ROSALYN THANDIWE ZULU v THE PEOPLE (1980) Z.R. 341 (S.C.)

SUPREME COURT
GARDNER, AG.D.C.J., CULLINAN, J.S., AND MUWO, AG.J.S.
17TH AND 18TH FEBRUARY, 1981
(S.C.Z. JUDGMENT NO. 3 OF 1981)

Flynote
Criminal law and procedure - Murder - provocation - Loss of self control- Test to be applied - Necessity for retaliation to be proportionate to provocation.
Criminal law and procedure- Murder - Provocation - Plea failing - Whether defence of self defence available.

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Criminal law and procedure - Murder - Self defence - Immediate danger of death or serious bodily harm - Test to be applied.

Headnote
The appellant was convicted of the murder of her husband. The trial Judge found *inter alia*, that during the marriage of the parties, the deceased had consistently used extreme violence against the appellant to the extent that on occasions she had to go to hospital. On the morning when the incident occurred, the appellant had an argument with the deceased whereupon the latter loaded a pistol in the presence of the appellant after sayings: "I am a hard-hearted man, I will kill you." The deceased then went into the bathroom and placed the loaded pistol on top of the toilet cistern. The appellant dressed herself and prepared to go out when the deceased called her. She went into the bathroom. The deceased then made an attempt to the gun from the top of the toilet cistern saying, "You think I cannot kill you." On seeing this, the appellant, who thought that the deceased intended to shoot, her, seized the gun first and fired six shots at the deceased, four of which hit him, as a result of which he died.

The trial Judge held that there was no provocation because the assaults by the deceased upon the appellent in the past were too remote and had ceased; and that once the appellant had seized the gun, she had every possibility of retreat and there was no need whatsoever to use the gun, on appeal.

Held:
(i) The immediate attempt by the deceased to seize the gun when the appellant entered the bathroom was itself an act of grave provocation.
(ii) Bearing in mind that the deceased was person capable of extreme violence, the appellant was justified in believing that she would be assaulted and the gun taken from her and used against her if she did not first use the weapon.
(iii) The courts in the Common Law countries have always been very slow to apply over-fine

tests to actions taken and weapons used in the heat of the moment.

Cases referred to:
(1) R. v McInnes [1971] 3 All E.R. 295.
(2) Tembo v The People (1972) Z.R. 220.

For the appellant: J.B. Sakala and H. E. Coovadia J.B. Sakala and Company.
For the respondent: L.S. Mwaba, State Advocate.

Judgment

GARDNER, AG.D.C.J.: delivered the judgment of the court.

The appellant was convicted of murder, the particulars being that on the 31st of August, 1979, she murdered her husband.

There was a great deal of disputed evidence in this case but the learned trial judge found the following facts, many of which were in

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favour of the appellant. He found that, during the marriage of the parties, the deceased had consistently used extreme violence against the appellant to the extent that on occasions she had to go to hospital. He found that on the morning when the incident occurred the appellant had had an argument with the deceased about another woman and had produced a letter which the deceased threw in the face of the appellant. Thereafter, the learned triad judge found that the deceased loaded a pistol in the presence of the appellant after saying: "I am a hard-hearted man, I will kill you"; that then the deceased went into the bathroom immediately adjoining the bedroom and placed the loaded pistol on top of the toilet cistern. The learned trial judge accepted the evidence of the appellant that she then dressed herself and prepared to go out, but, as she was leaving, the deceased called to her: "Woman, if you are my wife please come here". The appellant then went into the bathroom and she found her husband naked in the bath with soap on his face. The deceased then made an attempt to seize the gun from the top of the toilet cistern saying: "You think I cannot kill you". On seeing this, the appellant, who thought that the deceased intended to shoot her, seized the gun and fired six shots at the deceased, four of which hit him, as a result of which he died. Thereafter the appellant immediately took her children and reported to the nearest police station.

As we have said, the learned trial judge said that he believed the appellant. He properly advised himself that in accordance with the case of *R v Mclnnes* (1) at pp. 300/301 that the possibility of retreat must be taken into account, and that in all cases of this nature the possibility of provocation must be considered. He held that there was no provocation because the assaults by the deceased upon the appellant in the past were too remote and had ceased, and that in the circumstances of this particular case, once the appellant had seized the gun, she had every possibility of retreat and there was no need whatsoever to use the gun.

In the first place we would say that the immediate attempt by the deceased to seize the gun when the appellant entered the bathroom was itself an act of grave provocation, apart altogether from the cumulative aspect of the severe provocation over the years, and an appeal on this ground would be

bound to result in a finding of provocation. We have, however, to consider the plea of self-defence. The learned trial judge found that after the appellant had seized the gun she was "near the bathroom door" and that it was possible for her to escape. It is apparent that the learned trial judge failed to appreciate that when both parties were close to the gun the deceased, who had shown by his past behaviour that he was capable of extreme violence, was so close to the appellant that he was capable of attacking her, and that at that stage the appellant was justified in believing that she would be assaulted and the gun taken from her and used against her if she did not first use the weapon. Had the learned trial judge taken this aspect of the evidence into account he may well have considered that the initial use of the gun by the appellant was justified. As it was, he considered the use of the weapon unjustified. He did not then consider the aspect as to whether the firing of six shots

at the deceased constituted an excess of self-defence. As the Court of Appeal, per Baron, J.P., said in *Tembo v The People* (2) at p. 227:

> "The courts in the Common Law countries have always been very slow to apply over-fine tests to actions taken and weapons used in the heat of the moment."

We have little doubt that this was, a moment of unexpected anguish for the appellant. We find it extremely difficult indeed to gauge what would have been a reasonable retaliation by the appellant, and this difficulty is enhanced by the very fact that she is a member of the physically weaker sex. In particular we find it impossible to say what the learned trial judge's finding would have been on this aspect. We are not satisfied therefore that, had the learned trial judge considered all of the above aspects, he would inevitably have convicted the appellant.

This is not a case in which this court should exercise the proviso s.15 (1) of the Supreme Court Act. The appeal is allowed, the conviction is quashed, and the sentence is set aside.

Appeal allowed

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