IN THE PRIVY COUNCIL No.61 of 1960.

ON APPEAL

FROM THE SUPREME COURT OF THE BAHAMA ISLANDS

BETWEEN:

ELVAN ROSE ... Appellant

- and -

THE QUEEN ... Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal in forma pauperis by Special Leave granted on the 27th July 1960, from the conviction of the Appellant for murder in the Supreme Court of the Bahama Islands (Sir Guy Henderson Q.C., Chief Justice, sitting with a Jury) on the 14th day of May, 1960, wherefor the Appellant was sentenced to death.

2. The Appellant has no right of appeal from his said conviction other than to Her Majesty in Council.

3. The grounds of the appeal are that there were misdirections in the charge given by the learned Chief Justice to the jury on the issue of the Appellant's diminished responsibility for the said murder. The relevant statutory provisions dealing with the defence of diminished responsibility in force in the said Islands are set out in Paragraph 11 below and the misdirections relied upon by the Appellant are set out in Paragraphs 12 to 17 below.

4. The Appellant was tried together with one James Ingraham before the said Supreme Court on the 10th, 11th, 12th, 13th and 14th days of May 1960, for the murder of Samuel Otis King on the 17th day of February, 1960. Both the Accused were convicted and sentenced to death. The

details of the evidence given at the trial of the facts of the alleged murder are not (in the Appellant's submission) material to this appeal but the evidence is summarised in paragraphs (1) to (12) below. In addition to his evidence of the circumstances of the killing, evidence was given on behalf of the Appellant to support a verdict of manslaughter on the grounds of his diminished responsibility and on this issue rebutting evidence was given on behalf of the Prosecution. The details and the weight of this evidence are not (in the Appellant's submission) material to the matters raised in this appeal, but the effect of the evidence is summarised in paragraphs 7 to 10 below. For the purposes of this appeal it is sufficient, in the Appellant's submission, to show that the issue of the Appellant's diminished responsibility was sufficiently raised in evidence and should have been left to the jury. In fact this issue was left to the jury, the learned Chief Justice directed the jury thereon, and indeed it was never suggested at the trial that the evidence called by the Defence was not sufficient to raise a prima facie defence of diminished responsibility which should be considered by the jury.

5. At the date of the death of the said King (the 17th February 1960) the Appellant and the accused Ingraham were prisoners in Her Majesty's prison at Fox Hill in the said Islands, and the said King was an Overseer at the said prison. The evidence of the events of the said 17th February, 1960, given at the trial on behalf of the Prosecution can be summarised as follows :-

p.67 l.32. (1) A prisoner named Trevor Albury alleged that he saw the Appellant sometime after midday sharpening a knife. The Appellant complained to this witness that he had a headache.

p.31 l.8 (2) Sometime after the above incident the Appellant was alleged to have complained to the Chief Turnkey named Duncombe that he had a headache and asked for aspirin. Duncombe said that the Appellant frequently complained of headaches.

p.74 l.22. (3) At about 3.30 p.m. the Appellant was seen carrying a cot and a black bag.

(4) At about the same time Assistant Turnkey Thomas Audley Gay entered a corridor which opened into G Block and as he did so he was knocked unconscious by a blow on the head. He did not see who struck the blow. Both the Accused men had cells in G Block and at that time Ingraham should have been locked in his cell. p.50 l.8 p.53 l.12

(5) Both the Accused were then seen bending over Gay as though searching him. p.71 l.38

(6) Both the Accused were then seen to go towards the South Main Gate of the Prison where the deceased King was in charge. p.72 l.6

(7) At the South Main Gate Ingraham attempted to open the gate with (presumably) a key but failed to do so. The Appellant told King to open the gate and when he refused, took out a knife and threatened him with it. p.59 l.3 p.59 l.14

(8) King broke away from the Appellant who followed him and stabbed him with a knife inflicting two wounds one of which was fatal. It was alleged that the Appellant said to King before he stabbed him that he was going to kill him because he would not give him the keys. The blade of the knife broke off in King's body and the Appellant threw the handle away. p.84 l.24

(9) The Appellant then took the keys from King's body and returned to the South Gate and he and Ingraham tried to open the gate. p.84 l.36

(10) Chief Turnkey Duncombe came towards the gate and told the Appellant to drop the keys which he did. Duncombe then took the Appellant and Ingraham to their cells. p.33 l.30

(11) Sometime later on the same day both the Accused were found out of their cells again. First they were seen on top of a tank. The Appellant jumped off the tank and grappled with a prison officer calling out to Ingraham to stab him. The Appellant then broke away and jumped on the tank again. Ingraham was later seen by Duncombe on the roof of a building and the Appellant was seen by Duncombe running up and down on top of the tank. Duncombe called the Appellant to come down and he did so. He was handcuffed, put p.96 l.2 p.96 l.16 p.96 ll.17-19 p.29 l.10 p.28 l.43 p.29 l.14

into leg irons and placed in a punishment cell. A master key was found between his underpants and his skin. He told Duncombe that he wanted to catch or kill the Assistant Superintendent of the prison because he did not give him (the Appellant) a cot.

p.29 l.19
p.30 l.3
p.30 l.5

(12) Ingraham was caught outside the prison. The Appellant was later alleged to have said (among other things) that he was sorry that he had killed King when two other prison officers to whom he referred to in abusive terms were still alive.

p.93 l.34
p.93 l.25

6. The Appellant gave evidence on his own behalf, and said that he could remember nothing about this incident from the time he saw Gay go into Block G except that he saw blood and he ran up and down. He also said he could remember nothing that happened for several days later until the following Tuesday.

p.112 ll.29-33
p.113 l.9

7. On the question of his mental condition the Appellant gave some evidence. He said he had had two accidents which caused scars to his head, one when he was young and the second in 1956 when he fell off a tractor. He said he had frequent headaches (and pains in his neck and back). He saw double sometimes and at night he saw and heard things which other people did not see. The things he saw were something like electric wires twinkling and sometimes as though "part of the house tear open" and he heard what appeared to be "a big tin on the side of the house". He also said that in 1957 he had been charged and convicted of the murder of Samuel Williams. Before that for some time he had been followed and had reported this to the Police. On the said 17th February 1960 he had some giddiness and reported this to Duncombe and asked to see a Doctor. He also said that while he was in prison he had heard somebody walking but could not see anybody and he had reported this to the doctor. He had also seen a white woman bending over him and reported this to the Prison Doctor. According to the Prosecution this report was made two days after King's death.

p.110 ll.19-20
p.113 l.34
p.113 l.44
p.114 p.3
p.114 l.18
p.110 l.36
p.115 ll.5-24
p.112 l.48
p.114 l.24
p.114 l.32

8. A Police Officer, Corporal Hepburn, was called by the Defence to say that on a night in 1957 the Appellant had come to a police station in an excited state and had asked for a police escort to take him home because he was being followed. The Appellant was asked to point out

p.133 l.12

to the Corporal the people who were following him and pointed out a place where the Corporal could not see anybody. p.133 ll.16-20

9. The Defence produced X-rays of the Appellant's head and called Dr. Mary Augusta Josephine Etheridge, a specialist in neurology, neuro surgery and neuro psychiatry. She had examined the Appellant for the purposes of this case. She found evidence of injury to his head and had caused the X-rays to be taken. She said there was evidence of sutures and depressions in the skull. In her view the X-rays showed evidence of internal injury to the brain. She found evidence of a slight but noticeable deviation of the internal partition between the two halves of the brain and of an erosion of the clivus or basilar plate at the posterior part of the brain. This in her view was caused by an injury to the base of the skull. This might cause the pains in the back of the neck and auditory hallucinations spoken of by the Appellant. She also found evidence of injury to his optic nerve. All these things together with the evidence of delusions and hallucinations and his extremely brutal and violent behaviour on the two occasions when he had killed men led her to the conclusion that there was damage to the Appellant's brain. She described his condition as "Post traumatic constitution with paranoid developments the thing which we call today the punch drunk syndrome". In her opinion he had a "completely not only diminished but absent moral responsibility". She also said that the Appellant's amnesia might be the result of psychological injury together with the physical injury to his brain.

p.135 l.4
p.137 l.5
p.138 l.33
p.139 l.6
p.140 l.7
p.140 l.11
p.145 l.13
p.149 ll.5-9

10. For the Crown, Dr. Henry Podlewski, who was the Prison Medical Officer and a Psychiatrist in charge of a Mental Hospital, was called in rebuttal and said in evidence that punch drunk syndrome was a chronic and continuous condition in which there were no lucid periods. He admitted that in 1957 he had made a report to the effect that it was possible that the Appellant was suffering from paranoia but since that date he had seen the Appellant 30 or 40 times and he had not displayed any signs of serious mental illness. The Appellant had complained about pains in his back but very seldom about headaches. The

p.166 l.43
p.167 l.1
p.168 l.20
p.168 l.32
p.168 l.35

p.171 ll.33-37

Doctor also said that the Appellant's conduct in saying that he could not remember the incident could be consistent with a man who could not remember what had happened but was told he had committed a horrible crime. He repeated that there was nothing to show that the Appellant was suffering from a serious mental illness which he defined as the type of mental illness which would substantially diminish his responsibility for his action. He added that it was a possibility that a Doctor might think there was something wrong with him. He refused to give any opinion on the X-rays of the Appellant's head on the ground that he was not a radiologist.

p.172 ll.3-6
p.172 l.9
p.175 l.41

11. The relevant statutory provisions in the Bahama Islands relating to the defence of diminished responsibility are contained in Section 2 of The Homicide (Special Defences) Act, 1959, and provide as follows :-

> "2-(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it."

12. The first misdirection in the charge given by the learned Chief Justice to the jury of which the Appellant complains is set out in the following passage:-

"Now, while we're thinking of that" (defence of diminished responsibility) "there are two ways in which one can deal with this particular section. I can leave it to you with a copy of the section, for you to puzzle out in your own minds what is meant by those long words in the section. But, in England, a learned judge summed up to his jury in that case and it was questioned and finally decided that it was a perfectly good summing up where he endeavoured to show you what he thought was meant by that section. He said:- p.183 l.4

> 'There are some cases you may think where a man has nearly got to that condition but not quite; where he is wandering on the borderline between being sane and insane where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the borderline.... He is not fully responsible for what he has done.' Now you may think, and it is entirely a matter for you, that that is what is meant by these words in the Act .....' such abnormality.....as substantially impairs his mental responsibility.' In other words, he is not really responsible for what he is doing. His responsibility, if not wholly gone, has been impaired.'

"That, I think, might help you when you are considering this question of impaired responsibility. And, since that is supposed to be, or is said to be a borderline case of sanity or insanity, then it seems to me that I should explain very briefly what we understand by insanity in law. And that is that the person is so deranged that he doesn't know what he was doing and he doesn't know if what he was doing is right or wrong - he's unable to distinguish.

> 'It must be clearly proved that the time of his insanity' -

not this case, but I want you to see what insanity is so that you can see whether it is borderline or not.

'To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it he did not know he was doing what was wrong.'

'Wrong' means legally wrong. Do you think here, therefore, that there was this question of borderline? That's what you've got to look at. Do you think that Rose
p.184 l.8 was suffering from this abnormality?"

13. The Appellant submits that the direction was wrong and misleading to the jury. It is wrong to say that the condition of mind which could satisfy the requirements of the statutory defence of diminished responsibility was equivalent to a "borderline" case of insanity under the McNaghten Rules. The two defences are, and should be kept, quite distinct. The defences have quite different results and are governed by different principles. The common law defence of insanity has no relevance whatsoever to the matters which the jury have to decide in considering the statutory defence of diminished responsibility. This direction suggested to the jury that they should not find for the defence on the issue of diminished responsibility unless they considered that he was "on the borderline" of being so insane that either he did not know what he was doing or that what he was doing was wrong. The conception that a person is "on the borderline" of insanity is at best inexact and likely to lead to confusion in the minds of the jury. Further the direction is wrong in law. There is nothing whatsoever in the statute to warrant it. Further the final question put by the learned Chief Justice to the jury in the above
p.184 l.8 passage ("Do you think that Rose was suffering from this abnormality?") coming shortly after the reading of the McNaghten Rules, was likely to cause the jury to think that they must come to the conclusion that the Appellant was in some degree suffering from the abnormality referred to in those Rules before they could find for the defence on the issue of diminished responsibility. Again, in the

Appellant's submission, that is quite wrong. This passage read as a whole was very prejudicial to the Appellant's defence.

14. The second misdirection of which the Appellant complains was contained in the following passage:-

> "I don't think that you can have much doubt that it was his" (the Appellant's) "hand that struck the fatal blow with the knife, and that was the knife that he had at the gate, broken off, the handle thrown away, it doesn't matter really about the throwing away of the handle, what we're concerned with is the death - the killing. Do you think that he did that under the influence of this diminished responsibility, or do you think that he knew just exactly what he was doing? Did he intend to do it? If so, murder; if not, manslaughter." p.198 l.45 p.199 l.8

15. This, the Appellant submits, was a clear misdirection. A finding that the Appellant intended to kill the deceased did not negative the defence of diminished responsibility. The jury could not have understood this direction otherwise than as meaning that if they found that the Appellant intended to kill the deceased they must convict him of murder. That was wrong. Intention to kill has nothing to do with the defence of diminished responsibility. An abnormal mind is perfectly capable of forming an intention to kill. Indeed, an intention or a desire to kill is more likely to exist in an abnormal mind than in a normal mind. Here again the misdirection was highly prejudicial to the Appellant's defence, particularly as it came at a very late stage in the charge to the jury.

16. The third misdirection is contained in the following passage:-

> "Again, Gentlemen, we have got this plea of amnesia - that's what it comes to - that is a forgetfulness, a loss of memory a word almost from the word it comes. That is what Rose is saying, what he said in the box. And that, also, we have authority to say doesn't mean that the person is insane so as not to be able to plead, not to be able to deal with his case; but it is a matter for you to decide - p.184 ll.34-44

whether you think that is so. Because, if a person does a thing in an unconscious state you can't blame them."

In this passage, the learned Chief Justice confused amnesia, which is complete forgetfulness of an incident after it had occurred, with a state of unconsciousness at the time of the occurrence. The learned Chief Justice was in effect telling the jury that they should not accept the Appellant's evidence that he could not remember the incident unless they came to the conclusion that he was in an unconscious state at the time of the incident. Further it is submitted that the last sentence of this passage was likely to confuse the jury into thinking that they should only find in favour of the defence on the issue of diminished responsibility if they considered that he was at the time of the murder in an unconscious state. Again, this was a misdirection and was highly prejudicial to the Appellant's defence.

17. The fourth misdirection is contained in the following passage in the charge to the jury:-

p.184 l.44 to p.185 l.12

"There is one further matter and that is - and I don't think that it has yet occurred - it is I think a novel point. That is, that Ingraham is charged with murder because of the aiding and encouraging Rose in this murder. Now, supposing you find that Rose was suffering from diminished responsibility so as to reduce his crime to manslaughter then, I think it must follow that, that if you find that Ingraham was still in concert with Rose, that he was encouraging him to do what was done, then you must find Ingraham guilty of manslaughter and not murder. Because, he couldn't encourage something which isn't. If you find it's manslaughter then Ingraham must have encouraged manslaughter as far as I can see. I don't think that that has been laid down - I am subject to contradiction by my learned friends here - but I think that that must follow."

In this passage the learned Chief Justice suggested to the jury that if they found that the Appellant was suffering from diminished responsibility they could only convict Ingraham of manslaughter although he was completely responsible for his actions. This direction was

contrary to the express words of section 2(4) of the Act set out in paragraph 11 above and again was prejudicial to the Appellant's defence as it would be likely to cause the jury to reject that defence.

18. By reason of all or any of the above misdirections the Appellant has suffered a grave miscarriage of justice and further the administration of justice in the said Islands and in all parts of Her Majesty's Dominions where the defence of diminished responsibility has been introduced is likely to be diverted into wrong channels.

19. The Appellant therefore prays that this Appeal may be allowed and that his said conviction for murder and the consequent sentence of Death may be quashed and that a conviction for manslaughter may be substituted therefor for the following (among other)

R E A S O N S.

(1) BECAUSE each of the above passages in the charge to the jury contained misdirections in law and whether read separately or together with the other passages or the rest of the said charge were prejudicial to a proper consideration by the jury of the Appellant's defence.

(2) BECAUSE on the evidence a reasonable jury properly directed would have acquitted the Appellant of murder and convicted him of manslaughter.

(3) BECAUSE by reason of the above misdirections or any one or more of them the Appellant has suffered a grave miscarriage of justice.

(4) BECAUSE by reason of the above misdirections or any one or more of them the proper administration of justice in the said Islands and elsewhere is likely to be diverted into wrong channels.

J.T. MOLONY

D.A. GRANT

No.61 of 1960.

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