**TOLATO ATO**

**v.**

**THE STATE**

SUPREME COURT OF NIGERIA

11TH APRIL, 1968.

SUIT NO. SC 325/67.

**LEX (1968) - SC 325/67.**

**OTHER CITATIONS**

2PLR/1968/21 (SC)

**BEFORE THEIR LORDSHIPS:**

LIONEL BRETT, J.S.C.

GEORGE BAPTIST A. COKER, J.S.C.

CHARLES OLUSOJI MADARIKAN, J.S.C

**CONNECTED AREAS OF PRACTICE**

CRIMINAL LAW (MURDER WITH KNIFE), WOMEN AND CHILDREN

**REPRESENTATION**

COLE, - for the appellant

BELGORE [D.D.P.P.], - for the respondent

**ORIGINATING COURT**

HIGH COURT SITTING AT MAKURDI (HAGUE, ACTING J., Presiding)

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW: - Homicide – Murder – Duty of prosecution to prove same –Provocation - Whether words spoken in the course of a quarrel and followed immediately by a blow are evidence of provocation - Evidence of premeditation - Misdirection by trial court as to same – Effect on conviction of murder – When court would substitute murder with culpable homicide not punishable with death

HEALTHCARE AND LAW: - Women and Emergency healthcare services – Mother of young child stabbed by co-wife in the evening – Deceased only conveyed to Hospital later that night - Death from shock and haemorrhage resulting from stab wound in front of her left chest and a similar wound on her left breast – Implication for justice administration and society

CHILDREN AND WOMEN LAW: - Children as indirect victims - Women and Crime – Women and Polygamy – Women and divorce under customary law – Woman given notice of divorce by husband – Belief that co-wife is responsible for divorce - Fight and stabbing of co-wife occasioning death – Child of deceased present in room when fight ensued – Implication for children of the marriage and justice administration

**PRACTICE AND PROCEDURE ISSUES: -**

COURT:- Criminal Trial Court – Misdirection as to what constitutes premeditation – Duty of appellate court thereto

**MAIN JUDGMENT**

**MADARIKAN, J.S.C** (Delivering the Judgment of the Court):

The appellant in this appeal was convicted in charge No. MD/76C/66 by Hague, Acting J., in the High Court sitting at Makurdi on the 13th September, 1967, of killing Asabe Tswaki in circumstances amounting to culpable homicide punishable with death.

The case for the prosecution was that the appellant and the deceased were wives of one Tswaki Ndesati. In the evening of 22nd June, 1966, Mairamu Bayero (prosecution witness no. one) and Hassaha Bayero (prosecution witness No. two) saw the appellant entering the room of the deceased. Soon after they both heard a shout and the appellant ran out of the room. Hassaha Bayero (prosecution witness no. two) testified that:-

“I heard a shout from Asabe’s room. It was Asabe’s voice. Asabe told ‘I am dying. Talatu has stabbed me.’ Accused rushed out of the room. I went into the room. I saw blood on Asabe’s left breast. There was a wound about one inch deep. I saw knife on the floor also two bottles and a lamp.”

The deceased was found lying on the ground in her room crying with a wound on her left breast had a knife (exhibit A) beside her. Later that night, she died when she was being conveyed to the hospital at Wukari. The medical report of the doctor who performed a post mortem examination on her corpse was to the effect that she died of shock and haemorrhage resulting from stab wound in front of her left chest and a similar wound on her left breast

In her statement to the Police (exhibit C 2), the appellant admitted stabbing the deceased. When examined in chief at the trial, she denied stabbing the deceased but under cross- examination she stated:-

“She (i.e. the deceased) pushed me and I pushed her. We started fighting. I told her she was to blame for my not speaking to my husband for seven days. I knocked her down. I held her neck. She shouted and I shouted, but nobody came. She tried to take up her knife. I told her she could not do anything to me with the knife. I grabbed it from her and cut my finger. I said as she had tried to stab me, I would stab her and I did so, once. It was dark. I could not see which part of her body I stabbed.”

Learned counsel for the appellant, Mr. Cole, was granted leave to argue the following additional grounds of appeal:-

1. The learned trial judge erred by finding to the effect that the appellant did not successfully establish the defence of provocation.

2. The learned trial judge failed to direct himself on the conflicting evidence of identification of the corpse alleged to be that of the deceased. Evidence of the cause of death of the deceased was unsatisfactory.

3. The statement made by the appellant with its transaction was admitted as Exhibits C1 and C2 for identification only. In as much as the statement was not admitted in evidence as official exhibit, the learned trial judge erred by replying on it.”

Arguing the third additional ground of appeal., Mr. Cole referred to the evidence of Sergeant Major Ibrahim Danbani (prosecution witness no four) who testified that Nyobanga Sambo (Police Constable 43) recorded the statement of the appellant in Hausa and that he (i.e. Danbani) later translated the statement into English. Mr. Cole submitted that because Mr. Sambo was not called as a witness in the High Court, it was wrong for the learned trial judge to rely on the statement of the appellant to the Police the Hausa and English versions of which were marked as exhibits C1 and C2 respectively for identification only. Learned counsel for the respondent, Mallam Belgore, pointed out to us, and we agree, that in making his submission Mr. Cole would appear to have overlooked the fact that the depositions of Sambo were admitted in evidence under section 239 (1) of the Criminal Procedure Code and marked exhibit D. In it, Sambo said:-

“I recorded the statement of accused. I cautioned accused in Hausa. I recorded the statement, read it over to the accused and said it was correct and signed it. Statement tendered exhibit 4. Statement read.”

This ground of appeal therefore fails.

According to the medical report, the corpse of the deceased was identified to the doctor by “Police Constable 78 Danjuma and Brothers.” At the trial, Danjuma was not called as a witness but it was Police Constable 75 Usman Jibu who testified that he identified the corpse to the doctor. This formed the basis of Mr. Cole’s argument in support of the second additional ground of appeal. In our judgment, the conviction could be sustained in the absence of the medical report as there is sufficient evidence as to the cause of death.

In considering the defence of provocation, the learned trial judge said:-

“However, I shall consider Mr. Odugbesan’s contention that her statement in cross-examination is the truth as she is entitled to plead provocation by virtue of section 222 (4) Penal Code. The crux here is the sudden and temporary loss of self- control whereby malice is negatived. Here accused admitted that after disarming Asabe she said ‘as you have tried to stab me I shall stab you.’

This is indicative of premeditation as the accused had had time to consider what to do and chose to inflict damage on her victim with a deadly weapon. It does not avail her to say she had no intention to kill as a sharp knife is inherently dangerous to life. Accepting the defence case at its highest this could not be a successful defence to the capital charge reducing it to a lesser offence.”

For a better understanding of the argument of Mr. Cole, it is necessary to quote in full the evidence of the appellant under cross-examination. It reads:-

“I received the divorce notice at about 12 noon on Wednesday 22nd June, 1966. He came home, about 4 p.m. During that period I was lying down weeping. I did not speak to him when he came I did not start packing. I thought he had treated me very badly. I have been on good terms with first and second prosecution witnesses, exhibit A is not my knife - I have had one similar to A in appearance. First prosecution witness owns exhibit A. I did not enter deceased’s room. I went in to deliver a message to her from my husband. She pushed me and I pushed her. We started fighting. I told her she was to blame for my not speaking to my husband for seven days. I knocked her down. I held her neck. She shouted and I shouted, nobody came. She tried to take up her knife. I told her she could not do anything to me with the knife. I grabbed it from her and cut my finger. I said as she had tried to stab me. I would stab her and I did so, once. It was dark, I could not see which part of her body I stabbed. I then went to the charge office. I cannot say if exhibit A was a knife I used. I reported the incident to my husband. When I entered the room the woman and her child were on the mattress.”

Rightly in our view, both Mr. Cole and Mallam Belgore were at one in submitting that the judge misdirected himself in the portion of his judgment quoted above. We do not consider that words spoken in the course of a quarrel and followed immediately by a blow are necessary indicative of premeditation as the judge held. We are unable to say that if the judge had not so misdirected himself, he would inevitably have found the appellant guilty of culpable homicide punishable with death. We however feel satisfied that there was no question of an acquittal but that the offence of culpable homicide not punishable with death under section 222(4) of the Penal Code has been established.

The verdict and sentence of the trial court are accordingly set aside and in substitution therefor the appellant is found guilty of culpable homicide not punishable with death under section 222(4) of the Penal Code and sentenced to 7 years imprisonment with hard labour to run from the 13th September, 1967.

Verdict and sentence of trial Court set aside:

Appellant found guilty of culpable homicide not punishable with death.