Privy Council Appeal No. 61 *of* 1960

Elvan Rose - - - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH MARCH, 1961

Present at the Hearing:

LORD TUCKER
LORD DENNING
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD TUCKER]

The appellant was convicted of murder in the Supreme Court of the Bahama Islands after a trial before the Chief Justice and a jury on 14th May, 1960 and was sentenced to death. He has no right of appeal from this conviction other than by special leave to Her Majesty in Council. Leave to appeal *in forma pauperis* was granted on 27th July, 1960.

He was charged and tried together with another man named James Ingraham for the murder of Samuel Otis King on 17th February, 1960. Ingraham was also convicted and sentenced to death. He has not appealed. On 17th February, 1960 both the accused were prisoners serving sentences in Fox Hill prison where the deceased man King was employed as an overseer. At about 3.30 p.m. an assistant turnkey named Gay was knocked unconscious in a corridor of the prison. He did not see who struck the blow, but shortly afterwards both accused were seen bending over him as though searching him. They then went to the south main gate where King was in charge and attempted without success to open it. The appellant told King to open it and when he refused took out a knife and threatened him with it. King broke away from the appellant who followed him and, after telling him he was going to kill him because he would not give up the keys, stabbed him with a knife inflicting two wounds one of which was fatal. It is not necessary to refer in further detail to the events of that day as it was not disputed on the appeal that the accused killed King and that if the jury had been properly directed on the defence of diminished responsibility the verdict could not be questioned.

The relevant statutory provisions in the Bahama Islands 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."

The language is identical with that of the English Homicide Act 1957. It will be convenient at this stage to endeavour to summarise the effect of the medical evidence adduced by the defence in support of the plea of diminished responsibility. It is to be found in the evidence of Dr. Mary Etheridge who had qualified in Paris as a Doctor of Medicine and was a licentiate of the Royal College of Physicians in London and a member of the Royal College of Surgeons. She had specialised in neuro surgery and neuro psychiatry in Paris and served as a specialist in the Royal Army Medical Corps in India during the war. She had also worked at the Hammersmith Hospital and at the National Hospital for Nervous Diseases in London. She had acted as consultant in neurology, neuro surgery and neuro psychiatry at Princess Margaret Hospital and the Bahamas General Hospital.

She had examined the appellant and his history and said she found a clear cut history of delusions and hallucinations. She found indications of possible head injuries which she subsequently verified. In the cases of three of these injuries there was a history of subsequent unconsciousness and amnesia. She caused X-ray photographs to be taken, and carried out an examination of his optic nerves. After giving in considerable detail a description in highly technical language, which must have been extremely difficult for the jury to follow or understand, she summarised her conclusions in these words:—

"With the material at our disposal we were forced to certain conclusions, and these were: That we had a man who had given evidence or at least who had suggested to at least one observer—and I'm talking now about Cpl. Hepburn—that he was mentally unbalanced, who had suggested to another observer—and I'm referring now to Dr. Podlewski—that his condition might be delusional, it might have suggested a delusional state as he said and had given to myself evidence of injury to his skull with the possibility—and in view of his history I would say the probability—of underlying brain damage as evidenced by his delusional state, his hallucinations and on at least two occasions, his extremely brutal and violent behaviour—maniacal behaviour—I would say. If I had to put a name on it I would call it with Mr. Adolph Meyer, post-traumatic constitution, with paranoid developments the thing which we call today the punch drunk syndrome."

In cross-examination she was asked:—

"Q. Dr. would you say that all this adds up to being insane?

A. I didn't say such a thing.

Q. No, I am asking you?

A. Then I would say no. Not insane in the way which I imagine you mean.

Q. Well, you don't think he is insane in any way?

A. I didn't say such a thing.

Q. No, I am asking you?

A. I showed that he showed mental trouble, mental disorders, disorders of the intellect, he has periods of insanity.

Q. Well, you are saying that he had periods of insanity?

A. Insane in the way that in general people understand it."

Later on in answer to the question " Do you now say he has paranoia? " she replied :—

> " I said that Rose has had repeated injury to his brain which showed that his intellect had been impaired, which showed that he at many times, and he has given you evidence of it, has had completely not only diminished but absent moral responsibility."

The effect of the evidence of Dr. Podlewski, who was recalled in rebuttal by the prosecution, may be summarised by setting out the last two or three questions and answers in his examination in chief :—

> " Q. Is it your opinion that this man is sane or insane. That is, was he sane or insane on 17th February?
>
> A. My opinion is that there is nothing in what I have seen of him to indicate that he was suffering from any serious mental illness at this time.
>
> Q. Could you say whether or not he was on the borderline of insanity?
>
> A. I could definitely say he was not on the borderline.
>
> Q. I notice you keep saying, doctor, " any serious mental illness " would you like to explain that to us?
>
> A. Well, in the legal sense when I say " serious mental illness " I mean the type of mental illness which would substantially diminish his responsibility for his actions.
>
> Q. I see. A doctor might think that there might be something wrong with him. Is that what you mean?
>
> A. It is a possibility."

It had been elicited in the cross-examination of this witness when he had given evidence earlier in the trial that the appellant had been convicted of murder and sentenced to death in 1957. On that occasion he had made a report on his mental condition. This was put in evidence and showed that the appellant at that time had complained of molestation and annoyance by people who were threatening to kill him. The doctor was unable to ascertain whether this belief was delusional or not but if it was it would be consistent with the existence of paranoia. His sentence was subsequently commuted to life imprisonment.

The above will suffice to indicate the two conflicting medical views of the appellant's condition which the jury were called upon to consider in deciding whether on balance of probability the defence had established the plea of diminished responsibility which would justify a verdict of manslaughter.

The contention of the appellant is that the jury did not have a correct or sufficient direction in law as to the nature of this defence and in particular were misdirected as to the meaning of the words " mental responsibility ".

Before turning to the passages of which complaint is made their Lordships desire to emphasise that the Chief Justice was engaged in the difficult task of instructing the jury as to the meaning, and application to the evidence in the present case, of a difficult section which has introduced a novel conception into English criminal law, and moreover he was doing this before the Court of Criminal Appeal in this country had given judgment in the case of *Reg.* v. *Byrne* [1960] 2 Q.B. 396. After reading the section of the Act to the jury and explaining the burden of proof the learned Chief Justice read to the jury the following extract from the summing up of Mr. Justice Paull in the case of *Reg.* v. *Walden* which had received the approval of the Court of Criminal Appeal in England (see [1959] 1 W.L.R.1008) :—

> " 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 really 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 has done. His responsibility, if not wholly gone, has been impaired."

The Chief Justice then proceeded as follows :—

"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."

Then he quoted in full the rule in McNaughten's case, reading it out verbatim. He observed that it is "not this case but I want you to see what insanity is so that you can see whether it is borderline or not". After quoting it he went on:—

"'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 was suffering from this abnormality?"

It is said by counsel for the appellant that Rose's abnormality should not be judged by the test whether it bordered on insanity or not, and that no such test is justified by the language of the section. In any event it is not a conclusive test to be applied in every case. Furthermore if insanity is to be introduced into the application of the section there is no justification, he said, for confining it to legal insanity within the McNaughten definition. For the Crown it was argued that "mental responsibility" in the section means "mental responsibility in law" i.e. the standard required for a man to be held responsible in law for his acts; and that standard was to be found in the rules in McNaughten's case because there was no other standard to which it could be referred. It was right, therefore, said the Crown, for the Chief Justice to invite the jury to apply the test of borderline of insanity as defined in the McNaughten rules.

Their Lordships cannot accept the Crown's contention. It would be an undue limitation of the wide words of the Section. In *Reg.* v. *Byrne* (supra) the Lord Chief Justice delivering the judgment of the Court after setting out the matters required to be proved in the defence of diminished responsibility proceeded :—

"'Abnormality of mind', which has to be contrasted with the time-honoured expression in the M'Naughten Rules 'defect of reason,' means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts."

Later after referring to the citations from Scots cases in *Reg.* v. *Spriggs* [1958] 1 Q.B. 270 Lord Parker continued :—

"They indicate that such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language (not that of the M'Naughten Rules) a jury would regard as amounting to partial insanity or being on the borderline of insanity."

Their Lordships respectfully accept this interpretation of the words "abnormality of mind" and "mental responsibility" as authoritative and correct. They would not, however, consider that the Court of Criminal Appeal was intending to lay down that in every case the jury must

necessarily be directed that the test is always to be the borderline of insanity. There may be cases in which the abnormality of mind relied upon cannot readily be related to any of the generally recognised types of "insanity". If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised that there is no formula that can safely be used in every case—the direction to the jury must always be related to the particular evidence that has been given and there may be cases where the words "borderline" and "insanity" may not be helpful.

In the result their Lordships are of opinion that the direction given to the jury by which they were told to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the McNaughten Rules was a serious and vital misdirection which would, no doubt, not have been given had the Chief Justice had the benefit of Lord Parker's judgment in *Reg.* v. *Byrne* (supra).

There was a further passage in the summing up which was strongly relied upon by counsel for the appellant. Towards the end of his charge the Chief Justice referring to the killing said: "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." This was a misdirection. A man may know what he is doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility. This misdirection, coming where it did, may have been a determining factor in the jury's verdict.

There were two other passages which were the subject of complaint, but their Lordships, although appreciating that they were open to criticism, would not have regarded them standing alone as misdirections which could reasonably have affected the jury's verdict. One of these dealt with the appellant's amnesia which was said to have covered the period from the moment he saw blood when Gay was knocked down until several days later. It is not necessary to set out the passage, but it would seem that the learned Judge had not quite appreciated the use which the defence were making of this amnesia if it existed.

In the other passage the Chief Justice in dealing with the case of the appellant's fellow accused Ingraham had overlooked the provisions of sub-section (4) of the Act and told the jury that if they found that the appellant was suffering from diminished responsibility and consequently was guilty only of manslaughter and that Ingraham was acting in concert with him and encouraging him to do what he did then they should find Ingraham also guilty only of manslaughter.

As already indicated their Lordships would not have regarded these passages by themselves as sufficient to vitiate the verdict against the appellant.

In the event their Lordships are of opinion that the appellant was deprived of his right to have his defence of diminished responsibility properly considered by the jury and they must consequently humbly advise Her Majesty that the verdict of guilty of murder and the sentence of death passed upon the appellant should be quashed and a verdict of guilty of manslaughter and a sentence of imprisonment for life substituted therefor.

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In the Privy Council

ELVAN ROSE

v.

THE QUEEN

DELIVERED BY LORD TUCKER

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