MUNGATOPI v R

In the Court of Criminal Appeal of the Northern Territory

APPEAL from SUPREME COURT exercising Territory jurisdiction

CA 15 of 1990

Delivered at Darwin 23 December 1991

Heard at Darwin 10 December 1991

Judgment of Martin, Angel and Mildren JJ

CATCHWORDS:

Aboriginals - Crimes by Aboriginals - Aboriginal customary law - Evidence which in law may have amounted to an insult - Objective test not applied in a vacuum

R v Stingel (1990-1991) 171 CLR 312, applied.

Aboriginals - Crimes by Aboriginals - Offences against the person - Provocation - Wrongful act or insult must be capable of provoking an ordinary Aboriginal person - Actions and words amounting to provocation in law may be considered against the background of acceptable conduct in the Aboriginal community

Criminal Code (NT),s34(2)(d).
Jabarula v Poore (1990) 68 NTR 25
Sreckovic v The Queen [1973] WAR 85, considered.
R v Stingel (1990-91) 171 CLR 312, applied.
Holmes v Director of Public Prosecutions [1946] AC 588, applied.

Aboriginals - Crimes by Aboriginals - Offences against the person - Provocation - Wrongful act or insult - Background facts of Aboriginal man - Suspicion of marital infidelity - Victim's awareness or suspicion - Public refusal of requests - Allegedly neglecting children

R v Stingel (1990-91) 171 CLR 312, considered.
Jabarula v Poore (1990) 68 NTR 25, considered.

Criminal Law and Procedure - Appeal - Failure of trial judge to leave the question of provocation to the jury

Jabarula v Poore (1990) 68 NTR 25, considered.

Criminal Law and Procedure - Particular offences - Offences against the person - Provocation by wrongful act or insult reducing murder to manslaughter - Ordinary person deprived of the power of self control - Objective test

Criminal Code (NT),s4 and s34(2)
R v Stingel (1990-91) 171 CLR 312, applied.
Holmes v Director of Public Prosecutions [1946] AC 588, applied.

Criminal Law and Procedure - Particular offences - Offences against the person - Provocation - Ordinary person - Distinct from the reasonable person and the average person

Criminal Code (NT),s34

Criminal Law and Procedure - Evidence - Burden of proof - Provocation - Objective test to be satisfied beyond reasonable doubt - No jury acting reasonably

Jabarula v Poore (1990) 68 NTR 25, considered.

Criminal Law and Procedure - General principles - Criminal liability and capacity - Honest and reasonable mistaken belief

Criminal Code (NT),s32 and s34

REPRESENTATION:

Counsel:
Appellant: W. Somerville
Respondent: R. Wallace

Solicitors:
Appellant: N.A.A.L.A.S.
Respondent: Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
IN THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

№ CA 15 of 1990

BETWEEN:

GONZALES MUNGATOPI
Appellant

AND:

THE QUEEN
Respondent

CORAM: Martin, Angel & Mildren JJ.

REASONS FOR DECISION
(Delivered 23 December 1991)

This is an appeal against a conviction for murder. The sole ground of appeal was that the trial judge failed to leave provocation to the jury when it is said the he should have done so. The victim in this case was the accused's wife.

The Appellant is an Aboriginal from Bathurst Island. He is 29 years old. Although he speaks some English, he needed an interpreter to assist at his trial. His first language is Tiwi. He had a limited education at St. Johns College in Darwin and also on Bathurst Island. The Appellant met his wife at Garden Point, and after they were married they had two children, Charlena and Maggie. At the time of the offence, the older child was 4 years of age. The age of the younger child is not stated.

There had been some differences between the accused and his wife in the past, and on one occasion they separated for a while, but at the time of the offence they were living together at Milikapiti. These differences included arguments between them over the way in which his wife had allegedly failed to properly look after the children, and also her refusal to go home, following a request by the accused, after she had been asking gamblers at a card game

for beer.

Some time before November 1989 (precisely when, is unclear), and whilst the parties were living together on Bathurst Island, the Appellant came to suspect that his wife had been unfaithful to him.. The other man suspected of being involved had since died.

On the evening of 31 October 1989 the Appellant and his wife were at home when another woman, Diane Wilson, came around to the house and asked the deceased whether she had been "playing up" with Diane's husband. The Appellant did not hear his wife's response, but an argument then ensued which nearly developed into a fight between the two women. The altercation was stopped when Diane's husband, Ted, arrived.

The following morning, the Appellant asked his wife what had Diane come to speak to her about on the previous evening. The deceased told the Appellant that Diane had accused her of having an affair with Ted. The accused asked his wife whether she was having an affair with Ted, which she denied. He then asked the deceased to accompany him to Ted's house to ask him the same question, but for some reason which is not clear that did not occur. Later that day the Appellant saw Ted at the social club, but he also denied any affair. It is apparent that the Appellant disbelieved these denials and that he suspected or believed that the deceased and Ted were indeed having an affair.

Whilst at the club the Appellant saw that the deceased was there but the children were not.

After speaking to Ted the Appellant stacked up a number of beer cans and with Mark Mungatopi took the beer cans down to a barge landing nearby to be collected by the barge at a later time. After that had finished, the Appellant went to

the house of his sister, Josephine. Josephine was looking after the baby, Maggie, but the Appellant was unable to find out from her where Charlena was. Josephine asked the Appellant to get a nappy for the baby, which he did, after which he left to look for his wife. Having seen his wife and Ted together at the club he was feeling jealous again. After going to a number of places he eventually found his wife at Mark Mungatopi's place playing cards. He asked his wife to come home with him but she refused. He had in the meantime located Charlena at the home of a Mr Robinson and his wife. It was apparent to Mr Robinson that when the Appellant came to his home the Appellant was in a fairly angry mood. The Appellant considered his wife had not been looking after their children properly, and he was frustrated at being unable to find her readily.

When the deceased refused to go with the Appellant, a fight broke out and the Appellant punched his wife on the neck and cheek and also kicked her. There was evidence that the deceased was intoxicated and also some evidence that the Appellant had been drinking but was not drunk.

Some other male Aboriginals then intervened and stopped the fight. Indeed one of them used violence on the Appellant, punching him several times and knocking him to the ground. Shortly afterwards, the Appellant and the deceased left the card game and drove down a road to the intersection of that road with the road leading down to the barge landing. This was not in the direction of where they were living. The Appellant claimed that he went down that road in order to drive to the top of a hill on which there was a water pump. The evidence is not clear, but it may have been that he had some proper reason for going there. In any event, assuming that he did, the Appellant claimed that as he got to the intersection of the pump road with the road to the barge landing the deceased jumped out of the car and ran away. This must have happened only a few minutes after they had

left the house where the card game had been played. After that, the Appellant also got out of the car and pursued her, eventually catching her. The Appellant admitted in a statement to the police hitting the deceased over the head with a rock a number of times, and also dragging her by the hair. At the trial the Appellant claimed he was unable to recall hitting the deceased with a rock, and had no recollection of even chasing his wife or giving her a hiding.

The Crown evidence as to the cause of death was given by Dr Cummings, a forensic pathologist. Dr Cummings' evidence was not disputed by the Appellant at the trial. It is evident that the deceased had been very severely beaten. The deceased was a slightly built Aboriginal female of 25 years whose weight was 39kg. She had fifteen lacerations to the head and neck and a number of abrasions. There were multiple abrasions to her trunk, bruises on her back and both elbows, and on the back of both forearms. These bruises were consistent with having been caused by a blunt instrument. The bruises to the forearms were of the type commonly received whilst warding off blows. There were multiple abrasions over the front of both lower thighs, the knees and both legs. Externally there was a ragged irregular laceration measuring some 8 x 3 cm on the right labia majoria extending from the upper and outer aspect of the vagina upwards passed the orifice of the ureter ending in a subcutaneous track some 5.5 cm in length and up to 1 cm in diameter which extended upwards and outwards to the right, ending blindly in the soft tissue of the mons. There was also a second tear measuring some 1.4 x 0.4 cm situated just below that tear, extending upwards and backwards for a distance of about 2.8 cm. There were a number of internal injuries, some of which were inflicted after death. One series of injuries not so inflicted was to the rectum which had four internal injuries at the level of the junction of the anus and the rectal mucosa. On the left posterior

aspect of the rectum there were two irregular roughly circular perforations. One of these measured 1.5 x 1.4 cm and extended into a track which passed upwards along the anterior or front surface of the rectum and along the back of the vagina, some 11 cm above the entrance of the vagina. The second injury measured 2 x 1.5 cm and was associated with a blind track some 3 cm in length. There were tears and tracks associated with tears in the front wall of the vagina and the base of the bladder. The top of the track in the root of the mesantry was 26.5 cm in length in the opening of the vagina. There were also two tears in the front wall of the vagina, one situated 8 cm from the opening and the other situated 9 cm above the opening. The liver showed extensive lacerations involving the full thickness of the left lobe. There was a perforation about 1.2 cm in diameter in the base of the bladder which communicated with a 3 cm laceration in the front wall of the mid-line of the vagina. There was extensive bruising in the substance of the right temporal muscle caused by a blunt instrument, and a small chip fracture 1 x .02 cm on the outer margin of the right orbit. Dr Cummings concluded that death was caused by shock and haemorrhage due to multiple injuries and that the injuries which were most liable to have contributed to the death were the injuries to the rectum, the vagina and to the bladder. The description of the internal injuries is consistent only with an instrument of some kind being employed. Death occurred before the attack had ceased, as a number of injuries occurred after death.

The facts stated above are either not in dispute, or constitute the version of those facts most favourable to the Appellant.

At some stage during the attack the accused said that he placed the deceased in the back of the car and he continued to hit her whilst taking her down to the barge landing and

then back home.

At the trial, counsel for the Appellant relied upon the following matters as amounting to provocation as defined by the *Criminal Code Act*. The first was the deceased's belief that his wife had been unfaithful to him. The second was that the deceased was angry because his wife had neglected the children, and the third was that the deceased had refused to go home with the Appellant from the card game after being requested to do so.

Provocation is defined by the *Code* to mean "any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control."

The *Code* also defines 'wrongful act' and like terms to mean " an act that is wrong by the ordinary standards of the community; a lawful act may be a wrongful act, but any act expressly declared to be lawful cannot be a wrongful act."

Section 34(2) of the *Code* provides as follows:

> "When a person who has unlawfully killed another under circumstances that, but for this sub-section, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided -
>
> (a) he has not incited the provocation;
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> (b) he was deprived by the provocation of the power of self-control;
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> (c) he acted on the sudden and before there was time for his passion to cool; and
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> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way."

His Honour the trial Judge, after referring to the relevant facts, held that there was nothing in the circumstances which constituted a wrongful act or insult within the meaning of the definition of provocation. He went on to say:

> "It appears - and again, taking it at its best for the accused - that the deceased had placed the children with other persons, but there is little else to suggest that what she has done was of so provocative a nature that it would come within the definition."

Although His Honour's remarks are directed to whether there was a wrongful act or insult, it seems that His Honour concluded that even if the deceased's behaviour was a wrongful act or an insult, it was not of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control.

It was submitted by Mr Somerville, for the Appellant, that the deceased's behaviour, in refusing to come home and look after the children when called upon by her husband to do so, was an insult in the circumstances of the case. The refusal took place in front of three other female Aboriginals. There was evidence that under Aboriginal customary law an Aboriginal wife who fails to look after her children, by getting drunk and neglecting them, is liable to be punished by her husband, although the level of punishment admitted to by the Crown witnesses did not go beyond merely hitting such a wife.

In our opinion, in determining whether the deceased's actions and words could have amounted to provocation in law, it is appropriate to consider those actions and words against the background of what is acceptable conduct in the Aboriginal community to which the Appellant and the deceased belong. Similarly, where, as here, the deceased was aware of her husband's suspicions about her marital fidelity, that is a relevant background fact to be taken

into consideration.

As the High Court recognised in *R. v. Stingel* (1990-91) 171 CLR 312 at 324; (1990) ALJR 141 at 145:

> "The requirement that the wrongful act or insult be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is clearly intended to involve an objective threshold test. It is only if that test is satisfied that it becomes necessary to consider whether the accused was, in fact, subjectively deprived of his or her self-control.
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> As Wilson J. pointed out in *Reg. v. Hill* (1986) 1 SCR 313 at 342; (1986) 25 CCC (3d) 322 at 345, the 'rather cryptic statutory language requires interpretation in order to achieve the presumed purpose of the legislature in requiring the accused's conduct to be measured against that of the "ordinary person."' Wilson J. went on to identify "the rationale underlying the objective test" in words (at 343; 345) which are, in our view, applicable to a corresponding test in s.160 of the (Tasmanian) Code:
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> > "The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard."
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> As we have seen, however, that does not mean that the objective test was intended to be applied in a vacuum or without regard to such of the accused's personal characteristics, attributes or history as served to identify the implications and to affect the gravity of the particular wrongful act or insult."

We are prepared to assume, but without making any finding, that on the version of the facts most favourable to the Appellant there was evidence, which in law might have amounted to an insult. That evidence, in summary, was the deceased's words and actions in the presence of the

Appellant amounting to a refusal to come home when called upon to do so by her husband. The quality of that refusal is to be measured by the fact that it took place in the presence of the deceased's female friends whilst the deceased was drunk at a card game being played for cans of beer, against a background of suspected adultery of which she was aware, previous arguments over the alleged failure of the deceased to look after her children, the fact that the deceased had left her children to be looked after by others, had not informed the Appellant where either she or the children were, and the fact that the deceased had been seen earlier that night at the same club and at the same time as Ted had been.

In the Northern Territory, the concept of "an ordinary person" has been held by Kearney J., in relation to that expression as it appears in s.34(2)(d) of the *Criminal Code* and for the purposes of that expression as it appears in the definition of 'provocation' in the *Code*, to include an ordinary Aboriginal male person living today in the environment and culture of a fairly remote Aboriginal settlement, such as Milikipati: *Jabarula v. Poore* (1990) 68 NTR 25. Kearney J. went on to observe, in relation to such an ordinary person:

> "He is neither drunk nor affected by intoxicating liquor, does not possess a particularly bad temper, is not unusually excitable or pugnacious, and possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have. He possesses such of the Appellant's general cultural characteristics as might affect (his) reaction to the (insult) ..." [*Jabarula v. Poore, supra* at 34.]

It was not argued by the Crown that the law as stated by Kearney J. in *Jabarula v. Poore* was incorrect or that *Stingel* was binding authority for the proposition that, under the Northern Territory *Code*, the only objective characteristic of the ordinary man which can be considered

was the age of the accused: c.f. CLR at 329. The High Court in *Stingel* was at pains to state that it was keeping the focus of its considerations firmly fixed upon the provisions of the Tasmanian Code, and that in that regard "the Court was influenced by the fact that the provocation provisions of the Code differ significantly from the provocation provisions of the Criminal Codes of Queensland and Western Australia" (at CLR 320; ALJR 143).

Similarly, we would add that the provisions of the Northern Territory *Code* are significantly different as well. Assuming, but without deciding, that the law is correctly stated by Kearney J., we agree with the observations of their Honours in *Stingel*, (at CLR 325; ALJR 145) that the wrongful act or insult must therefore have been capable of provoking an ordinary Aboriginal person of the kind discussed "not merely to some retaliation, but to retaliation 'to the degree and method and continuance of violence which produces the death' : *Holmes v. Director of Public Prosecutions* [1946] AC 588 at 597; and see generally *Sreckovic v. The Queen* [1973] WAR 85 at 91."

Likewise we recognise that conduct which in some circumstances may be quite unprovocative may be intensely so in other circumstances. As the Court said in *Stingel* (at CLR 325-6; ALJR 146):

> "Particular acts or words which may, if used in isolation, be insignificant may be extremely provocative when viewed cumulatively. Thus, in *Moffa, [Moffa v. R.* (1977) 138 CLR 601] where the deceased's insulting conduct had culminated in the throwing of a telephone at the applicant, Gibbs J. commented (at 616):
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> > "However, it is no doubt right to infer that the throwing of the telephone was only the last straw that caused the applicant's control to collapse. In any case, in deciding whether there is sufficient evidence of provocation, it is necessary to have regard to the whole of the deceased person's conduct at the relevant time, for acts and words which considered separately could

> not amount to provocation may in combination, or cumulatively, be enough to cause a reasonable person to lose his self-control and resort to the kind of violence that caused the death. Everything that the deceased said and did on 21 August must therefore be considered in deciding whether there was provocation."

Furthermore, what must not be lost sight of is that this ordinary Aboriginal person is *ex hypothesi*, a person capable of losing his self-control to the extent of intentionally wounding or even killing another when there is no need to do so for his own protection; and that an 'ordinary' person is neither the same as the reasonable person in the law of negligence, nor is he an average person: see *Stingel* at CLR 328, 332.

Upon the assumptions we have made, the question is therefore whether a jury might, if it accepted the view of the gravity and the implications of the provocative conduct in this case to which we have referred, have entertained a reasonable doubt about whether the objective test as explained by *Jabarula v. Poore* was not satisfied.

In our view, no jury acting reasonably could fail to be satisfied beyond reasonable doubt that the conduct of the deceased which amounted to an insult in the manner in which we have described was not of such a nature as to be sufficient to deprive any hypothetical ordinary 29 year old Aboriginal from Bathurst or Melville Islands of the power of self-control to the extent that he would take his wife away from his village and mercilessly beat her in the manner described by Dr Cummings in this case. In our opinion, no jury acting reasonably could fail to be satisfied beyond reasonable doubt that the Appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary 29 year old

Aboriginal.

We would add that, although the matter was not raised in the court below, even if the excuse of honest and reasonable mistaken belief as set out in s.32 of the *Criminal Code* had the effect that the Appellant was entitled to the benefit of an honest and reasonable, though mistaken, belief that his victim had committed adultery, and that the accused was entitled by virtue of the combined effect of ss. 34 and 32 of the *Code* to treat that conduct as an unlawful act or insult within the meaning of the *Code*, (a point accepted by Kearney J. in *Jabarula v. Poore*, *supra* at 32 but which it is again not necessary for us to decide) we would still not consider this additional circumstance to have warranted a jury entertaining a reasonable doubt whether the objective test, as we have explained it, was satisfied.

Accordingly, the appeal is dismissed.