IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., PLATT, J.S.C., & SEATON, J.S.C.,)

CRIMINAL APPEAL NO. 15 OF 1989

BETWEEN

JOSEPH MAGEZI ::APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal against conviction and sentence of the High Court decision Holden at Hoima by (Hon. Justice C.M. Kato) dated the 25th May, 1989)

IN

HIGH COURT CR. SS. CASE NO 20 OF 1989

JUDGMENT OF THE COURT

As long ago as 1st January 1982, the Appellant Joseph Magezi quarreled over a woman with the deceased Estakyo Mbetegeza. As a result, at the end of the quarrel, the Appellant stabbed Mbetegeza once in the stomach, with a bayonet about 9 inches long. The wound penetrated as far as some internal organs which were cut. Although Mbetegeza was taken to hospital, he could not be saved and he died about two days later.

At his trial in 1989, the Appellant admitted these facts. He attempted to plead guilty to manslaughter, but that was not accepted by the State. At the end of his trial, the Appellant still alleging that he had been provoked and had taken liquor, was nevertheless found guilty of murder contrary to Section 183 of the Penal Code Act, and was sentenced to death. He now appeals, the main ground being that provocation had not been negatived by the Prosecution.

This being a first appeal, it is the duty of this Court to evaluate evidence afresh in the light of the findings of the trial Court. The learned Judge summed up the issues, whether the Appellant attacked the deceased for no apparent reason and when the deceased had fallen down, stabbed the latter in the stomach, or whether the deceased attacked the Appellant first. But it is right to say that the attack by either side was an expression of desire to possess Nyamusana and that side of the case did not receive as accurate prominence as Counsel for the Appellant protested was necessary. According to Counsel the essence of the case is whether the deceased intervened when the Appellant was dancing with Nyamusana and

attacked the Appellant thus provoking the Appellant, by trying to take Nyamusana away from the Appellant. The learned Judge held as follows when dealing with the defence of provocation:-

'It was the case for defence that the accused had gone to the dance with his wife called Nyamusana and that during the dance the deceased tried to pull her away from him, but when she resisted going away from him the deceased turned around and kicked the accused and then stabbed him. On the other hand, prosecution case has been that this lady Nyamusana was at one time a wife of the deceased and she had stayed with him for 3 years and that on that night they danced together before the accused attacked him. In deciding whether or not provocation has been established, it must be shown that the accused lost self-control when he was acting the way he acted. According to the evidence of Gobi the accused did not come together with Nyamusana and he did not pay her entrance fee. The evidence of Naume Nyakirya (PW3) is that the deceased danced with Nyamusana that night so did the accused. The mere act of the deceased having danced with Nyamusana could not have provoked a reasonable man in accused's station of life since the accused must have known that Nyamusana was at one time the deceased's wife and that in taking her to the dance, if at all he ever took her there which I do not believe he did, he must have expected her to dance with other people. There was no evidence on record to suggest that the accused had lost his self—control at the time he acted as he did.'

Then the learned Judge correctly directed himself on the approach to provocation:

"It is the law that the accused does not have the duty of proving provocation he only has the duty of raising that defence…….. It is also the law that once the defence raises any defence it is duly of the prosecution to negative such defence..... In the case now under consideration prosecution has adduced evidence from 2 witnesses Kahwa (PW2) and Nyakirya (PW3) show that the accused was not provoked by the deceased in any way.' (Sic).

The learned Judge's careful and correct directions on the law in stand out in contrast to his directions on the facts.

The facts which the witness Erifazi Kahwa (PW ii) brought out were that the deceased Mbetegeza was his brother. As such Kahwa was in a position to explain Mbetegeza's relationship with Nyamusana. He said under cross—examination:—

"My brother had not married Nyamusana but they had stayed together for about 3 years and they were living at Nyamusana's parents but at the time of his death he had left that place. I did not know that Magezi had married her."

Indeed Kahwa related that by the time of his death the deceased by then had separated with Nyamusana for a few days. After that Nyamusana disappeared". Those facts were concurred in by Naume Nyabirya (PW iii) and Sodraki Gobi (Pw-iv). Hence although the deceased had been living with Nyamusana, he had separated from her a few days before the dance and none of these witnesses could dispute the Appellant's allegation that he had "married her" at the time of the fatal incident, although they could not confirm this association either.

At the time of the deceased's fatal injury, the deceased and the Appellant were at a disco dance. Nyamusana was also there. According to Gobi (Pw4) these three came separately to the dance. Nevertheless, Naume (Pw3) saw the deceased dance with Nyamusana and then she danced with the Appellant. It is clear that the Appellant took no aggressive attitude towards the deceased while the latter danced with Nyamusana. It was about the time that the Appellant was dancing with Nyamusana that the trouble started. Kahwa found the Appellant and Nyamusana dancing. The evidence of this witness was:—

"The accused attacked Mbetegeza because the accused was dancing with Mbetegeza's

wife called Nyamusana".

But under cross—examination he related:-

"I was a bit fur so I do not know how things started but I saw the accused boxing the deceased and then the fight started,"

This meant that the deceased fell down and the Appellant pulled a bayonet from his pocket and stabbed the deceased on the abdomen.

At the hospital the deceased told Kahwa that the Appellant had killed the deceased because of the wife. In conclusion Kahwa told the Court:-

"It is true that my brother wanted to take Nyamusana from the accused and when the accused injured my brother Nyamusana ran away".

This statement would appear to explain Kahwa's earlier statement that

"The accused attacked Mbetegeza because accused was dancing with Mbetegeza' a wife".

There had been a "commotion at the disco" and then the appellant boxed Mbetegeza.

The effect of this evidence seems clear, that the Appellant had only attacked Mbetegeza after the latter had caused commotion in wanting to take Nyamusana from the Appellant, and then the fight started.

Naume Nyakirya's evidence is less clear. She had been sitting on a bench in the dancing hail and saw the Appellant box the deceased and then stab him. She had seen each of the men, the Appellant and the deceased dance with Nyamusana. Nyamusana had danced first with the deceased and then the Appellant. She did not know what caused the appellant to attack the deceased. She did not see any commotion or hear any quarrelling between the Appellant and deceased before the fight.
Gobi (Pw4) was not in the dance hail.
It is apparent that there were contradictions between the deceased's brother Kahwa and Naume Nyakirya as to what had happened. Kahwa thought there had been a commotion before the fight, Naume did not observe that. Kahwa knew the cause of the fight, namely that the deceased wanted to take Nyamusana from the Appellant; Naume says she "really" did not know why the Appellant attacked the deceased.
The Appellant explained that as he and Nyamusana were dancing Mbetegeza tried to pull Nyamusana from him and when she refused to go with him, Mbetegeza kicked the Appellant. Mbetegeza also attacked the Appellant with a knife. The Appellant grabbed Mbetegeza removed the knife and then stabbed the deceased.

The trial Judge did not resolve the conflict between Kahwa and Naume and indeed acknowledge that Kahwa's evidence did support the defence that there had been a commotion and that Mbetegeza had wanted to take Nyamusana from the Appellant. In view Of Kahwa's evidence, it is unfortunate that the trial Judge considered that Kahwa's evidence like that of Naume showed that the Appellant had not been provoked in any way. Naume's evidence might have that effect, but Kahwa's evidence was similar to that of Naume. Indeed if Kahwa's evidence was acceptable, as the learned Judge seems to have thought it was, then the learned Judge could not conclude that there could be no provocation because Mbetegeza danced with Nyamusana. That was not the point. The issue was whether the Appellant could have been provoked when Mbetegeza tried to pull Nyamusana away from the Appellant. The evidence of loss of self—control lay in the defence, and Gobi (PW4) said that he himself could feel annoyed if someone tried to get his wife away from Gobi at a dance, and he would fight him if he could do so. He would escape if the other man was too strong for him. He also

said that any man could carry a knife depending on his intentions. The record does not reveal that the learned Judge ever analysed for the Assessors or himself the conflict between Kahwa and Naume, or point out that the defence had some support in Kahwa's evidence, though the details of the fight were different as narrated by Kahwa and the Appellant. It seems to us that Kahwa's admission, (that Mbetegeza had wanted to take Nyamusana from the Appellant) was so important that without mentioning this fact to the Assessors, the summing up was defective. Without acknowledging this fact in the judgement the real issue was not properly tackled. When the deceased's brother acknowledged that the deceased had wanted to take Nyamusana from the Appellant, it is more than likely that the Appellant had been provoked and that there had been a commotion before the fatal fight. On that basis, Gobi (Pw4) explained that there could be provocation.

Had the Assessors been properly directed, it is not certain that they would have come to the same conclusion that the Appellant was guilty of murder. Certainly it seems difficult to follow the opinion of the Assessors that the Appellant came to the dance to kill Mbetegeza in order to possess Nyamusana for himself. The Appellant had not attacked Mbetegeza when the latter danced with Nyamusana. It was when the appellant was dancing with Nyamusana that the trouble broke out, and that could only logically come about if the deceased wanted to get Nyamusana back for himself.

Looking at all the evidence in this case, it seems to us that there is a strong possibility that the Assessors would have advised the Judge that this was a case of manslaughter, if they had been properly directed. At any rate, it cannot be said that the Appellant's defence was negatived by the evidence of Kahwa. Altogether the evidence seems to us to suggest that it was as likely to be case of provocation as not. Therefore we give the benefit of the doubt to the Appellant.

It follows that the Appellant's conviction is quashed, and the sentence of death set aside. There will be substituted therefore a conviction for manslaughter contrary to Section 182 of the Penal Code Act.

On sentence, we take into account the fact that the Appellant is a first offender and that he has been in custody since January 1982. We impose such term of imprisonment as will result in the Appellant's immediate release unless he is held for any other lawful cause.

DATED at Mengo this 18th day of December, 1990.

Sgd:
S.T. MANYINDO
DEPUTY CHIEF JUSTICE

H.G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT

DISSENTING JUDGMENT

JUDGMENT OF SEATON, J.S.C.

The trial court, in coming to a decision whether or not malice aforethought had been proved, considered all the circumstances. These included the relationship between the deceased, Nyamusana and the Appellant. Whether Nyamusana was the wife or cohabitee of one or either of the two men was a factor but not the overriding one - even if she were mere friend of one of the two men, the attempt by one to take her away from the other could have provoked a sudden loss of self—control which is what happened according to the Appellant.

On the other hand, if the commotion and killing were not the result of sudden provocation but were the execution of a preconceived plan to eliminate a rival for the girl's emotions, then the killing would be murder not manslaughter.

It was the nature of the weapon used, the area of the body injured and the repetition of the blow that the prosecution pointed to as proof of intent to cause death. Whether it is customary for men in that area to carry knives of the type used in the killing when attending an evening dance would be known to the assessors. They were unanimous in finding there was malice aforethought. I might have disagreed with them but I cannot say that the trial Judge was wrong in agreeing with them.

There was no misdirection on the law applicable to manslaughter and murder. On the facts adduced by the prosecution, there was ample evidence, if believed, which would justify the trial court's conclusion. I would therefore dismiss the appeal.

DATED at Mengo this 18th day Of December, 1990.
E.E. SEATON
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT