No. 95/4772/Z4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Friday 25 October 1996

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Bingham of Cornhill)

MR JUSTICE BLOFELD

and

MR JUSTICE CRESSWELL

R E G I N A

- v -

COLIN FREDERICK CAMPBELL

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(Official Shorthand Writers to the Court)

MR EDWARD FITZGERALD QC and MR PAUL TAYLOR appeared on behalf of
THE APPELLANT

MR RICHARD LATHAM QC, MISS JOAN BUTLER and MR WILLIAM COKER QC
appeared on behalf of THE CROWN

J U D G M E N T

(As Approved by the Court)

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Monday 25 October 1996

THE LORD CHIEF JUSTICE: On 24 July 1985, in the Crown Court at Reading, before Mr Justice Kenneth Jones and a jury, the appellant pleaded not guilty to the murder of Deirdre Inge Susan Sainsbury, but guilty to her manslaughter by reason of provocation. The Crown declined to accept this plea and the trial proceeded. On 26 July, the appellant was convicted of murder.

It was common ground at the trial that the appellant had killed the deceased, and the only defence was provocation. The appellant did not seek to establish, under section 2(1) of the Homicide Act 1957, that he had at the relevant time been

> "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."

The trial judge accordingly directed the jury that the defence of diminished responsibility provided by the section had not been put forward in the case and that there was no evidence whatsoever to substantiate such a defence. He directed the jury to put this aspect out of their minds.

The appellant obtained leave to appeal against conviction, and on appeal argued that in the light of the psychiatric evidence given at the trial, the judge should have directed the jury not only on provocation but also on diminished responsibility: see R v Campbell (1987) 84 Cr App R 255. The appeal failed. The court held that since the appellant had not sought to prove diminished responsibility, and there was not even prima facie evidence before the jury to support such a defence, the judge had been right to direct the jury as he did. Since the defence advanced at trial was one of provocation, the trial judge naturally directed the jury on the law of provocation and on the relevant facts. It was in evidence that the appellant suffered from epilepsy, but the judge directed the jury in clear terms that this was not a characteristic of which the jury could take account in determining

whether the provocation was enough to make a reasonable man do as the appellant had done. In his grounds of appeal against conviction as first drafted, the appellant sought to challenge the judge's direction on provocation, but in the perfected grounds this challenge was not pursued. In the event, provocation was not an issue canvassed on the hearing of the appeal.

Since the dismissal of his appeal on 31 October 1986, the appellant has continued to serve the mandatory life sentence imposed upon him for murder. But his advisers have been active in seeking to obtain and draw to the attention of successive Home Secretaries evidence suggesting that the appellant had at the relevant time suffered from a mental condition which fell within section 2(1) of the 1957 Act and substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing. In a letter of 24 July 1995, written on behalf of the Secretary of State, it was accepted that the appellant "was under a greater disability at the time of the offence than was apparent to the courts". The Home Secretary has accordingly referred the case to this court under section 17(1)(a) of the Criminal Appeal Act 1968, and it is to be treated for all purposes as an appeal to this court by the appellant. We must allow the appeal against conviction if we think that the conviction is unsafe and dismiss the appeal in any other case.

Diminished responsibility:

The correct approach to a defence of diminished responsibility was helpfully stated by this court when the present case was last before it:

> "So diminished responsibility is something which the defence has to prove on a balance of probabilities. Where, as here, the killing is admitted, what the defence has to prove is that the accused was suffering from such abnormality of mind of the relevant type as substantially impaired his mental responsibility for his acts and omissions in doing the killing. So it is necessary first to identify those acts and omissions, then to consider what evidence there is to suggest that:
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> (a) the accused was suffering from an abnormality of mind (arising in the way envisaged by the statute), and

(b) the abnormality was such as substantially to impair his mental responsibility for his acts and omissions in doing the killing."

The court identified the relevant acts and omissions of the appellant in a passage which it is convenient to repeat:

"*How did the girl come to die?*

On December 22, 1984, she was hitch-hiking in London seeking a lift to Oxford. The appellant, who had been playing hockey, stopped and picked her up. According to his account to the police he drove his car for a little way, then stopped it in Osterley Lane, and made advances towards her. She struck him across the eye with her hand. He then punched her. He thought that the punch must have hit her in the throat, because she began gurgling and blood poured from her mouth.

The appellant later told the police that she then passed out and collapsed straight forwards. He put the seat belt onto her. He did not throw her out of the car because he had already told her his name and he thought she might report him. Then he drove off. Asked where he went, he said, 'I don't remember, she came to as I was driving around. She was gurgling and blood was coming out of her mouth. I was frightened. I wasn't thinking clearly. I tried to strangle her.'

A little later he said, 'I don't know how many times I kept doing that'. The police officer asked, 'Doing what?,' to which the appellant replied, 'Trying to strangle her. It seemed like an eternity, there was blood everywhere.'

He was asked to explain how he strangled her, and he said, 'She struggled a couple of times, I hit her and she passed out and I strangled her with my hands. Everything that happened got worse. It was something that I did not intend.' He was asked, 'At what stage did you know you had killed her?' and he replied, 'When I left her. She was still making a noise. I pushed her in the back and threw some things on top of her. She was too badly hurt to help. I hit her with the hockey stick across the throat. I think I knew she was dead then. I just wanted to get rid of her.'

The officer said, 'For some reason you went berserk and attacked her?' The appellant replied, 'The first time I hit her I didn't mean to, it was spontaneous; but after that, yes, I went berserk with panic.' A little later on the police officer said to the appellant, 'So basically you strangled her to cover up for the injury you had caused by hitting her in the throat?' The appellant replied, 'Yes.' The officer asked, 'Can you offer any explanation as to why you killed that girl?' and the appellant replied, 'Plain blind panic.'

> When giving evidence at his trial the appellant described his response to the blow, with which the deceased attempted to reject his advances, as follows:
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> > 'As soon as I was hit, I hit back with my fist. I think I shouted "witch" or "bitch". I did not expect to be hit, at worst I expected her to say "no". I can only assume that I must have hit her in the throat. She was gurgling and choking. I had never heard anything like it before. Blood was gushing everywhere. I think I tried to help her. I gave up and ended up killing her. I strangled her. Between my shaking and strangling her, I ended up pulling her into the back of the car. I strangled her because I wanted to cover up the damage I had done. I did not stop and think. I did not reason anything out. I did not intend it should end the way it did.'
>
> For present purposes it is unnecessary to consider his evidence as to what he did to the girl after he believed her to be dead. Suffice it to say that he mutilated her body appallingly in the hope that anyone who found it would believe that she had been the victim of a frenzied attack. Having done that he dumped the body in a ditch. What is significant is that he does not suggest that the girl died as the result of a single blow, or even as the result of a brief attempt at strangulation. He describes a heavy blow to the throat, which, if he is right, clearly caused her serious injury but not death, followed, after quite an interval during which he was driving the car, by prolonged attempts at strangulation, during which she was struggling.
>
> The evidence of the pathologist, Dr Cordner, was not disputed, and it tended to confirm the accused's account of the attack on the girl. Death, said the pathologist, was due to compression of the neck and aspiration of blood. There was evidence of a severe blow to the Adam's Apple, and his conclusion was that both the blow and the strangulation caused the death."

Although the main events in this narrative are not the subject of dispute, the parties interpret them in a very different way. The Crown pointed out that the events took place over a considerable period, and that the appellant was himself able to give a reasonably clear and coherent account of what had happened and where. The Crown suggested that the appellant, having struck his first and highly injurious blow on the deceased, had resorted to ever more desperate steps to cover up his crime and avoid detection, steps which (however criminal) were entirely rational. For the appellant, emphasis was laid on a number of statements made by him, particularly in his initial interviews, which suggested

that his memory of certain events was imperfect and that he had at the relevant time been quite unable to control his conduct or measure his responses in anything approaching a rational way. This court cannot choose between those two competing interpretations.

At the time of the trial and of the first appeal there was clear evidence that the appellant had at the relevant time suffered from an abnormality of mind in the form of epilepsy. The psychiatrist called by the defence had, however, been unable to suggest that this abnormality had been such as substantially to impair the appellant's mental responsibility for his acts and omissions in doing the killing. The nature and extent of this abnormality was accordingly not explored in any depth. As a result of the investigations made on behalf of the appellant since dismissal of his appeal, we were asked to receive the written and oral evidence of two eminent psychiatrists with special expertise in the field of epilepsy, Dr Fenwick and Professor Fenton. The first question for the court was whether we should receive this evidence.

Section 23 of the Criminal Appeal 1968, as recently amended, provides so far as relevant:

> "(1) For purposes of this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice --
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> .....
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to --
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> (a) whether the evidence appears to the Court to be capable of belief;
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> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
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> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
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> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those

proceedings."

Under the section, the Court of Appeal must therefore primarily consider what it thinks necessary or expedient in the interests of justice, but must pay particular regard to the four matters listed in subsection (2). Here, the evidence which we are asked to receive appears to us to be capable of belief, and the Crown do not suggest otherwise. It appears to us that the evidence might afford a ground for allowing the appeal. It is plain that the evidence would have been admissible in the proceedings from which the appeal lies on an issue (diminished responsibility) which is the subject of the appeal. The reason given for failing to adduce the evidence in the proceedings before the jury is that the evidence was not then available to the appellant, and that there has in the intervening decade been an advance in medical science which permits a more complete picture of the appellant's mental condition to be presented than could then have been easily done.

This court has repeatedly underlined the need for defendants in criminal trials to advance their full defence before the jury and call any necessary evidence at that stage. It is not permissible to advance one defence before the jury and, when that has failed, to devise a new defence, perhaps many years later, and then seek to raise that defence on appeal. It is, however, plain that the failure of the appellant's advisers to advance a defence of diminished responsibility at the trial was not a matter of tactical decision but of practical necessity: since the expert witness on whom the defence relied found it impossible to support a defence of diminished responsibility, it was rightly judged to be improper to advance such a defence. Since the case has now been referred back to this court for reconsideration, we were bound to judge the application to adduce this evidence according to our judgment of what the interests of justice required. We concluded that in all the circumstances we should receive this evidence and accordingly had the benefit both of studying the written reports of Dr Fenwick and Professor Fenton and of hearing their oral evidence.

The evidence given by Dr Fenwick, with which Professor Fenton was in broad agreement, was to the following effect:

The appellant suffers (and has at all material times suffered) from epilepsy and frontal lobe damage. This is demonstrated by tests conducted in June 1985 before the trial and repeated this summer. The effect of this frontal lobe epilepsy is to affect the functions of judgment, control of the emotions, control of impulses, and forward planning. The appellant has over the years suffered from generalised seizures and partial complex seizures, but infrequently. More important is the fact that the appellant has suffered from absence seizures, lasting for anything from a few seconds to about half a minute, almost continuously. These seizures can be shown to occur most frequently, and to last longest, when the appellant is for any reason excited or aroused and so inclined to over-breathe. Such seizures lead to a change in the intellect and a reduction of the patient's ability to appreciate the circumstances surrounding him and to process information. While there will be gaps between these seizures, the patient will have a very imperfect understanding of what is happening around him while he is subject to one of them. The effect of the electrical discharges of the brain which occur during such seizures is to interrupt conscious thought processes and affect emotional control in a profound way. The events which preceded and accompanied this killing were, in the doctor's judgment, just such as would lead to a state of excitement and arousal, over-breathing and high levels of electrical discharge. Having studied the available evidence of what the appellant did and said at the time, both doctors were of the clear opinion that at the time of the killing the appellant had been suffering an abnormality of mind of such significance as seriously to diminish his responsibility for the act that he carried out.

Having received this new evidence and considered all the material drawn to our attention and all the arguments addressed to us on both sides, we are of opinion that a defence of diminished responsibility, if based on the evidence now available, might well succeed, and might well have succeeded at the trial if then advanced along the present lines. It follows that in our judgment this conviction is unsafe and we must allow the appeal.

Mr Fitzgerald QC, representing the appellant on this appeal, urged that the court should exercise its power under section 3 of the 1968 Act to substitute for the verdict found by the jury a

verdict of manslaughter on the ground of diminished responsibility. He submitted that the interests of justice did not require the court to order a retrial under section 7, and that it would in all the circumstances be oppressive to the appellant so to order. We do not accept this submission. At the trial, the psychiatrist advising the Crown was of the clear opinion that the appellant could not sustain a defence of diminished responsibility. That evidence was not called because the defence gave an assurance that no defence of diminished responsibility would be advanced before the jury, as in the event it was not. As we understand, the Crown remain of opinion that a defence of diminished responsibility is not open to the appellant, despite the new evidence which he now adduces. In the result, this is an issue which has never been before a jury, and it would in our judgment be quite wrong for us to express a concluded view on the merits of this issue after hearing only one side of what may well be a live and difficult issue. We accordingly order that the appellant be retried on an indictment charging him with murder. Such indictment must be preferred and the appellant arraigned within two months from the date of this order, and the appellant must remain in custody pending retrial.

We are concerned that the appellant should not misunderstand the potential benefit to him of a favourable verdict on retrial. He cannot achieve a verdict which will lead to his acquittal. He can at best secure a verdict of not guilty of murder but guilty of manslaughter on the ground of diminished responsibility. Should he achieve that outcome, he should not assume that the mandatory life sentence to which he is now subject will be replaced by a determinate sentence. While the appropriate sentence is essentially a matter for the trial judge if the defence of diminished responsibility should succeed, it may well be (given the evidence of the appellant's mental state) that an indeterminate sentence will still be considered appropriate in order to ensure that danger to the public is avoided.

Provocation

On the hearing of this appeal, Mr Fitzgerald sought to challenge the direction given by the trial judge on provocation. He accepted that that direction faithfully reflected the law as it was

understood at the time of trial. But he submitted that the law had, over the intervening decade, so developed that there were then excluded from the jury's consideration matters which they would now be invited to consider. We would be very slow indeed to allow an appeal on these grounds. Although the appellant at one point proposed to challenge the trial judge's direction on provocation on appeal to this court, he did not in the event do so. Any such challenge at that time would necessarily have failed. It would be quite contrary to the general practice of this court to permit convictions to be reopened because the law has changed since the date of conviction.

There is, however, in this case a dilemma which cannot be evaded. If the Crown maintain their challenge to the appellant's defence of diminished responsibility, so that a new trial takes place on that issue, and if the appellant at that trial advances a defence of provocation in addition to that of diminished responsibility, the trial judge will necessarily be obliged to give the jury an appropriate direction. Until recently, the judge's duty would clearly have been to direct the jury on provocation in accordance with the authoritative decisions of the House of Lords and this court given since the enactment of section 3 of the 1957 Act. Whether this remains the duty of the judge has been the subject of argument on this appeal.

The foundation of the argument is the recent decision of the Judicial Committee of the Privy Council in Luc Thiet Thuan v The Queen [1996] 3 WLR 45. This was an appeal from the Court of Appeal of Hong Kong, and the issue was whether, in applying the test of the reasonable man, account could be taken of brain damage which would render a defendant more likely to respond violently to an act of provocation than another person of the same age and gender not suffering from such brain damage. Both the trial judge and the Court of Appeal of Hong Kong ruled that such brain damage was irrelevant to the defence of provocation. The Privy Council, by a majority, took the same view. In the majority advice given by Lord Goff of Chieveley doubt was cast on several leading cases decided in this court. Lord Steyn dissented, expressing support for these Court of Appeal authorities and reaching the conclusion that the trial judge had misdirected the jury by failing to direct them that the evidence of the defendant's brain damage and its impact on his response to provocation was

relevant to the objective requirement of provocation. Mr Richard Latham QC, for the Crown, submits that the trial judge should direct the jury in accordance with the view of the majority of the Privy Council. Mr Fitzgerald, on the other hand, submits that the view of Lord Steyn is to be preferred.

If we were entitled to choose between the competing views expressed in the Privy Council decision, we should face a difficult task. The legislation in Hong Kong and this country is to the same effect. There is compelling force in the construction which the majority have put on a section which makes reference to the reasonable man and gives no express warrant for elaborating or qualifying that concept. We are, however, conscious that the body of Court of Appeal authority which is in doubt represents a judicial response, born of everyday experience in criminal trials up and down the country, to what fairness seems to require. If the concept of the reasonable man expressed in section 3 were accepted without any qualification, successful pleas of provocation would be rare indeed, since it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation. It is in recognition of human frailty that the scope of the defence of provocation has, to a very limited extent, been enlarged. As Lord Steyn put it at page 66H:

> "But even more important than the promptings of legal logic is the dictates of justice. Justice underpinned these decisions".

We do not, however, conceive that it is open to us to choose between these competing views. The previous decisions of this court are binding upon us. The decision of the Privy Council is not. It appears to us that unless and until the previous decisions of this court are authoritatively overruled, our duty and that of trial judges bound by the decisions of this court is to apply the principles which those cases lay down. If there is an effective retrial in this case, and if provocation is an issue, it will be the duty of the trial judge to apply the law binding upon him as it then stands.

MR FITZGERALD: My Lord, I do have an application in relation to the second point, that is to say your Lordship's ruling in relation to the special characteristics. My Lord, it is an application that you should certify a point of public importance in relation to your Lordships' decision at the commencement of the second limb ruling, that "it would be quite contrary to the general practice of this court to permit convictions to be reopened because the law has changed since the date of conviction".

THE LORD CHIEF JUSTICE: Have you formulated a question?

MR FITZGERALD: My, Lord, yes.

THE LORD CHIEF JUSTICE: Are you in a position to deal with this, Mr Coker?

MR COKER: My Lord, I would like to, but I am not as familiar with the papers as I should be.

MR FITZGERALD: My Lord, I do not know whether it would assist if I indicated to your Lordship at this stage the point that I have formulated? Perhaps your Lordship would hear me at some later stage?

THE LORD CHIEF JUSTICE: Can you give us the gist of the question?

MR FITZGERALD: My Lord, yes. It is: whether on a reference back the appellant is entitled to the benefit of the clarification of the law which has taken place since the appellant's conviction?

My Lord, in my submission the Thornton (No. 2) case was precisely such a case whereby there was clarification of the law since the appellant's conviction. It is not correct to say that it is not the general practice of this court --

THE LORD CHIEF JUSTICE: That is not a ground of decision.

MR FITZGERALD: My Lord, I have just seen your Lordships' judgment, but my understanding of your Lordships is that on the second point which was a self-sufficient ground for quashing the conviction, the reason that that point did not lead to a substitution of a verdict of manslaughter for one of murder on the basis of misdirection was the decision of this court that it would be contrary --

THE LORD CHIEF JUSTICE: But it does not actually affect it. The order that we have made is that there will be a retrial, and that is what we would have ordered anyway.

MR FITZGERALD: I see. If, even in the event of a misdirection which was relevant, your Lordships have been minded to order a retrial --

THE LORD CHIEF JUSTICE: There still would have been an issue as to whether he was provoked.

MR FITZGERALD: Yes. My Lord, my argument was that if there had been a misdirection and there was evidence -- and the judge thought there was -- then the conviction should be quashed and a verdict of manslaughter should be substituted. My Lord, if the court's decision is that in any event there would have to be a retrial, even if there had been a misdirection, then I appreciate that it would be academic. But it would be my submission that if there was a misdirection -- and I do not accept that it faithfully reflected the law at the time because the case of Raven, which I relied on, was decided in 1982 before this case -- it is my submission that the common law, as clarified now, has always been, and was at the time, that special characteristics of this nature should be taken into account. The case of Raven was decided before this case -- the direction in Raven was given before this case -- and that

therefore if there was a misdirection which justified the substitution of a verdict of manslaughter for the verdict of murder, that would be a ground for not ordering a retrial.

My Lord, that is the argument. I appreciate that even if there was a misdirection of law of which the court can take cognisance there would have been a retrial. But I would have submitted that if there was a misdirection of law it would be highly unusual on a defendant to order a retrial. I would therefore submit that it would not be an academic point for the House of Lords to decide what the correct approach is as to the clarification of the law which has taken place since the appellant's conviction. It is my submission that one does not, as it were, exempt the conviction from being quashed because the clarification has taken place since the conviction. But in any event it is not my submission, and never was my submission, that this was not something which should have been appreciated in 1984.

My Lord, those are the submissions I make.

THE LORD CHIEF JUSTICE: Mr Fitzgerald, the court is not sympathetic to your application. I appreciate you would have preferred that we should substitute a verdict, but for the reasons that we have given we consider that that would not be an appropriate course. The matter will go back to be retried. You will have the benefit of the opportunity to run your defence of diminished responsibility and unless the law changes in the meantime you will get the benefit of a favourable direction, from your point of view, on provocation.

MR FITZGERALD: I am grateful.

THE LORD CHIEF JUSTICE: We think that you are getting all to which you are entitled.

MR FITZGERALD: My Lord, I am obliged to your Lordships for hearing me and I apologise for the fact that I, having just read the judgment --

THE LORD CHIEF JUSTICE: We appreciate the difficulty. If, on further reflection, you feel that there are other points you wish to advance, we will hear you. But at the moment we are unsympathetic.

MR FITZGERALD: My Lord, I am obliged. My Lord, I do not think that there is any need for any consequential directions. As I understand it, the defendant would have to be arraigned within two months.

THE LORD CHIEF JUSTICE: Yes.

MR FITZGERALD: The only matter is whether it would be more appropriate if it were not to be heard in Reading. I do not know whether that would be a matter for the trial judge rather than your Lordships? There having been a trial in Reading, although I appreciate it was some time ago, it would be our submission that it might be better if it were at another venue.

THE LORD CHIEF JUSTICE: I am given a piece of paper which draws attention to various consequential aspects of ordering a retrial. I think most of them we have already covered. I think we should order legal aid for the retrial.

MR FITZGERALD: I am obliged.

THE LORD CHIEF JUSTICE: It is suggested that, although the provision of section 8(1) regarding the court at which the trial should be held is repealed by Schedule 11 of the Courts Act 1971, the court

should be invited to raise the question of location of retrial with counsel.

MR FITZGERALD: My Lord, I have made my submissions. In my respectful submission it would be more appropriate that it be held elsewhere. But I do not know what the alternatives would be.

THE LORD CHIEF JUSTICE: I do not think the citizens of Reading will have a memory that long. If they do, they are unique.

MR FITZGERALD: Do we need a legal aid certificate for this appeal? I do not know whether we do, my Lord?

THE LORD CHIEF JUSTICE: We will certainly order that.
