10,1960

No. 49 of 1959

In the Privy Council

On Appeal from the High Court of Australia

BETWEEN

Her Majesty's Attorney-General
for the State of South Australia
APPELLANT

AND

John Whelan Brown
RESPONDENT

APPELLANTS CASE

CASE FOR THE APPELLANT

CASE FOR THE APPELLANT

Record.

1. This is an appeal by Special Leave granted by Order in Council dated the 12th day of August, 1959, from a judgment and order of the High Court of Australia dated the 20th May, 1959, quashing the Respondent's conviction and sentence and ordering that he should be retried. The Respondent had been tried in the Supreme Court of South Australia at Adelaide (Abbott J. sitting with a jury) on a charge of murdering Neville Montgomery Lord on the 23rd November, 1958, and on the 20th March, 1959, the Respondent was found guilty of the said offence by unanimous verdict of the jury and was sentenced to death. From that conviction the Respondent appealed to the Full Court of the said Supreme Court and on the 15th April, 1959, by a unanimous judgment of the said Full Court (Napier C.J. Mayo and Piper J.J.) his appeal was dismissed. From that judgment the Respondent appealed to the High Court and as stated above on the 20th May, 1959, the said High Court (Dixon C.J., McTiernan, Fullagar, Kitto and Taylor J.J.) delivered a unanimous judgment allowing the appeal and ordering a retrial. P. 93. P. 92. P. 5. Pp. 72-80, 81. Pp. 84-91, 92.

2. At the Respondent's trial it had not been disputed that the Respondent had killed the said Lord in circumstances which would apart from a defence of insanity amount to murder. The sole defence was that at the time of the killing the Respondent was insane and that therefore the jury should return a verdict in the form prescribed under the law of South Australia of not guilty on the ground of insanity.

3. The only relevant statutory law relating to the defence of insanity in South Australia is contained in section 292 (1) of the Criminal Law Consolidation Act, 1935 to 1952 of South Australia which provides:—

> "(1) Where it is given in evidence that any person charged with an indictable offence was insane at the time of the commission of the offence, and the person so charged is acquitted, the jury shall be required to declare whether he was acquitted by them on the ground of insanity."

There is no statutory definition either of murder or of insanity in South Australia. The law applicable is the common law of England and in particular so far as the defence of insanity is concerned, the rules known as the McNaughton Rules. As in England the onus of establishing the defence of insanity is on the accused.

4. The main points raised by the Appellant in this appeal are:—

(1) That the High Court misinterpreted certain passages in the direction to the jury given by the learned Trial Judge.

(2) That the High Court's criticism of the said direction were unwarranted.

(3) That the High Court misinterpreted and misapplied the law relating to the defence of insanity.

(4) That the High Court laid down principles or rules relating to the said defence which are in the Appellant's submission erroneous in law and which will, if not corrected, be used as precedent in

South Australia and elsewhere for an unwarranted extension of the said defence.

(5) That there was no proper ground disclosed at the hearing of the appeal before the High Court for upsetting the verdict of the jury.

5. The evidence of the circumstances in which the killing took place was not in dispute and can be summarized as follows:—

The deceased, Lord, was the manager of the "Pine Valley" sheep station situated about 65 miles to the north of Morgan in South Australia. He was
P. 6, ll. 25-29. 32 years of age and married with two young children. The Respondent, a single man aged 25, started work as a general station hand on Pine Valley on Thursday, 20th November, 1958. He and another employee, J. R. Stokes
P. 6, ll. 30-45. (known as "Dave") had adjoining rooms in the men's quarters some 70-100 yards from the main house where the Lord family lived.

On Sunday, 23rd November, 1958, Stokes was absent from the station
P. 10, ll. 40-47. but he had left unconcealed in his room a .303 calibre rifle (belonging to the
P. 11, ll. 1-10. station) and upwards of 20-30 rounds of ammunition. Up to, and on, the evening of the 23rd November the Respondent was, to all outward appearances,
P. 8, ll. 28-32. sane and normal. At about 6.45 p.m. on the 23rd November he dried the
P. 9, ll. 1-11. dishes for the cook Mrs. Schiller and there was nothing unusual to be noticed in his demeanour. He asked Mrs. Schiller when Stokes was returning to the
P. 8, l. 30. station and was told that he was returning on the evening of the 24th November.
P. 95, l. 11- Apparently the Respondent then went to his quarters. A report of what
P. 100, l. 31- followed was given by the Respondent to the investigating detectives in an interview (the accuracy or fairness of which was not questioned in Court). According to the Respondent he went to bed at about 8 p.m. Later, he stated
P. 96, l. 21- at about 8.30 p.m. but according to other witnesses it must have been nearer
P. 8, l. 36- 9.30 p.m., he rose, went to "Dave" Stokes' room, got the rifle and ammunition
P. 6, l. 5- (the Respondent said the magazine was full), tested the loading of the rifle,
P. 96, ll. 21-37. made his way to the house and looked through the windows. Some lights were on and he saw Mrs. Lord in the children's bedroom and her husband in
P. 96, ll. 38-48. another bedroom lying in bed asleep. The Respondent said he walked in through the front door and into the bedroom where Mr. Lord was lying, put
P. 9, l. 39. the rifle up, aimed it at Mr. Lord and shot him. (Lord died instantly from a bullet wound through the head.) Mrs. Lord came running into her husband's
P. 7, ll. 12-15. room by a different door and threw herself on the bed beside the body of her
P. 96, l. 48. husband. The Respondent returned found Mrs. Lord lying beside her husband
P. 98, l. 50. and as he described it "singing out", and "told her to shut up". He then left the room reloaded the rifle and went to look for Mrs. Schiller in her
P. 96, l. 49. quarters "to see where she was . . . because I thought she might
P. 97, l. 5. have rung up and given the alarm". The Respondent could not find Mrs.
P. 98, l. 16. Schiller, so he returned to his own quarters, took a pair of "Dave's" boots
P. 97, l. 10. and a packet of bullets "and then took off like. I got scared and ran away".

P. 14, l. 18. A search (in which "black trackers" assisted) was organized which continued for four days until, at about 10 a.m. on Friday, 28th November, 1958, the Respondent was seen coming from a disused shed about 25 miles from the nearest homestead. The first question the Respondent asked was "Is he
P. 12, l. 18. dead?" He was told "Yes, dead and buried."

The Respondent was taken to the nearest police officer. When cautioned he admitted the fact of the shooting, and directed the constable to a spot—in the scrub about 8 miles from Pine Valley station—where the loaded rifle he had taken was lying across a dead tree trunk. P. 12, l. 40. P. 13, l. 27.

Later, on the same day, the Respondent was questioned by detectives Lenton and Zeunert and the effect of his answers describing the killing has been summarized above.

Lenton asked the Respondent if he wished to offer any reason for his actions and the Respondent said "Even though I do recall everything and I did it, I don't think I was responsible for my actions". The Respondent admitted to the Police Officer that he knew he was firing a loaded rifle and realised that if the bullet hit anybody it would probably kill them. He was then asked if he knew at the time that it was wrong to point a loaded rifle at a person and shoot them and he answered "Yes, but I couldn't help myself". He was asked if he thought he would have done it if there had been a policeman standing by him and he said "No". The Respondent was also asked whether Lord or any member of his family had given him any reason to bear malice towards them and he said "No". The Respondent also told the Police Officers that he had not been feeling depressed and had never received any injury to his head. P. 99, ll. 8-10. P. 99, ll. 11-21. P. 99, ll. 22-24. P. 99, ll. 5-7. P. 99, l. 42. P. 100, l. 17.

6. At the trial the Respondent read a long unsworn statement from the dock which was not of course subject to cross-examination. In his statement he said:— Pp. 55-57.

> "I shot Mr. Lord but I do not know why. I had no reason to shoot him."
>
> . . . . . .
>
> "I had no cross words with him. I hardly knew him, but I liked him."
>
> "On the Sunday evening when it happened I seemed to be acting in a dream. I do not know why I chose Mr. Lord rather than Mrs. Lord or the lady cook. I can remember taking the gun and going to the house and the bedroom door and firing the gun. I knew what was happening but my mind did not seem to be working in other ways."
>
> "In my mind there was no reason for what I was doing. In my mind there was no idea, that I was doing wrong, or that there would be any consequences, or that I would be punished afterwards."
>
> "I seemed to be doing things without my mind coming into it. Just as if my body was doing things without my mind, just as if some strange person was doing it and I was watching it. Afterwards when I was in the bush I was not sure at first whether I had really done it, or was dreaming."

7. The Respondent also described his life referring to the fact that he was brought up by a foster mother, had had a number of jobs and had committed some criminal offences. He said that since he was a lad he had had the habit of masturbation. He had kept this habit secret, that he had been worried by this habit and had tried to stop it but that, when he stopped for a period he would get very depressed and he used to have queer feelings that he was

going to do something bad. He had felt queer on Saturday, 22nd November, 1958, but he had masturbated and the feeling had gone away. He said that on Sunday the 23rd November it came back suddenly. He said that sometimes things appeared to be a long way away and he heard a strange noise—a buzzing noise or a clicking noise—in his head. He did not say whether he had any of these sensations at the time when he killed Mr. Lord. He said that as he left the house after killing Lord his mind started to work and he repeated to himself "Do you realise what you have done". Until he heard the aeroplanes searching for him he could not believe that he had done it.

Pp. 16-19. Pp. 19-20. P. 17, l. 17. P. 18, l. 20. P. 18, l. 11. P. 20, l. 47.

8. Two witnesses who knew the Respondent gave evidence that he was quiet, polite, reticent and generally well behaved. One of these witnesses said in evidence in chief that the Respondent had seemed quieter than before when he visited his house for a few days before taking up his job at Mr. Lord's station. But under cross-examination he said that he had noticed little difference in the Respondent's behaviour since he was about 15. Both these witnesses said that the Respondent appeared to them to be mentally quite normal.

Pp. 21-34. P. 29, l. 18-p. 30, l. 17. P. 28, l. 43. P. 21, ll. 15-41. P. 22, l. 11-p. 23, l. 9, and p. 23, ll. 17-42. P. 25, l. 19-p. 26, l. 18.

9. The defence also called a psychiatrist, Dr. Forgan who had interviewed the Respondent for about an hour on two occasions after his arrest. Dr. Forgan had caused certain tests to be carried out on the Respondent and found that he was of normal intelligence with no disorder in his thought processes, suffering from no delusions or hallucinations, with no physical damage to his brain and that there was no evidence that he was suffering from syphilis. The Doctor said that the Respondent was a schizoid or introspective personality, that 60 or 70 per cent of the population came within that definition although the Respondent had a degree of such a personality which was not common. The Doctor said that in his view the Respondent was on the occasion of the murder suffering from schizophrenia, that there was no evidence that he had ever suffered from schizophrenia before that occasion nor had he suffered from it since that occasion and he was not suffering from it at the time of the trial. The type of schizophrenia from which the Respondent was alleged to have been suffering was simple schizophrenia and as he had been suffering from simple schizophrenia the Doctor considered that he did not know that what he was doing was wrong. If he had been suffering from another type of schizophrenia it would not have followed that he did not know that what he was doing was wrong. The Doctor's process of reasoning was that he found that the Respondent was a schizoid personality, and that he committed an unexplainable act of violence; from that he concluded that for the few moments during which he was so acting (but not longer) he was suffering from schizophrenia; as there was no evidence that the schizophrenia was of any other type it followed that it was simple schizophrenia; and from that it followed that the respondent did not know that what he was doing was wrong. The Doctor thought that after firing the shot and hearing Mrs. Lord's screams the Respondent had realized that he had done something wrong. The Doctor also said that he based his opinion largely on the fact that there was no ascertainable motive for the crime. He was asked in cross-examination whether there might not have been a subconscious motive for the murder and he agreed that there could be some subconscious motives and characterized them as self aggrandizement, envy

P. 28, ll. 1-18. P. 22, ll. 16-19. P. 32, ll. 14-27.

and frustration. The Doctor admitted that he had never himself come across a case where there had been a single attack of schizophrenia lasting for only 5 minutes but he had read of such cases in an American book.

10. The Crown called in rebuttal Dr. Shea Deputy Superintendent at the Mental Hospital at Parkside who had examined the Respondent on three occasions since his arrest. He also found that he was an introspective or schizoid personality. He said there was no such thing as schizophrenia which only lasted for a few minutes and then disappeared: that simple schizophrenia was never suden in its onset but always gradual; that in any type of schizophrenia there are periodical outbursts but that between these outbursts the patient would still be suffering from schizophrenia and would be so diagnosible. He was satisfied that the Respondent was not suffering from schizophrenia. He thought that at the time of the murder the Respondent was impelled by the subconscious motives described by Dr. Forgan. He said that he was quite satisfied that at the time of the murder the Respondent was sane and knew that what he was doing was wrong and indeed the Respondent had told him that he did so know.

Pp. 34-54. P. 36, ll. 32-39. P. 37, ll. 10-45. P. 38, l. 24. P. 36, ll. 18-31. Cp. p. 27, ll. 3-5.

11. In his direction to the jury the learned Trial Judge defined murder and the defence of insanity, directed the jury as to the onus of proof and standard of proof required in establishing the defence, reminded them on several occasions that it was a crime without any apparent motive, and also reminded them in broad outlines of the issues raised in the medical evidence. On two occasions the learned Trial Judge referred to the possibility that the Respondent was acting under some uncontrollable impulse. He told the jury that if they came to the conclusion that that was the only explanation of the death caused by the Respondent, their verdict should be guilty of murder. In the Appellant's submission the learned Trial Judge was not only entitled so to direct the jury but he was bound to do so. As he reminded the jury, in answer to a question by the Police Officer whether he knew that what he was doing was wrong, the Respondent had said "Yes, but I couldn't help it". That answer raised the question whether the Respondent was acting under uncontrollable impulse and it was the learned Judge's duty to tell the jury that if they thought that the Respondent was acting under an uncontrollable impulse but knew, as he told the police, that he was doing wrong, it was no defence to the charge, and it was in that case immaterial whether the Respondent was or was not suffering from schizophrenia.

P. 58. P. 61, ll. 4-24. P. 61, ll. 1-3, and P. 69, ll. 5-25. P. 63, l. 35. P. 62, l. 37. P. 62, ll. 7-11, p. 63, ll. 5-25. P. 62, l. 48-p. 63, l. 4. P. 65, ll. 14-49.

12. As stated above the jury returned a verdict of guilty and the Respondent was sentenced to death.

13. The Respondent appealed to the Full Court of the Supreme Court on the ground that the learned Trial Judge in his charge

P. 70.

(*a*) failed to instruct the jury, or to instruct the jury adequately as to the test in law to be applied by them in determining the issue of insanity as raised by the Appellant's case;

(*b*) failed to put the case for the appellant to the jury;

(*c*) in regard to the Appellant's unsworn statement from the dock, warned the jury to be careful "in accepting it in its entirety".

(*d*) in directing the jury that the penalty was not their concern instructed them in such terms as (were) likely to deflect the

jury from a calm and dispassionate determination of the issue of insanity.

P. 75, l. 16, and l. 32.

14. In their judgment the Full Court dealt with all these points and also with what seemed to them to be the real complaint that underlay the specific objection namely that the charge taken as a whole was so adverse as to be unfair to the Respondent. The Full Court decided that there was no substance in any of these matters and dismissed the appeal.

P. 82.

P. 84, l. 11.

15. The Respondent applied for special leave to appeal to the High Court. The grounds of the application were in substance the same as the grounds of appeal to the Full Court. In their judgment allowing the application for special leave to appeal the High Court said that the case was not an easy one but that they had come to the conclusion that "having regard to the tenor of the judge's charge to the jury the conviction could not be allowed to stand". The High Court's criticisms of the charge to the jury are summarized below.

P. 89, l. 6.

P. 89, l. 14.

16. First the High Court referred to the passages in the charge which dealt with uncontrollable impulse and said that there were very serious objections to these passages. The first objection was that the learned Trial Judge had stated in the first passage that crimes were frequently committed without any apparent or discoverable motive. The High Court said that this put this "cardinal point"—absence of motive—in a "false light". If this means that the learned Trial Judge did not put before the jury the point that the absence of a motive for the crime was some indication that the Respondent was not sane in the ordinary sense of the word, this is not so because this was clearly put before the jury in two passages during the direction and at the request of the defence in a further passage when the jury were recalled. Then the High Court criticized a reference in the charge to the possibility that the Respondent had been caused to commit the crime by the sight of the means to do it, namely, the rifle and ammunition left lying about near his bedroom. The High Court said that this could hardly be anything but prejudicial to the defence as it is suggested that the Respondent on finding the weapon was prompted to shoot Lord for a reason which existed but was not ascertainable. The Appellant submits that there was nothing unfair to the Respondent in this suggestion. It was accepted by the psychiatrist called on behalf of the Respondent that he was acting under some subconscious motive. The effect of the Trial Judge's comments was simply that if the weapon had not been available the crime might well not have been committed.

P. 89, ll. 16-21.

P. 89, ll. 23-29.

P. 89, l. 10.

17. The High Court then criticized the learned Trial Judge's direction on uncontrollable impulse as "clearly erroneous in point of law". The Appellant submits that the High Court only came to this conclusion by misinterpreting the direction given by the Trial Judge. They interpreted the Trial Judge's direction as meaning that if the jury accepted that the Respondent shot the deceased under an uncontrollable impulse he must have known that he was doing wrong. That is not what the Trial Judge said. The High Court pointed out that at the trial the defence had not raised uncontrollable impulse as a defence nor had it been suggested that it amounted to a defence. However, the answer given to the Police Officer that the Respondent knew when he fired the shot that it was wrong to do so but could not help himself (which was put in evidence as part of the case for the prosecution) did raise a question of

P. 99, ll. 19-21.

uncontrollable impulse which the learned Trial Judge was bound to deal with in his charge to the jury. In the two passages of which the High Court complained the learned Trial Judge simply told the jury that if they accepted as the true explanation of the crime the answer given to the Police Officer by the Respondent namely, that he knew he was doing wrong but could not help himself, that was no defence. The High Court failed to pay proper regard to the word "only" in the first passage of the direction or to the sentence following the second passage extracted from the direction, both of which make clear the proper effect of the direction on uncontrollable impulse.

18. The High Court further stated that the fact that uncontrollable impulse had been mentioned by the Trial Judge made it necessary to put before the jury the "true operation" of uncontrollable impulse as a possible symptom of insanity of the required kind and degree. The effect of this statement is that the learned Trial Judge should have told the jury that if they considered that the Respondent acted under an impulse that he could not control they should go on to consider whether that in itself did not indicate that he was so insane that he did not know that what he was doing was wrong. In this case the only evidence that the Respondent acted under an uncontrollable impulse was contained in the answer to the Police Officer in which the Respondent also stated that he knew that what he was doing was wrong. According to the High Court the jury should have been told that they could accept the second part of the answer as evidence that the first part was wrong. Further the Appellant submits that the High Court's ruling was wrong in law. It amounts to a ruling that in every case where a Trial Judge refers to uncontrollable impulse he must not only tell the jury that it is no defence but also that it should be considered as a foundation for a defence of insanity. This the Appellant submits is a serious extension of the defence of insanity. It is further pointed out that no attempt was made by the defence either by evidence or in argument at the trial or in either appeal court to use uncontrollable impulse as evidence of a disease of the mind leading to inability to know that the act was wrong. P. 90, ll. 3-7.

19. The next passage of the direction which the High Court criticized was one in which the Trial Judge directed the jury not to concern themselves with the consequence of their verdict if they found the Respondent insane. The High Court said that the passage "could hardly operate otherwise than to distract the jury from an unprejudiced consideration of the defence of insanity" and was "likely to suggest that an acquittal on the ground of insanity would carry with it a responsibility on the part of the jury for any future act of violence" by the Respondent. No complaint was ever made by the Respondent about this passage in the direction and the Appellant submits that it was clearly designed to have the exact contrary effect on the minds of the jury to that suggested by the High Court. P. 90, ll. 9-49. P. 90, ll. 39-49.

20. The High Court referred to a further passage in the direction which they alleged might convey to the jury a "not dissimilar impression". In this passage the learned Trial Judge reminded the jury that after killing Lord the Respondent said he had gone to look for the woman cook. He told the police that he thought she might have rung up and given the alarm. The learned Judge suggested to the jury that they might think that at that stage he knew that what he had done (in killing Lord) was wrong. He reminded the jury that the Respondent had not said what (if anything) he would have done if P. 90, l. 50. P. 91, l. 12.

he had found the cook and added: "Perhaps, gentlemen, she may think now that she was a fortunate woman that the accused did not find her". The High
P. 91, ll. 10-12. Court then said, "It is difficult to see how the jury could understand this passage except as importing that though Brown was in sufficient possession of his faculties he would or might have shot Mrs. Schiller (the cook) had he found her". The Appellant submits that the Trial Judge was perfectly entitled to tell the jury they could draw that inference. The evidence was that on the way to look for the cook the Respondent reloaded his rifle. The jury were entitled to conclude that he did this so that he would be able to use it if he found the cook. Further the jury were entitled to accept that if at that time he thought she might have given the alarm he knew he had done something wrong in shooting Lord. The jury were entitled to judge the validity of the Respondent's claim that he did not know he was doing wrong in shooting Lord by his conduct immediately afterwards when he knew he had done wrong. No complaint was made by the respondent about this passage in the direction.

P. 91, ll. 19-22. 21. The High Court then said that it was difficult to resist the impression that the position taken up by Dr. Forgan was not placed before the jury by the summing up "in a way which would be understood and appreciated". This criticism was not developed by the High Court. It had been dealt with at length by the Full Court but the High Court did not make any reference to reasons given in the judgment of the Full Court for rejecting this argument.

P. 91, ll. 27-30. 22. Finally the High Court stated that the rejection of the view that the Respondent had suffered from schizophrenia did not necessarily dispose altogether of the question whether there had existed a disease or disorder of the mind which might satisfy the prerequisite condition required by the formula. By this the High Court appears to suggest that the learned Trial Judge should have told the jury that they could reject all the evidence called by the defence that the Respondent had suffered from schizophrenia but find that in fact he was suffering from some other unnamed disease or disorder of the mind about which no evidence had been called and that by reason of that supposed disease or disorder the Respondent either did not know what he was doing or that what he was doing was wrong. The Appellant submits that this is quite erroneous in law and will be a dangerous precedent. It appears to impose an obligation on a trial judge to tell the jury that they can reject a defence of insanity put forward on behalf of an accused and then make out a defence of insanity of their own, which is not supported by any evidence. This the Appellant submits is not only contrary to the common law of England but also to the express wording of section 292 (1) of the Criminal Law Consolidation Act, 1935 to 1952 referred to in paragraph 3 above. This section provides for a verdict of acquittal on the ground of insanity only "where it is given in evidence that the accused was insane".

P. 87, ll. 24-39. The High Court treated the evidence as to the operation of subconscious motives, which is in fact a common psychological phenomenon, as evidence of "abnormality of mind and irrationality of conduct" and therefore sufficient evidence of a disease of the mind within the McNaughton Rules. They thereby treated something which at most might possibly have indicated a state of diminished responsibility (which is in any case no part of the law of South Australia) as leading to a defence on the ground of insanity.

The Appellant will therefore pray that the appeal be allowed and the conviction and sentence of the Respondent be restored for the following (among other)

REASONS

(1) BECAUSE the Respondent was guilty of the offence as charged.

(2) BECAUSE there was and is no proper or sufficient ground for interfering with the Respondent's conviction.

(3) BECAUSE there was no error in the direction to the jury given by the learned Trial Judge alternatively there was no error sufficiently serious to warrant interference by the High Court with the Respondent's conviction.

(4) BECAUSE the High Court misinterpreted the said direction.

(5) BECAUSE the criticism of the said direction by the High Court was unjustified.

(6) BECAUSE the High Court misinterpreted and misapplied the law relating to the defence of insanity in South Australia.

(7) BECAUSE the judgment of the High Court extended the ambit of the said defence beyond that permitted by law.

(8) BECAUSE the High Court's dictum or ruling on uncontrollable impulse was wrong in law.

(9) BECAUSE the High Court was wrong in holding that the learned Trial Judge had failed to put the Respondent's defence adequately before the jury.

(10) BECAUSE the High Court based its order setting aside the conviction partly on grounds which were not only erroneous but which were not properly open either to a Court of Criminal Appeal or as grounds for the grant of special leave by a second court of review.

(11) FOR the reasons given in the judgment of the Full Court of the Supreme Court of South Australia.