The Republic of Kiribati v. Tekatea Bauro

Court of Appeal
Gibbs V.P., Frost, Donne, Dillon, and Mitchell J.J.A.
19 April 1988

Criminal law—defences—provocation—test for provocation—whether accused reacted as an ordinary person would have acted—ordinary person to be assessed in light of an ordinary citizen in the society of Kiribati as it exists today.
Criminal law—defences—provocation—effect of interposition of "cooling-off" period between act of provocation and act of killing.
Criminal law—defences—provocation—tradition and custom—whether court can take notice of unproved custom in determining the effects which acts of provocation had on accused.
Criminal law—evidence—tradition and custom—whether unproved tradition and custom can be considered in court.

Bauro had been charged with murder of his adopted son but at his trial before Maxwell C.J. was convicted of manslaughter on the ground that he had acted under provocation. Maxwell C.J. considered that the actions of the son toward his father were such as to raise, in a village community where the authority of the head of the family is sacrosanct, more passion than in more sophisticated communities. The Attorney-General referred two questions to the Court of Appeal under section 20 of the Court of Appeal Act 1980:

1. Was the Court entitled to take into account unproved customs or traditions of the village community of an accused when deciding whether the accused acted under provocation?
2. Was the Court required to take into account that the accused had had time to cool off between the time of being provoked and the time at which the killing occurred?

HELD:

(1) The first question was not raised by the facts of the case. The trial judge had correctly applied section 198 of the Penal Code which was modelled on section 3 of the Homicide Act 1957 (U.K.). That required a dual test for deciding if there was provocation. First, did the provocation cause an accused to lose his self-control? Second, would a reasonable man have acted as the accused did? When the second part of the test is applied in Kiribati one must consider the position of an ordinary citizen in Kiribati as it is today. That was exactly what the trial judge had done in holding that the provocation was such as would have caused a reasonable person to act as the accused did.

The question referred to the Court could, however, be answered No, unless in the circumstances judicial notice can be taken of the custom.

Director of Public Prosecutions v. *Camplin* [1978] A.C. 705; [1978] 2 W.L.R.

679; [1978] 2 All E.R. 168; 67 Cr. App. R 14 (H.L.) followed.

(2) A court is required to consider the fact of a cooling-off period between provocation and the killing, as one of the facts of the case. But such a fact does not operate to dictate the result through any binding presumption or rule of law. *Lee Chun-Chuen* v. *R.* [1963] A.C. 220; [1962] 3 W.L.R. 1461; [1963] 1 All E.R. 73 (P.C.) referred to.

Editorial observation: Compare the "slow fuse" claim for a "reasonable Niuean" in *Latoatama, Folitolu, and Tamaeli* v. *Williams* [1954] N.Z.L.R. 594 where defendants were charged with the killing of the New Zealand Resident Commissioner of Niue Island.

Other case referred to in judgment:
Ibeibe Tebwebwe v. *R.* [1977] Gilbert Islands Law Reports 119

Legislation referred to in judgment:
Court of Appeal Act 1980, section 20
Homicide Act 1957 (U.K.), section 3
Penal Code, sections 197 and 198

Legal sources referred to in judgment:
Archbold (42nd. ed.), paragraph 20–33
Reference by Attorney-General under section 20 of the Court of Appeal Act 1980

Counsel:
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T. Teiwaki for Bauro

GIBBS V.P., FROST, DONNE, DILLON, and MITCHELL J.J.A.

Judgment:

The respondent, Tekatea Bauro, was charged that on 27 February 1987 at Nuka Beru he murdered Tirouea Tekatea, who was his adopted son. He was tried before the learned Chief Justice (Maxwell C.J.) who found that the respondent had intentionally stabbed his son, but in doing so had acted under such provocation as to reduce the charge to manslaughter. He found the respondent guilty of manslaughter and convicted him accordingly.

The evidence which the learned Chief Justice accepted may be shortly stated as follows. On 27 February 1987 the respondent was at his work when he was informed that his son was drunk and acting in a disorderly manner. The respondent went to his home and found his house, boxes, and canoe destroyed and his house in disarray. He went from his home to look for his son at the house of one Kiriti, a place where his son usually purchased fermented toddy. The respondent had with him a tobacco knife. It took the respondent about half an hour to bicycle to Kiriti's house. He there found his son and Kiriti sitting or lying in circumstances suggesting that they had been drinking. There was a conflict of evidence as to what next occurred. The respondent gave evidence that his son was accidentally killed in the course of a struggle. In his evidence he said that he was not provoked and that it was not his intention to kill his son. He relied on accident and not on provocation or self-

defence. The learned trial judge found, as he was entitled to do, that the respondent had deliberately stabbed his son in the chest. He said, however, that he was bound to consider the questions of provocation and self-defence even though the accused had denied that he had been provoked and had not said that he acted in self-defence. He pointed out that the accused was in a dilemma since if he raised the defence of provocation, that would weaken his defence of accident. He found that the respondent was provoked by what his son did at home and by the fact that his son, after causing the damage, went to his usual drinking place. He then went on to consider the question whether these acts of the son had deprived the respondent of the power of self-control, and to consider whether the damage done by the son and his subsequently being found where he usually purchased his fermented toddy would have caused a reasonable man in the respondent's village or community to lose his self-control. On that point he said:

> In a village community where the authority of the head of the family or old men of the village is sacrosanct and is accepted as natural and proper, the act as committed by the accused, in my view, is bound to arouse more passion than in a more sophisticated community.

He rejected the submission of the prosecution that if there was provocation there was enough time for the accused to cool off. After reviewing the evidence he found that the respondent had acted under extreme provocation.

The Attorney-General has referred to this Court under section 20 of the Court of Appeal Act 1980 the two following points of law for its consideration and opinion:

1. Whether in the trial of an accused person charged with murder where provocation is being considered by the Court in extenuation under sections 197 and 198 of the Penal Code (cap. 67) the Court is entitled, when considering the effect which the acts perpetrated by the deceased had on the accused, to take into account extraneous matters like unproved customs or traditions of the village community of the accused.
2. Whether in the trial of an accused person charged with murder where provocation is being considered by the Court in extenuation under section 197 and section 198 of the Penal Code the Court ought, in law, to take into account evidence that the accused had time to cool off in determining whether the act or acts constituting provocation was or were enough to make a reasonable man do as the accused did.

The first question is not appropriately raised by the circumstances of the present case. The learned Chief Justice did not take into account unproved customs or traditions. Rather, he related the question whether the provocation was enough to make a reasonable man do as he did to the situation of a reasonable man in a village. That was plainly right. Section 198 of the Penal Code is modelled on section 3 of the Homicide Act 1957 of the United Kingdom. The effect of the latter section was considered by the House of Lords in *Director of Public Prosecutions* v. *Camplin* (1978) A.C. 705; 67 Cr. App. R. 14. As that case shows, section 198 requires the Court to apply a dual test: the provocation must not only have caused the accused to lose his self-control but must also be such as might cause a reasonable man to react to it as the accused did. The jury in England, and the judge in Kiribati, must decide, as a matter of opinion, whether a reasonable man might have reacted to the provocation

as the accused did, and for the purposes of that test the expression "reasonable man" means "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today". When the test is applied in Kiribati one must consider the position of an ordinary citizen in the society of Kiribati as it is today. That was what the Chief Justice did in the present case.

This case is quite different from a case such as *Ibeibe Tebwebwe* v. *Reg.* (1977) Gilbert Islands Law Reports 119 where it was sought to rely on an alleged custom involving knife fight after challenges, and the Court of Appeal pointed out that the alleged custom was not supported by evidence and that there was nothing to justify the court in taking judicial notice of its existence.

The answer to the first question is, "No, unless in the circumstances judicial notice can be taken of the custom".

The second question is whether the Court in considering the question of provocation ought to take into account evidence that the accused had time to cool off before he acted as he did. In *Lee Chun-Chuen* v. *Reg.* (1963) A.C. 220; (1963) 1 All E.R. 73 the Privy Council said (at page 79 of All E.R.):

> Provocation in law consists mainly of three elements—the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation.

They said that these three elements are not detached, and that "their relationship to each other—particularly in point of time, whether there was time for passion to cool—is of the first importance". Clearly evidence of a cooling-off period is relevant.

However, as has been said, the issue is one of opinion rather than of law, and the question whether there was time for the accused to cool off between the provocative act and his retaliation to it is simply one of those matters to be considered in coming to a conclusion—it does not result in any binding presumption or rule of law (see Archbold (42nd. ed.) paragraphs 20–33 at pages 1620–1621). In the present case, it may be noted, the provocation found by the Chief Justice included the fact that the son was found where he normally purchased his fermented toddy and apparently having been drinking there. Question 2 should be answered, "Yes, as one of the facts of the case".

The order will be: questions answered—

1. no, unless in the circumstances judicial notice can be taken of the custom;
2. yes, as one of the facts of the case.