IN THE SUPERIOR COURT OF JUDICATUE
THE COURT OF APPEAL (CRIMINAL DIVISION)
SITTING AT ACCRA ON 16TH MAY, 1996

CORAM: - WOOD, JA (PRESIDING) BROBBEY AND ESSILFIE-BONDZIE, JJA.

CRIMINAL APPEAL
NO. 1/96.

ASARE BOATENG @ CONGO ... APPELLANT

- versus -

THE REPUBLIC ... RESPONDENT

J U D G M E N T

BROBBEY, J.A.:- Asare Boateng alias Congo, referred to hereinafter as the appellant, was charged with one count of murder of one Kwasi Adzakah contrary to section 46 of the Criminal Code, 1960 (Act. 29).

The facts which gave rise to the charge are that on 31st October, 1994 some mis-understanding developed between the deceased and a sister to the appellant. The appellant got to the scene. Thereafter, what really transpired was not clear. According to the prosecution, the appellant lost his self-control, picked an iron bar and hit the deceased on the head. He was rushed to hospital w where he was pronounced dead on arrival.

The accused's versions are two. In his very first cautioned statement which he gave to the police on 1st November, 1993, he said it was he who picked up an iron bar and hit the deceased on the head as he was about to enter his room. At his commital on 13th February 1995 he told the committal court that it was the deceased who picked up an iron bar and attempted to hit him with it. He managed to get hold of it and in the course of the ensuing struggle the iron bar hit the head of the deceased. He repeated this last story when he made his defence during his trial in the High Court.

After his trial, he was convicted and sentenced to death. He then appealed to this court against the conviction and sentence.

In this court, Mr. J.E. Yeboah who appeared for the appellant argued only one ground to the effect that the trial judge failed to give certain directions on exhibit B, the cautioned statement of the accused.

In that statement, the appellant said that the deceased had a propensity to shoot and that he once shot at him but missed. Counsel then contended that a person who could shoot and miss was a dangerous person. Secondly he said the deceased was a medicine man and could kill by a curse. Thirdly, he sought to buttress his view of the deceased by relying on a statement by the PW2 to the effect that the deceased was a "cantankerous" person. He submitted that all those points showed that the deceased was potentially dangerous person. As he left the scene to enter his room, no-one knew what he would do if allowed to enter. That put the appellant in such a state of fear that he had to take precautionary measures to protect himself.

Counsel contedded that the fear of harm to the appellant convayed by those facts gave rise to the defence of provovation and therefore if the jurors had been properly directed, they would have reduced the charge of murder to manslaughter by virtue of that provocation.

There is no doubt that the trial judge did not refer to the cautioned statement of the appellant in her directions to the jurors. ATTA vrs. COP 1963 2 GLR 460, S.C. is authority for the proposition that a proper consideratio of the case for the defence should cover not only his evidence in court but the statement he gave to the Police. To the extent that the directions to the jury on the appellant's defence covered only his evidence in court, the summing up was defective and counsel was therefore justified in attacking it. That clearly amounted to misdirection by non-direction as was held in KEMBEY vrs. REPUBLIC 1989 - 90 GLRD 24, R. Vrs. THOMAS FINCH 1917 CR. App. REP. 77, and R. Vrs. GRUMAH 1959 GLR, 307 three of the cases relied upon by counsel for the appellant in arguing the appeal before this court. The question to be answered here is whether or not the misdirection was fatal to the conviction or would have led to a verdict different from that of jurors at the trial court. The correct answer to that question involves appropriate consideration of the particular facts relied on to found the defence of provocation.

In Exhibit B, the appellant referred to some previous occasion when the deceased fired a gun at him and missed. It is important to point out that he referred to a single occasion only.

That single occassion defeated his assertion that the appellant was of the habit of firing his gun. The mere occurrence of one event on one occassion was no proper foundation for asserting that that occurance could be repeated on another occassion. The situation would have been different if the appella had referred to more occassions to establish a system or habit on the part of the deceased. The appellant could not justifiably have been in a mental state of fear by the knowledge of that single incident.

Secondly, the circumstances in which the appellant found himself as he himself described in exhibit B, could not have led him to be afraid of his life, let alone lose his self control on account of that fear. He said because of that single incident he was afraid that when the deceased was entering his room he was going to bring a gun. If the appellant really believed that he was put in a state of fear for his life, or even that of his sister who was around, that belief was hollow, baseless, or groundless. There was no word, gesture or action from the deceased from which the appella could justifiably have formed that belief. If even the deceased once shot at him and missed what made the appellant believe that, without more, the deceased was going into his room to bring a gun? That was not the only infer that could be put on the fact that the deceased walked towards his room. In any case, there was nothing to make the appellant believe that the gun was even in the room at that material time.

The knowledge of the appellant that the deceased once shot and missed him was too remote to form the basis for fearing for his life, let alone a basis for the loss of his self-control. Even if he feared for his life he himself said the deceased was entering his room and had his back to the appellant. There was no situation of imminent danger confronting the appella which could have induced him to lose his self control.

A similar issue arose in the case of F. v. WUNUA (1957)3 WALR 303. In that case there was a struggle between a husband and his wife, during which the husband admittedly stabbed the wife with a pen knife. When an issue was raised on appeal as to the proper direction or considera-tion of the defence of provocation it was held that the proper consideration or direction was whether or not the provocation was such as was likely

.../4.

to deprive, or did in fact deprive, the accused of his self-control. AYI V. GRUSHIE 1961 GLR 653, S.C. also endorsed the view that what is required in a defence of provocation is whether or not the acts, words, gestures or circumstances complained of were such as deprived the accused of his power of self control. In the circumstances of the instant case where there was no gun in sight, no mention of a gun by the deceased, no action by the deceased indicative of his move or intention to collect his gun from his room, the knowledge of propensity to cause harm possessed by the appellant was too remote to found provocation which was likely to cause the appellant, or did in fact cause the appellant, to lose his self control.

Two cases buttress the view that the circumstances in which the appellant found himself could not give rise to provocation. The first was KETSIWAH V. THE STATE 1965 GLR 483, S.C where the appellant's defence of provocation was based on the fact that he was stunned by a hail of abuses from the wife which led him to kill her. On appeal, the Supreme Court held that mere abuse could not amount to provocation in law. His conviction for murder was affirmed.

If words cannot constitute provocation how can mere knowledge suffice to constitute a basis for provocation?

The second case was OFOSU V. THE STATE 1963 2 GLR 412, S.C. In that case the appellant in his defence told the trial court that he killed his uncle because the uncle had said that he was going into his room to pick up his gun to shoot him. He was convicted of murder. On appeal it was argued on behalf of the appellant that the trial judge failed to address the jury on the defence of provocation. The Supreme Court dismissed the appeal, the court holding in the head note that

> "threatening gestures, or insults do not by themselves constitute sufficient evidence of provocation unless they are accompanied by acts which are likely to cause loss of self-control. In this case there was no evidence of provocation or facts from which any inference of provocation could legally be drawn so as to reduce such homicide to manslaughter; R v. SEMINI

.../5.

(1949) 33 Cr. Ap. R. 51 at p. 57, CCA applied. KWAKU MENSAH V. REPUBLIC. (1949) AC 83, P.C. cited."

If the situation where the deceased was said to have expressed his intention to pick a gun to shoot was not enough to found provocation, I do not see how the mere thought or knowledge of propensity to cause harm will be enough to form the basis for the defence of provocation.

Counsel referred to the fact that the deceased was a medicine man who could kill by a curse. That did not seem to be a strong point. In any case, that too was rather remote to cause any imminent danger to the appellant on the basis of which he could found provocation.

Lastly counsel relied on the fact that the PW2 described the deceased as "cantankerous" to support his view that the deceased was a pontentially dangerous person. As counsel himself pointed out, cantankerous means quarelsome. That would not be a basis for fear. On that day, the deceased even proved not to be cantankerous because he left the scene to enter his room instead of staying there to argue with or confront the appellant. Therefore, this could even not be said to be a case in which the deceased provoked the appellant by trading insults or exchanging words.

Apart from the total want of any fact or incident capable of putting the appellant in fear for his life to lose his self control, he had every opportunity to leave the scene to avoid the incident when he saw the deceased enter his room. He did not have to pick the iron bar to hit the deceased because he had no reason to do so.

These are the points which support the view that the nature of the misdirection complained of by counsel for the appellant could not have affected the verdict of the jury in so far that that misdirection was grounded on the failure of the trial judge to direct thejurors on the defence of provocation. In a murder trial like the instant one, it is the duty of the trial judge to decide whether there is evidence to go to the jury on provocation. If he decides that there is, then it is for the jury to determine whether the provocative act was such as to deprive the appellant of the power of self control: See HOLMES V.R DPP. 1946 AC 588 at p. 597 applied in GBUMAH VRS THE STATE 1963 2 GLR 423, S.C.

On the facts, there was no evidence on the part of the appellant capable of giving rise to provocation. The trial judge therefore had no obligation to direct the jurors on the issue of provocation because mere knowledge of propensity to fire a gun was not enough to found a defence of provocation. Counsel for the appellant relied on State v. Nyavie & Ofori 1962 GLR (PTI) 174 and Rex v. Sydney Augustus Wann 1912Cr. App. R 15 both of which supported the proposition that if the jurors had been properly directed, they would have returned a different verdict. The two cases are distinguishable from the instant one in that in both cases, the misdirections complained against were found to be fatal to the conviction. In the instant case it has already been explained that the defence of provocation would have failed and therefore the misdirection based on that provocation could not have affected the verdict returned by the jury. Counsel further relied on AKUOKO V. THE REPUBLIC 1974 2 GLR 103, C.A. in which it was held that the failure of the trial judge to direct the jury on provocation amounted to a misdirection. In that case, a dispute arose between a husband and his wife, who was the sister of the appellant. The husband suddenly attacked the wife with a cutlass and inflicted several wounds on her in the presence of the appellant. The appellant retaliated by slashing the husband with a cutlass and he died from the wounds inflicted on him. On these facts, there was clear evidence of provocation which should have been left to the jurors. In the instant case, there was no evidence of any lethal weapon around, attack or imminent attack on the appellant or on any person which could possible have induced the appellant to lose his self control in such a manner as to take any retaliatory measure. The facts of the AKUOKO case make that case distinguishable from the instant one. The principle in that case could not therefore be applied here.

This was a case in which the evidence of the appellant in court was in drametrical conflict with his cautioned statement to the police. In the case to the police he said he was the one who picked the iron bar and hit the deceased on the head. In court he said it was rather the deceased who picked the iron bar to hit the appellant and when the appellant rushed on him, a struggle ensued, in the course of which the bar hit the head of the deceased. In effect, he put up the defence of accidental death in court

while in exhibit B, according to his counsel, he put up a defence of provc arising out of fear for his own life.

The law is well settled on the situation where a person's evidence in court is found to be contradictory of a previous written statement give by him. Various views have been expressed on that issue but the effect are more or less the same: In REP. V. HARRIS 1927 20 CR. App. R. 144, it was held that the effect of the evidence of such person was to render that evid negligible.

The same view was held in AKOWUAH V. COP 1963 2 GLR 390. In GBETOWOK V. REPUBLIC 1975 1 GLR 485, C.A. it was held that such a person must be at least suspect. In R. V. GOLDER (1960) 45 CR. App. R.5, it was held that such a person should be regarded as unreliable.

In STATE V. OTCHERE 1963 2 GLR 463 it was held that such a person is not worthy of credit.

In BUOR V. OTCHERE : 1965 GLR 1, the Supreme Court held that the evider of such a person should not be given much weight.

In the instant case, it is obvious that the jurors rejected the defence put forward by the appellant and that was why they convicted him. If nothing at all, these authorities on conflicint evidence provide one solid reason why the jurors were justified in rejecting the defence of the appellant.

A similar issue arose in Kŭo-den alias SOBIT v. THE REPUBLIC 1989-90 GLRD 98, S.C. where the defence of the appellant in court differred materially from the accounts of the incident they previously gave. Their conviction by jurors was confirmed in the court of Appeal. Their further appeal to the Supreme Court failed , the court adding that

> "In the instant case, the wavering behaviour of the appellant, the inconsistent account they gave of what happened on the fateful day to the police, their Chief, the committing Magistrate and at the trial completely justified the jury to return the veridct of guilty."

The record itself discloses another reason why the jurors were justified in rejecting the defence of accidental killing put up by the appellant which was this:

The harm which killed the deceased was inflicted at the back of his head, and secondly, it was the result of a very heavy force applied in hitting the head. These came out from the evidence of the PW3 and that of the PW4, the doctor who conducted the post mortem examination on the deceased. If he was hit on the head accidentally as the appellant portrayed, the injury could not have been as severe as was described by the doctor who said, inter alia, that the neck bone was so broken that the head could be rotated 360%. He also added that the brain matter was protruding.

In fact, the injuries described by the PW4 were more consistent with a deliberate attack on the head from the rear of the deceased as the appellant himself described in exhibit B. The appellant's description in exhibit B of how the injury was caused was sufficient reason for the jurors disbelieving the story he put up in court during his trial, that he might have died accidentally during a struggle.

Against the conflicting defence of the appellant was the version if the prosecution as put before the jurors by the only eye witness to the incident, the PW3, and the doctor PW4 that the deceased died from injuries inflicted on him by the appellant from his back, which version the jurors must have accepted as the basis for convicting him.

Apart from the misdirection by non-direction relating to exhibit B, the summing up was on the whole quite accurate. It covered virtually all other relevant points which have to be taken into account in a murder charge like the one which the appellant faced.

For all the foregoing reasons, and particularly for the reason that the misdirection could not have affected the verdict of the jury and further that there was ample evidence on the record which supported the conviction and the sentence imposed, I would dismiss the appeal.

S.A. BRODRICK
COURT OF APPEAL

WOOD (MRS) JA:- I agree.

G. T. WOOD (MRS)
JUSTICE OF APPEAL

ESSILFIE-BONDZIE, JA:- I also agree.

A. ESSILFIE-BONDZIE
JUSTICE OF APPEAL