KALINDA v THE PEOPLE (1966) ZR 29 (CA)

COURT OF APPEAL

BLAGDEN CJ, DOYLE JA, DENNISON J

15th MARCH 1966

Flynote and Headnote

[1] Criminal procedure - Appeal - View taken of defence's factual submissions on appeal.

Where the trial judge has made no finding on the validity of facts put forward by the defence an appeal court must take the view of those facts most favourable to the appellant.

[2] Criminal law - Provocation - Adultery - Wide view taken of.

In Zambia, a confession of past adultery or of intention to commit adultery is as serious provocation as being discovered *in flagrante delicto* and can form the basis of a valid defence to a murder charge.

Cases cited:

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

(2) *Holmes v D P P* [1946] AC 588; [1946] 2 All ER 124.

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

Judgment

Doyle JA: On 11th October, 1965, at the sessions of the High Court at Ndola the appellant was convicted of murder. His defence at trial was insanity and sudden provocation. On appeal to this Court the grounds of appeal solely related to insanity but the Court considered that the question of sudden provocation should also be argued and gave leave for this to be done. The Court was satisfied that there were no grounds to support an appeal based on insanity but allowed the appeal for reasons to be given later. These reasons we now give.

The facts put forward at trial by the appellant and his witnesses were that appellant had been living happily for many years with his wife and seven children. Early in 1964 his wife had started running around with other men. This had caused the appellant, who was a church elder and headmaster, very great distress. He remonstrated with his wife to little effect. He did not actually find his wife *in flagrante delicto* but in July, 1964, she admitted that she had committed adultery with a certain man and on a number of occasions appellant had observed physical signs which heightened his suspicions as to his wife's behaviour.

In consequence of her behaviour the appellant had taken to locking his wife in his house, blocking up the windows and guarding the house, by walking around it or sitting in it armed with a shotgun.

DOYLE JA

On 10th May, 1965, his wife had threatened to leave the appellant and to marry another man. He had pleaded with her to remain and keep the family together. In addition to the personal distress suffered by appellant, he also feared that in accordance with Lala custom he would, if his wife left him, also lose his children.

On 13th May he found his wife packing her things and adjusting her bicycle. She then told him that she was leaving to marry another man and that, in effect, she would take the children with her. He became enraged, lost his senses and shot her twice with a shotgun.

There was no evidence of the whereabouts of the shotgun at the time of the conversation, but the shooting happened immediately after the conversation. The shotgun was a single shot and therefore required to be reloaded.

[1] The learned trial judge did not expressly state to what extent he accepted the defence evidence but generally he seems to have accepted it. In any event in the absence of an adverse finding this Court must determine the appeal on the view of the facts most favourable to the appellant.

[2] The learned trial judge devoted most of his attention to the defence of insanity which, as this court has held, he rightly rejected. The defence of sudden provocation does not appear to have been strongly urged as the judge refers in his judgment to the fact that there had been a suggestion of sudden provocation. He dealt with this defence in the following paragraph:

' As to the question of sudden provocation I cannot find that the accused can avail himself of this defence. If the words of the wife when she told her husband she was going to marry another man and then made reference to the beer could be said to be sudden provocation, there can be no doubt that the subsequent shooting of the deceased by the accused with a shotgun was out of all proportion to the provocation offered. I am not satisfied that the act of the accused in shooting the deceased as I have described bore a reasonable relationship to the provocation.'

In the opinion of this Court the learned judge did not give adequate consideration to the meaning of the words in the context in which they were spoken. If he had he could not have had any doubt that the words could and did provide grave provocation. Perhaps he was misled in his approach to the defence of provocation by the fact that it had not been strongly pressed. However that may be, the plain meaning of the words used was that the wife was departing to commit adultery and to break up the family.

To be found in adultery has in the English common law always been considered one of the gravest forms of provocation. In Zambia and other African territories a confession of adultery has been held

to be the equivalent of being found in adultery and to be grave and sudden provocation. There is a difference but little distinction between confessing to past adultery and stating that one is about to commit it. In *Greyson v R* [1], the facts were that the appellant had been having marital troubles with his wife, the deceased. She had at one time left him for another man. On the night of the crime the appellant and his wife went to bed peacefully together. He awoke and heard his wife talking to a man outside. He went out but saw no one but his wife. He spoke to her and she replied, 'Are you a man at all? I started long ago to tell you that I did not want you. Do you mean that I should not carry on with other men?' Appellant then attacked her with a knife and inflicted six or eight wounds from which she subsequently died of haemorrhage. Appellant was convicted of murder. On appeal to the Federal Supreme Court, Briggs, F.J. delivered the leading judgment with which the other judges concurred. He dealt with the gravity of the provocation in the following passage:

' In assessing the gravity of the provocation it seems that there are three elements to be considered, the direct insult to the appellant's virility, which must have been unjustified unless the deceased's child was a bastard, the fact (if it was such) of an immediately recent adulterous association with a man believed to be Maloya, and the whole of the antecedent history. In view of that history it seems to me that before the deceased spoke the appellant had good reason to suspect that she had left his hut to commit adultery, and either was about to do so or had just done so when he came out. The implied admission in her words must have turned that suspicion into certainty, and revived in a moment the anger that a long and sordid course of deceit, unfaithfulness, insult and injustice had not so far caused to boil over. Whether or not the deceased was "taken in adultery", as described in *Holmes v DPP* [2], is immaterial under the law of Nyasaland. The wrongful act detected, and coloured by previous matters, and the insult were together provocation both sudden and very grave.'

In the opinion of this Court these words could properly be applied to the circumstances of this case where there was a similar history of a straying wife, a husband trying to keep the home together and the declared intention of the wife to depart and commit adultery.

The learned trial judge has clearly not had in mind the gravity of the provocation. His finding that the use of a shotgun bore no reasonable relationship to the provocation was therefore based on an erroneous comparison. Had he properly assessed the nature of the comparison, he might still have come to the conclusion that the means were not proportionate or that there was present some element of premeditation, grievance or revenge which could prevent the reduction of the crime to manslaughter. The majority of the judges in *Chibeka v R* [3], which also had some similarity to the present case, found that an attack with an axe inflicting twenty - three wounds was not proportionate to provocation caused by a

previous history of adultery culminating in an incident in which the wife stated that the appellant was not a proper man and threatened to leave him for another. No case is exactly similar in its facts and we are unable to hold that had the learned trial judge directed himself correctly on the

measure of provocation, he must of necessity have come to the conclusion that the means of retaliation was out of all proportion to the provocation given. Accordingly we allowed the appeal, quashed the conviction for murder and substituted a conviction for manslaughter with a sentence of five years imprisonment with hard labour.

Appeal allowed