

Sadao v. ROP, 5 ROP Intrm. 250 (1996)
AKINO SADAO,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 4-94
Criminal Case No. 74-94

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: July 12, 1996

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Justice; and
PETER T. HOFFMAN, Justice.

BEATTIE, Justice:

Appellant Akino Sadao ("Sadao") was charged with second degree murder and voluntary manslaughter in connection with the death of Douglas Sawaichi ("Sawaichi"). After a trial before a judge and two special judges, he was convicted of voluntary manslaughter. In this appeal, Sadao challenges the instructions given to the judges on voluntary and involuntary manslaughter. We affirm.

FACTS

On April 3, 1994, Sadao became involved in an argument with William Rengchol ("Rengchol"). Sadao picked up two rocks and threw them at Rengchol, and one of them hit him on the hand and the head. Standis Towai ("Towai") and Sawaichi were at the scene of this altercation and both tried to calm down Sadao and get him to stop throwing rocks. Sadao gathered more rocks, however, and slapped Towai when he tried to intervene further. He then threw an iron stone rock at Sawaichi. The rock hit him in the head and killed him.

Sadao was convicted of voluntary manslaughter in connection with the death of Sawaichi, assault and battery with a dangerous weapon for hitting Rengchol with a rock, and assault and battery for slapping Towai. He appeals only his conviction for voluntary manslaughter, contending that the instructions to the special **1251** judges improperly blurred the distinction between voluntary manslaughter and involuntary manslaughter.

DISCUSSION

I.

Manslaughter was a crime at common law created by the courts of England due to strict sentencing laws for the crime of murder. In those times, the common law courts were not allowed to take extenuating circumstances into account in sentencing for murder--the death sentence was mandatory. "The rule of law that provocation may, within narrow boundaries, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness." W. LaFare & A. Scott, *Criminal Law* § 7.10 at 664 (1986). Although some states in the United States enacted homicide statutes containing several tiers of homicides of varying degrees and specifically defined each, at the federal level, the United States Congress simply adopted the traditional common law offenses of murder and manslaughter. Palau enacted homicide statutes which are substantially similar to the federal homicide statutes in the United States. *Compare* 18 U.S.C.A. §§ 1111-1112 with 17 PNC §§ 1701-1704.

In Palau, homicides are ranked so that manslaughter is an intermediate crime which lies between the more serious crime of murder at one extreme, and justifiable homicide, which is not a crime, at the other. The hierarchy of homicide crimes depends primarily on the concept of malice, a common law concept and a term of art which encompasses at least the following mental states, any one of which is a sufficient *mens rea* for the offense of murder: (1) intent to kill; (2) intent to cause serious bodily harm; and (3) intent to do an act which is so imminently dangerous to others that it evinces a depraved heart and disregard for human life. *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 261 (1991).

At the top of the homicide hierarchy in Palau is the offense of murder. Murder is the unlawful killing of a human with malice aforethought. 17 PNC § 1701 (first degree murder) and § 1702 (second degree murder). At common law, the offense of voluntary manslaughter emerged as a killing done with a mental state which constituted malice aforethought, but which was deemed to be without malice because it was done in the heat of passion resulting from adequate provocation. *United States v. Browner*, 889 F.2d 549, 552 (5th Cir. 1989). The Palau voluntary manslaughter statute follows the common law and occupies the next tier down from murder on the 1252 scale of homicide crimes. 17 PNC § 1703.¹ The lowest tier is occupied by the offense of involuntary manslaughter. Involuntary manslaughter, like voluntary manslaughter, is an unlawful killing without malice aforethought, but:

In contrast to the case of voluntary manslaughter, however, the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to meet the traditional malice requirements.

¹ We note that the statute provides that voluntary manslaughter may arise from the unlawful taking of a life without malice "upon a sudden quarrel or heat of passion". Today, we need not decide whether "sudden quarrel" describes other circumstances, separate from "heat of passion", which will reduce a defendant's conduct from murder to voluntary manslaughter. *See State v. Coop*, 573 P.2d 1017, 1021 (Kan. 1978) ("Sudden quarrel is one form of provocation for 'heat of passion' and is not separate and apart from 'heat of passion'").

Id. at 553. Thus, although involuntary manslaughter requires the same act as murder--unlawfully causing the death of another--the requisite mental state is reduced to the absence of "due caution and circumspection,"² a form of negligence, often referred to as "criminal" negligence, which is more serious than ordinary tort negligence but not so serious as to amount to the extreme recklessness and wantonness required for malice. *Id.*

II.

Sadao contends that the trial judge erred when he instructed the special judges on "misdemeanor-manslaughter" by merely quoting the involuntary manslaughter statute without providing an adequate **L253** explanation of its meaning.³ Sadao argues that this instruction foreclosed the triers of fact from finding that Sadao had only intended to injure Sawaichi with the rock, in which case, he argues, he would have killed Sawaichi in connection with an assault and battery, a misdemeanor. Therefore the triers of fact would have to conclude that the injury, although intentionally inflicted, was done so during the commission of an "unlawful act not amounting to a felony" so that Sadao would be guilty only of involuntary manslaughter.

We have difficulty in ascertaining any factual basis in the record for an instruction on misdemeanor-manslaughter. Sadao does not explain why an assault and battery with a two pound iron stone rock would not amount to at least assault and battery with a dangerous weapon instead of a mere assault and battery.⁴ The larger problem with Sadao's argument is that a defendant who is convicted of a greater offense generally cannot obtain a reversal of his conviction by showing an error was made in an instruction on a lesser offense. The error is usually deemed to be cured by the conviction on the higher offense. *See* Annotation, *Modern Status of Law Regarding Cure of Error, in Instructions as to One Offense, By Conviction of Higher or Lesser Offense*, 15 ALR 4th 118 (1982). As discussed *infra.*, 250, adequate instructions on the voluntary manslaughter charge were submitted to the special judges, and Sadao was convicted of that offense. Thus, even assuming that there was a sufficient factual basis for instructing the special judges on misdemeanor-manslaughter, we find that any error in those instructions was cured by the conviction on the voluntary manslaughter charge.

Sadao also argues that he only intended to scare Sawaichi by throwing the rock in his direction and that such conduct would only amount to simple assault and therefore he could be

² "Every person who shall unlawfully take the life of another without malice. . . in the commission of a lawful act. . . without due caution and circumspection shall be guilty of involuntary manslaughter. . . ." 17 PNC § 1704. Palau's involuntary manslaughter statute also covers unlawfully taking the life of another without malice and in the commission of an unlawful act not amounting to a felony, commonly referred to as "misdemeanor-manslaughter". We do not address what mental state is required to convict under that prong of the statute. *See People v. Stuart*, 302 P.2d 5 (Cal. 1956).

³ "Every person who shall unlawfully take the life of another without malice, in the commission of an unlawful act not amounting to a felony . . . shall be guilty of involuntary manslaughter" 17 PNC § 1704.

⁴ It is noteworthy that Sadao was convicted of assault and battery with a dangerous weapon for throwing a rock at Rengchol, hitting him in the hand and the head.

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guilty only of involuntary manslaughter. He argues that the instructions shut down this avenue of defense. The special judges were instructed, however, that they could find Sadao guilty of voluntary manslaughter only if they found that he intentionally inflicted the fatal injury. They were instructed that if they found that he **¶254** inflicted the injury unintentionally, they could convict him of involuntary manslaughter. Thus, if they found that he only intended to scare Sawaichi by throwing a rock in his direction, but hit him with it instead, they could find him guilty of involuntary, but not voluntary, manslaughter, and therefore that avenue of defense was not foreclosed.

Finally, Sadao contends that the instruction on voluntary manslaughter was flawed because it did not state that the government must prove the defendant intended to kill Sawaichi or cause him serious bodily harm, and that such state of mind was negated by heat of passion caused by adequate provocation.

Regarding the contention that to be convicted of voluntary manslaughter a defendant must act with the intent to kill or cause serious bodily harm (or with some other mental state that amounts to malice), we agree. This follows from the earlier discussion explaining that voluntary manslaughter encompasses all the elements of murder except that, although the defendant must act with a mental state that constitutes malice, he is nevertheless deemed to have acted without malice because the malice is negated by the fact that the killing occurred in the heat of passion in response to adequate provocation.⁵ However, we find no reversible error in the instructions to the special judges.

A trial court's instructions to special judges constitute reversible error only if "considering all the instructions, the evidence and the arguments that the [special judges] heard, it appears that [the special judges were] misled or did not have a sufficient understanding of the issues and [their] duty to determine them. . . . Reversal is inappropriate unless the **¶255** [special judges'] understanding of the issues was seriously affected to the prejudice of the complaining party." *ROP v. Worswick*, 3 ROP Intrm. 269, 273 (1993) (quoting *Simmons, Inc. v. Pinkertons, Inc.*, 762 F.2d 591, 597 (7th Cir. 1985)). After instructing the special judges on the elements of second degree murder, which included an explanation of what constitutes malice, the trial judge instructed them that if Sadao killed Sawaichi in the heat of passion caused by adequate provocation, he was not guilty of second degree murder, so that if they had a reasonable doubt whether Sadao acted in the heat of passion caused by adequate provocation, they must find him not guilty of second degree murder and consider whether he may be guilty of the lesser included

⁵ At first blush this may seem at odds with our description of voluntary manslaughter in *Omelau v. ROP*, 5 ROP Intrm. 23, 25 (1994). There, we said that the elements of voluntary manslaughter are that, without legal justification or excuse, the defendant inflicted an injury on another resulting in the death of the victim. Although that description of voluntary manslaughter was accurate as far as it went, it was a broad description which embraced all four forms of criminal homicide found in the statutes of Palau. In the context of that case, where defendant had set her house on fire, causing the death of her children, the broad description was sufficient in that the requisite mental state for voluntary manslaughter was not in issue--the facts of the case established that the defendant's mental state was sufficient for murder, but she was only charged with the lesser included offense of voluntary manslaughter.

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offenses of voluntary manslaughter or involuntary manslaughter. Then the special judges were instructed that "Voluntary manslaughter has two elements . . . first, that the defendant *intentionally* inflicted an injury or injuries upon Douglas Sawaichi; and, second, that Douglas Sawaichi died as a result of such injury." (emphasis supplied).

Sadao inflicted the fatal injury on Sawaichi by hitting him in the head with an iron stone weighing almost two pounds. The evidence showed that iron stone is the heaviest, hardest rock found in Palau and that Sadao was not far from Sawaichi when he threw the rock at his head. The special judges were instructed that they could convict Sadao of voluntary manslaughter only if they found beyond a reasonable doubt that he *intentionally* inflicted the fatal head injury with the iron stone. We are satisfied that, "considering all the instructions, the evidence and the arguments" the special judges were not misled with respect to the mental state required for the offense of voluntary manslaughter and that their understanding of the issues was not seriously affected to the prejudice of Sadao. *Worswick*, 3 ROP Intrm. at 273. Considering all the instructions as a whole, they correctly drew the distinction between voluntary manslaughter, requiring a mental state of intentionally inflicting the fatal injury (or inflicting it with another mental state which, but for provocation, would constitute malice), and involuntary manslaughter, requiring only that the fatal injury be inflicted as a result of criminal negligence.

As to Sadao's contention that the instructions should have stated that the government must prove Sadao's state of mind was negated by heat of passion caused by adequate provocation, we believe it misperceives the elements of voluntary manslaughter. Although some courts have said that the government must prove that a killing occurred in the heat of passion as an element of voluntary manslaughter, *see Government of Virgin Islands v. Knight*, 764 F. Supp. 1042, 1048-1049 (D. Virgin Islands 1991), we reject this rule. The government does not have to prove heat of passion **1256** as an element of voluntary manslaughter, but rather, where evidence of heat of passion is presented in a murder trial, the government must prove beyond a reasonable doubt that the homicide was *not* committed in the heat of passion in response to adequate provocation in order to convict for murder--that is, the government has the burden of proving that the defendant killed with malice, and that burden includes proving that the malice was not negated by sufficiently provoked heat of passion. *See Omelau v. ROP*, 5 ROP Intrm. 23, 25, n. 1 (1994) (citing *Mullaney v. Wilbur*, 95 S.Ct. 1881, 1892 (1975)). If the government were required to prove beyond a reasonable doubt that a defendant killed in the heat of passion as an element of voluntary manslaughter, it would have the "ludicrous result that [special judges who] find the evidence in balance on the question of provocation can convict the defendant *neither* of second degree murder *nor* of [voluntary] manslaughter". *United States v. Alexander*, 471 F.2d 923, 942 (D.C. Cir. 1973).

CONCLUSION

For the foregoing reasons, we find no reversible error in the instructions to the special judges, and the judgment of the trial court is AFFIRMED.