THE PEOPLE v NJOVU (1968) ZR 132 (HC)
HIGH COURT
BLAGDEN CJ
15th OCTOBER 1968

Flynote and Headnote

[1] **Criminal law - Murder - "Malice aforethought" defined.**
To establish "malice aforethought" the prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.

[2] **Criminal law - Self-defence - Limitations - Force necessary to repel the attack.**
The right of self-defence extends no further than doing what is necessary to repel the attack.

[3] **Criminal law - Provocation - Effect on ordinary person of the community.**
The provocation must be some wrongful act or insult of such a nature as to be likely, when offered or done to an ordinary person of the community to which the accused belongs, to deprive him of the power of self - control and to induce him to assault the person by whom the act or insult is done or offered.

[4] **Criminal law - Provocation - Time for heat of passion to cool.**
A homicide induced by provocation will not be reduced to manslaughter if the assault occurs after the accused has had adequate time to cool his passions.

[5] **Criminal law - Provocation - Relationship between provocation and response.**
A homicide will be reduced to manslaughter on account of provocation only if the response of the accused bears a reasonable relationship to the provocation suffered.

Cases cited:

(1) *R v Shaushi s/o Miya* (1951), 18 EACA. 198.

(2) *Jackson v R* (1962) R & N 157.

(3) *Chibeka v R* (1959) 1 R & N 476.

(4) *Greyson v R* (1961) R & N 337.

Statute construed:
Penal Code (1965, Cap. 6), ss. 177, 180, 182, 183.
Chigaga, State Advocate, for the People.
Dumbutshena, Legal Aid Counsel, for the accused:

Judgment

Blagden CJ: The accused, James Fuleshala Njovu, aged fifty - nine years, stands charged with the murder of his wife, Tilabilenji Njovu, on 26th May, 1968, at Chipata.

The burden of proof is on the prosecution to establish that charge against the accused, and the standard of proof which must be attained before there can be a conviction is such a standard as satisfies me of the accused's guilt beyond all reasonable doubt, so that I can be sure that he did murder Tilabilenji Njovu.

In accordance with the definition of murder in section 177 of the Penal Code, to obtain a conviction for murder it is necessary for the prosecution to prove to the standard which I have just described the following elements, which, in this case, will together make up the crime of murder with which the accused is charged, namely that:

(i) the accused caused the death of Tilabilenji Njovu;

(ii) by an unlawful act; and

(iii) with malice aforethought.

"Malice aforethought" relates to the state of mind of the accused person at the time he caused the death of the deceased. By section 180 of the Penal Code "malice aforethought" is expressed to include certain specific intents and knowledge on his part.

[1] So far as this case is concerned to establish "malice aforethought", the prosecution must prove that the accused either had an actual intention to kill or to cause grievous harm to the deceased, his wife, or that he knew that what he was doing would be likely to cause death or grievous harm to someone.

So far as the proof of the first of these three necessary elements is concerned there is a little difficulty in this case. The accused has all along admitted that he killed his wife. He has also admitted that he stabbed his wife with the knife which was produced in evidence as Exhibit P.2. To stab a person is unlawful unless it appears that the stabbing was justifiable as being perpetrated legitimately in the exercise of the right of self-defence. According to the accused's own evidence immediately prior to the stabbing his wife slapped him twice in the face, seized him by the throat and dragged him or attempted to drag him from the bed room into the sitting - room. Mr Dumbutshena has suggested that if that evidence is accepted then there is an element of self-defence in the accused's actions, at least sufficient to reduce this homicide of his wife from murder to manslaughter. [2] The right of self-defence extends no further than doing what is necessary to repel the attack. It is true that if a person oversteps these bounds and kills his attacker, the need in his case for some reason of self-defence may suffice in the circumstances to reduce his act of homicide from murder to manslaughter (see, as to this, *Archbold, Criminal Pleading Evidence and Practice, 36th ed., para*. 2496 and, for examples, see *R v Shaushi s/o Miya* [1], and *Jackson v R* [2]. But I am fully satisfied on the evidence which I have heard, including that of the accused himself, that when he stabbed his wife he was not acting in self-defence at all. It follows therefore that I am fully satisfied that the prosecution witnesses have established the first two of the three elements that together constitute the crime of murder, namely, that the accused caused the death of his wife by an unlawful act. He is thus at the very least guilty of manslaughter.

But there remains the third element - "malice aforethought". The accused claims that he did not intend to kill or cause grievous harm to his wife and, further, that he did not know that his use of the knife would produce either of these two results. This might be difficult to believe ordinarily, but the accused claims that his judgment in these matters was completely overcome by the heat of passion engendered in him by the provocation he received from his wife, under the stress of which he lost all control of himself.

By section 182 and 183 of the Penal Code, it is provided that when a person unlawfully kills another, but does the act which causes the death in the heat of passion caused by sudden provocation, he is guilty of manslaughter only.

The conditions which have to be fulfilled before provocation has this effect may be summarised as follows:

(a) [3] The provocation must be some wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person of the community to which the accused belongs, to deprive him of the power of self - control and to induce him to assault the person by whom the act or insult is done or offered.

(b) [4] The assault so induced must be committed before there is time for the accused's passion aroused by the provocation to cool.

(c) [5] The character and nature of the assault so induced must bear a reasonable relationship to the provocation suffered.

Let me stress at once that where, as here, the issue of provocation is raised, there is no burden on the accused to establish it; the burden is on the prosecution to negative it and moreover to negative it so convincingly hat I can be sure beyond all reasonable doubt that the accused was not provoked in the manner or to the extent specified in sections 182 and 183 of the Penal Code, to which I have just referred.

What is the evidence regarding provocation here?

[The learned Chief Justice then reviewed the evidence adduced at the trial.]

I therefore find that the accused was subject to a fairly lengthy period of provocation by Tilabilenji Njovu through her conduct of returning home late or on occasions not at all and that this culminated on Sunday, 26th May, 1968, in her returning home very late despite repeated efforts to get her back earlier, refusing to prepare any food, demanding meat for

herself instead and assaulting the accused by slapping him in the face and pulling him by the wrist.
This conduct clearly amounted to provocation and the accused lost control of himself and stabbed his wife to death.
[The learned Chief Justice then continued his review of the evidence.]
[3] But the test of provocation is an objective and not a subjective one. Was this provocation of such a nature as to be likely to deprive an ordinary person of the community to which the accused belongs of his power of self - control? I would have thought not but I feel a genuine doubt about the matter which must be resolved in the accused's favour. I accordingly find that the provocation here was of a nature likely to deprive an ordinary person of the accused's community of his power of self - control and that it did so deprive the accused of his power of self - control. I also find that when the accused stabbed his wife he did so in the heat of passion and before there was time for that passion to cool.
[5] There remains only one point to consider. Can it be said that the accused's stabbing of his wife bore a reasonable relationship to the provocation he had suffered from her?
In England the position is governed by the common law. But in Zambia the position is governed by statute; section 183 of the Penal Code defines provocation. Section 182 reads as follows:

"(1) When a person who unlawfully kills another under circumstances, which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.
(2) The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation."

The interrelation of these sections 182 and 183 of the Penal Code was considered in *Chibeka v R* [3] when Clayden, F.J., had this to say at page 483:

"So that, where there are circumstances going to show provocation, the Court, before it convicts of the crime of murder, must be satisfied that the Crown has proved beyond reasonable doubts either that there was no 'provocation' as defined in section 183, no act or insult likely to make an ordinary person of the community to which the accused belongs lose control of himself and assault, or, if there was 'provocation', that what was done in the assault could not be regarded as what an ordinary person of that community, who had lost control of himself, might have done on the 'provocation' given."

With respect it seems to me that the last part of this dictum is in conflict with the express wording of section 182 (2) which I have just quoted. To put it shortly, the court does not have to be satisfied that what was done could not be regarded as what an ordinary person might have done. It is the other way round because the court has to be satisfied that what was done could be regarded as what an ordinary person might have done.
Clayden, F.J.'s dictum was cited by Briggs, F.J., with approval in *Greyson v R* [4] at pages 342 - 343; and he went on to say (at page 343):

"The sub-sections really mean that one must consider the whole of the provocation given and the whole of the accused's reaction to it, including the weapon, if any, used, the way it came to hand, the way it was used, and every other relevant factor, and must finally decide whether an ordinary man of the accused's community - with his ordinary allowance of human wickedness - might have done what the accused did."

I think this is a helpful dictum and sets out what I would regard as the fair overall approach.
Adopting it I have come to the conclusion that it would not be right to convict the accused of murder. He and his wife had lived together for 28 years and raised large a family. Quite clearly, the accused lost all control of himself on this occasion and, not without considerable hesitation, I have come to the conclusion that, extreme though his retaliation was to his wife's provocation, I am satisfied that, on the standards of the community to which he belongs, that retaliation did bear a reasonable relationship to the provocation.
I accordingly find the accused not guilty of murder but guilty of manslaughter. Accused convicted of manslaughter.
Accused convicted of manslaughter.