

TANZANIA / JUDGMENT

19710709 TZHC Dar es salaam

COURT
TZHCDECIDED
9 July 1971

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0 1jP - IN Tffi BLOB COUBT OF TANZANIA AT PAR BS SAL/tAM Crimtha1 Sessions Case No.71 of 1971 THE R1PtTBLIC vs. 0/tITANI s/o MtTT)UNTA CRARGs NURJMR contrary to section 196 of the Penal Code.

JUDGMENT

OYIUKE J. - in this case the accused IS charged with the murder of DATJDI MMtAJi, The incident occurred in the night of the 12th November 1970 outeie the deceased's house at Nbesi in Mzizima district in the Coast Region.. The case for the prosecution was that In the night in question the deceased, his son Motciwa (P.w.i), his son's wife Luango (P.W.2), his daughter llyamirunge o his sister ToinyI and a viaitor Sositenesi a/c Xasuga sat outside the house drinking a local brew called 'KANO.A.LA'. The deceased's daughter Nysirunge was a marriod woman and had visited the father that day. The memberS of this party helped themselves, liberally to Kangala. As the drinking progressed Sositenesi developed some interest in Nyarnirunge and made some immoral advances to her in the presence of the deceased. The deceased resented this and. started a row. He asked. Zoaiteriesi to leave and started to push Nyamirungo out of the premises and beat her in the process. The accused who had spent the evening in a pombó shop nearby appeared on the scene at this stage. Be held the deceased and remonstrated with him not to beat his daughter, This apparently incensed the deceased all the more and be turned on the ancused and floored. him. The accused alleged in his extra-judicial statement (exhibit 'A') that the deceased also hIt Mm with a stick. The accused got up and struck the deceased on the head with some instrument. P.W.1 said it was a knife. PJ.2 said it was a dark night and she did not see Olearly what the instrument was. She testified that she saw the accused rise from the ground., raise his hand and, hit the deceased on the head. The deceaSod fell and the accused ran away not' ced that the deceased bled profusely from the wound be sustained in his forehead. P.W.l made a report to the police and a jolice ambulance was sent and tho deceased was carried to Muhimbili hospital where he died 9 days after admisøion. An autopsy was carried out on the body of'the deceased and the report was tendered as exhibit 'C'. The doctor who did the post- mortem examination had returned to Poland and was not likely to return to this countr. Her report, exhibit 'C', was therefore tendered under 8 .34(b) of the Bvidence Act 1967. The report showed that the deceased sustained a crescent shaped wound which fractured the skull bone In the frontal and parietal region. The cause of death was given as brain injury. The accused made an unsworn statement in which be adopted his extra-judicial statement, exhibit 'A4 In that statement be denied hitting the

deceased or causing him any injury. He stated that he went to separate a fight quarrel and in the process the deceased pushed him down and hit him twice with a stick. He ran away. In my summing up to the assessors I asked them to consider whether it was the accused that inflicted the fatal wound on the deceased and if so whether what the deceased did to him, namely, pushing him down and assaulting him with a stick when he was merely trying to bring peace, was capable of provoking the accused to the extent of losing his self-control and inducing him to attack the deceased and whether the accused was in fact provoked. The three assessors were unanimous in their opinion that the accused was provoked into inflicting the fatal blow on the deceased and that the accused was not guilty of murder. I accept the opinion of the assessors. 4. Kifindu, learned State Attorney, has submitted that the defence of provocation was not open to the accused in that the provocation did not justify the use of such lethal weapon and was not sufficient to reduce the crime to manslaughter. He was contending in effect that there was no reasonable proportion between the provocation and the retaliatory act. I do not think that in Tanzania it is a rule of law that the retaliatory act must bear a reasonable proportion to the provocation and that absence of such reasonable proportionality deprives an accused of the defence of provocation. I am of the view that the question whether the retaliatory act is proportionate to the provocation is relevant in determining together with other factors whether the accused was really provoked or whether he was merely using the provocation as an occasion or pretext for revenge. Once, however, it is established, that he was in fact provoked I do not think that the disproportionality between the provocation and the retaliatory act should deprive the accused of the defence of provocation and prevent the crime being reduced to manslaughter. In view of the foregoing I find, the accused not guilty of murder but guilty of manslaughter. Delivered in open Court at Dar es Salaam this 9th day of July, 1971- (G.C.M. Officiating) JUDGE

Accused: I have an old mother and 3 younger brothers are at school, They depend, on me for their sustenance. I have no father. I ask for leniency. Prosecutor: Accused had no ill will towards the deceased. He had good intentions. He had drinks and the provocation made him react only once. Disproportionality and drunkenness should be regarded as aggravating circumstances requiring severe penalty. Court: The attack on the deceased was vicious and the drink he took that night might have made him react violently to the provocation. If the accused had not been drinking heavily that night he might not have been as ferocious. I bear in mind however that he is a young man and first offender. I sentence him to 8 years (eight) imprisonment. (c.c.M. oyimc) JtThG1

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