Omelau v. ROP, 5 ROP Intrm. 23 (1994)

NORMA OMELAU,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 2-93
Criminal Case No. 108-92

Supreme Court, Appellate Division
Republic of Palau

Decided: December 7, 1994

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee : Nicolas Mansfield

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; PETER T. HOFFMAN, Associate Justice

MILLER, Justice:

Appellant Norma Omelau was convicted by the trial court of arson and two counts of voluntary manslaughter for having started a fire in her home in which her two daughters perished. Appellant raises two issues on appeal: (1) Whether there was sufficient evidence that she started the fire; and (2) whether the government was required to show that appellant was motivated by "heat of passion" directed towards her children in order to convict her of voluntary manslaughter. We affirm.

I.

In reviewing a challenge to the sufficiency of evidence underlying a criminal conviction, we consider "whether, viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found that the essential elements of the crime were established beyond a reasonable doubt." *Minor v. Republic of Palau* , 5 ROP Intrm. 1, 3 (1994). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Republic of Palau v. Chisato*, 2 ROP Intrm. 227, 239 (1991).

The trial court in this case was presented with two diametrically opposed descriptions of the genesis of the fire at appellant's home. For the prosecution, appellant's husband, Ngiraberenges Omelau, testified that despite his efforts to prevent her, appellant dragged a tank

of gasoline into the kitchen of their house. His son, Rodney Eledui Omelau, testified that he saw ⊥24 appellant ignite the gasoline by setting fire to a piece of paper at the kitchen stove and dropping it onto the gasoline. By contrast, appellant testified in her own defense that it was her husband who carried the gas tank into the house, despite her efforts to stop him, and that it was he who started the fire.

The testimony of appellant's husband and stepson, if believed, was sufficient to establish that appellant started the fire. Appellant argues, nevertheless, that these two witnesses were so lacking in credibility that no reasonable trier of fact could have found appellant guilty beyond a reasonable doubt. That in extraordinary circumstances a credibility issue may warrant the reversal of a criminal conviction on appeal is established by *Republic of Palau v. Tmetuchl* , 1 ROP Intrm. 443 (1988). We conclude, however, that the record does not warrant such a result here.

In *Tmetuchl*, the key witness linking the three defendants to the murder of President Remeliik had, prior to trial, told three different stories to the police, two of which did not inculpate the defendants at all; had told at least three different versions of the facts incriminating the defendants; and had failed three separate polygraph tests, twice recanting her statements and admitting she had lied only to re-recant twice more and again incriminate the defendants. With that background, it was fair for the court to conclude, as one member of the panel put it, that "[b]y the time of trial [the government's key witness] had completely destroyed her own credibility." 1 ROP Intrm. at 496 (King, J., concurring and dissenting).

The same conclusion cannot be reached for the two witnesses whose credibility is attacked by appellant. Each of those witnesses testified inconsistently with prior statements given to the police, with appellant's husband stating that he never told anyone the version of facts that he testified to until the eve of trial. Moreover, each had an arguable bias in testifying the way he did: appellant's husband had an interest in exculpating himself for the very crimes with which appellant was charged, and appellant's stepson in protecting his natural father. To acknowledge that their credibility was subject to legitimate attack, however, is a far cry from saying that either was so untrustworthy that no reasonable fact-finder could credit his testimony. Here, both witnesses were subjected to vigorous cross -examination by defense counsel. It was then up to the trial court, having observed their demeanor on the witness stand, and having heard all of the evidence, to consider their potential bias, to assess the reasons each gave for having given inconsistent accounts earlier, and to decide whether they should be believed or not. The trial court having made that determination, we are in no position, ⊥25 on the basis of a cold record, to say that it was an unreasonable one.

II.

Appellant's second contention concerns the elements of the crime of voluntary manslaughter. 17 PNC 1703 defines voluntary manslaughter as the "unlawful[] tak[ing] [of] the life of another without malice aforethought, upon a sudden quarrel or heat of passion". Appellant asserts that the "heat of passion" characteristic of manslaughter "must have been entertained toward the person slayed and not toward another." Appellant's Opening Brief at 18, quoting 40

Am. Jur. 2d Homicide § 57. Appellant therefore argues that since the evidence shows her heat of passion to have been directed towards her husband, and not her daughters who died in the fire, her manslaughter conviction should be overturned.

We disagree, and our disagreement stems from the fact that the only form of homicide with which appellant was charged was manslaughter, and not first- or second-degree murder. The terms "heat of passion" and "sudden quarrel" "have application only in a case where the defendant has been [charged with] murder in the first or second degree". *United States v. Holmes*, 632 F.2d 167, 170 (lst Cir. 1980); see generally *United States v. Alexander* , 471 F.2d 923, 941-47 (D.C. Cir. 1973). In that circumstance, evidence that a homicide was committed in a heat of passion may serve to reduce a defendant's culpability from murder to manslaughter.[1]

Where murder is not charged, the concepts of "heat of passion" and "sudden quarrel" are simply not pertinent. The elements of voluntary manslaughter, standing alone, are solely that, without legal justification or excuse, "the defendant . . . inflicted an injury or injuries upon the deceased, and that the deceased . . . died as a result of such injury." *Alexander*, 471 F.2d at 947; accord, *Holmes*, 632 F.2d at 167.[2]

⊥26 With this background in mind, appellant's contention must be rejected. The rule requiring that "heat of passion" be directed "towards the person slayed", which appellant now invokes, is a limitation of the circumstances in which a defendant can argue that he or she should be convicted of manslaughter rather than murder. Had appellant been charged with murder, this rule might properly have been cited by the government in arguing that she should be convicted of that charge, and not the lesser charge of manslaughter. The government having exercised its discretion not to charge appellant with murder, the question whether appellant could have relied on a "heat of passion" argument is simply irrelevant. See *Alexander*, 471 F.2d at 947 n.56 ("[I]t is not a defense to manslaughter that the injury was inflicted in heat of passion caused by provocation.").

CONCLUSION

For the reasons stated above, appellant's convictions are affirmed.

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[1] More accurately stated, failure of the prosecution to disprove "heat of passion" may require acquittal on the murder charge. See *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 1892 (1975) (where properly presented, government must prove beyond a reasonable doubt the absence of "heat of passion" to convict defendant of murder).

[2] The further distinction between voluntary and involuntary manslaughter is not at issue here.