulder and when he was assaulted he threw it to the ground where 15 it fell blade upwards. By reasons of his wife's exertions, the child she was carrying on her back was about to fall to the ground. The appellant rescued the child and then pushed his wife away. According to him his wife fell on her back and the axe penetrated her head deeply. She stood up with the axe so deeply imbedded that it remained in position. She then 20 shook her head and the axe fell out.

The learned trial judge dealt with the matter as a case of murder or accident. He thought that the suggestion that her injuries were caused by a fall on the axe was preposterous. He then summed up the case in the following passage: 25

"The prosecution case is that the accused killed and intended to kill his wife. The accused says that he did not kill her. Implicit in the prosecution case is that the reason for the killing was the belief of the accused that his wife had committed adultery. The accused does not assert any such belief. On the evidence in front of me all 30that I am required to decide is whether or not the accused killed and intended to kill his wife. I am not required to decide whether or not she committed adultery, a fact which, standing alone, is no justification for killing. In the result therefore I find that the prosecution has discharged its constant burden and it has satisfied me 35 that the accused murdered his wife and I so convict him."

The judge's approach did not take into account any question of provocation, nor, although obviously rightly rejecting as preposterous the fact that the death could have occurred accidentally as stated by appellant, did he make any finding as to the truth or otherwise of the appellant's story of abuse and assault. We do not consider that the mere statement relating to adultery made by appellant could have justified a reduction of the crime to manslaughter as, even assuming that there was adultery, there was no evidence that the provocation was sudden.

[1] The facts related in the story of abuse and assault would, however, 45 if believed, have been capable of amounting to provocation, both grave and sudden. It is true that the appellant did not allege any loss of controls, but this may have been because he feared that such a statement would be inconsistent with his defence of accident.

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DOYLE AG CJ

The line of cases set out in paragraph 2508 of the 36th edition of Archbold, *Pleading, Evidence and Practice in Criminal Cases,* show clearly that where there is evidence which could reasonably support an alternative defence to that put forward, this defence must be considered, although not in terms maintained by the prisoner. We are unable to say that the 5 learned trial judge, if he had considered the matter, must have disbelieved the appellant's tale of abuse and assault. If he had believed it, or if it had raised a reasonable doubt, he might well have found a verdict of manslaughter. In the circumstances, we allow the appeal, quash the verdict of murder and substitute a verdict of manslaughter. For this offence we 10 sentence the appellant to seven years' imprisonment with hard labour, with effect from date of arrest.

[2] We have one further comment. The learned trial judge in making his note elliptically recorded the evidence of some of the witnesses with the phrase "as in deposition". The depositions taken at a preliminary inquiry do not form part of the record in the Court of Appeal. It is likely 15 that the judge was making a note for his own recollection and relied also on the note of evidence being recorded by apparatus. Where this occurs a direction should have been made (as provided in paragraph (a) (viii) of sub-rule 3 of rule 33 of the Court of Appeal for Zambia Rules) that a copy of the transcript should form part of the record. Otherwise large

portions 20 of the evidence may be, as in this case, omitted from the record. We could, under the sub-paragraph cited, ourselves have called for the transcript. However, we were satisfied that there was sufficient evidence in the record to enable us to deal with the appeal without recourse to the transcript. We draw attention to the matter as a reminder that, where a note is made 25 in the manner of this case, the person making up the record should ask the judge to make the requisite direction if the judge has not already done so.

Appeal allowed