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No.61 of 1960

IN THE PRIVY COUNCIL

63617

ON APPEAL

FROM THE SUPREME COURT OF THE BAHAMA ISLANDS

BETWEEN:

EVAN ROSE — Appellant

- and -

THE QUEEN — Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal, by special leave of the Judicial Committee given on the 27th July 1960, from a judgment dated the 14th May 1960 of the Supreme Court of the Bahama Islands (Sir Guy Henderson, C.J. and a jury) whereby the Appellant was convicted of murder and sentenced to death. p.200

2. The indictment charged the Appellant jointly with one James Ingraham with the capital murder of Samuel Otis King. Ingraham was also convicted and sentenced to death. The principal question in this appeal is whether the jury were rightly directed on the issue of diminished responsibility of the Appellant. p.1

3. The common law of England relating to Criminal matters applies where the statute law of the Bahamas is silent. Section 3 of the Penal Code of the Bahamas (Cap.69) sets out general rules to be observed in the construction of the Code. The following provisions of the Homicide (Special Defences) Act 1959 of the Bahama Islands are relevant to this appeal:-

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

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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.

4. The trial took place before Henderson C.J. and a jury between the 10th and 14th May 1960. The evidence for the Crown included the following :-

p.2 (i) Dr. Frank Duck performed a postmortem on the deceased. The cause of death was stab wounds in the back. He found human blood on the clothing of both accused.

pp.5 & 166 (ii) Dr. Henry Podlewski was the prison medical officer and had been a psychiatrist for the last eleven years. On 17th February he attended the deceased and another prison overseer named Gay who was covered in blood. The next day he examined the Appellant who had no external injuries and whose general physical condition appeared to be very good. Cross-examined on behalf of the Appellant, he had known him since 1957. He had made a report in that year on his mental state, when he found that his intelligence was of a good average and he showed no evidence of mental illness except for one belief that could be delusional. He thought he had been followed by people who disliked him. If this was a delusion, it could be a sympton of paranoia. In this report he had said that even if the Appellant was suffering from paranoia, he knew the nature and quality of the murder he had then committed. After the report was made the death sentence which had been passed was commuted to life imprisonment.

Since 1957 the Appellant had complained of headaches on three occasions. He had some scars on his

head but they were not significant enough to be entered on his medical record. There might be underlying injuries to the brain which did not correspond to skull injuries. Paranoia was not caused by brain injury. Further examination of the witness was reserved.

(iii) Superintendant Moir C.I.D. questioned the Appellant at 8.25 p.m. on the 17th February, who replied "I ain't telling Jesus Christ anything". He described the layout of the prison by reference to photographs and produced a knife handle he had found which corresponded to the blade in the deceased's body. p.17

(iv) Chief Turnkey Arthur Duncombe said that on 17th February he was on duty. He saw the two accused trying to get out of the south gate of the prison, the Appellant having the keys in his hand. He dropped them when told to do so. The deceased was lying on the ground. The accused were taken to their cells but broke out again and the Appellant was recaptured on top of the water tank. When searched, a master key was discovered in his underpants. He said that he wanted to catch or kill the Assistant Superintendant because he had not given him his cot. Earlier the Appellant had come to the witness' office and asked for aspirins as his head was hurting him severely. He was told to wait and was next seen at the south gate. In cross-examination, the witness said the Appellant was always complaining of headaches and would be given an aspirin by a turnkey. The Appellant had always appeared normal while in prison, but stammered at times. p.27

(v) Joseph Rigby, a prisoner, saw both accused on 17th February at the south gate. They appeared to be struggling with the deceased. Then the deceased got away pursued by the Appellant, who said "I am going to kill you" and then pushed a knife into his back. Both accused then tried to get out of the gate but were apprehended. p.39

(vi) Assistant Turnkey Thomas Gay said that on 17thFebruary he was hit on the head while in the prison but did not know who struck him. He was by the cell of the accused Ingraham. The key found on the Appellant had been in his possession. p.47

(vii) Errol Roberts, a prisoner, tried to intervene between the Appellant and the deceased at the gate, but was pushed away by the Appellant. The Appellant tried to get the deceased's keys by threatening him with a knife. The deceased escaped and the p.55

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Appellant pursued him and stabbed him. The Appellant returned with the keys to the gate. The accused were arrested before they could open the gate.

p.67 (viii) Trevor Albury, another prisoner, saw the Appellant about mid-day sharpening the knife that was later used. He complained of a headache and at 3.30 p.m. asked to go to his cell. In cross-examination he said the Appellant did not often complain of headaches.

p.74 (ix) Conrad Balfour, another prisoner, heard a scream in the prison and saw the accused running towards the gate. He saw them struggling with the deceased and the Appellant was demanding the keys. The Appellant then followed the deceased and stabbed him. The Appellant would stammer when worked up. He had only seen him worked up once.

p.83 (x) George Johnson, a prisoner, heard the Appellant say to the deceased after they had been at the gate, "I am going to kill you because you wouldn't give me the keys". He then stabbed him.

p.91 (xi) Clarence Hollingham, an overseer, arrested the accused Ingraham outside the prison. He later heard the Appellant say to the other accused that he had to die anyhow, the quicker, the better. He also said he was sorry he killed the deceased while two other turnkeys were still alive. The Appellant had previously seemed to get on quite well.

p.95 (xii) Assistant Superintendant James Ogilvy said the Appellant had complained about his bed and had been annoyed when he was refused a hospital bed.

p.103 (xiii) Winfred Small, an overseer, overheard the accused talking on 19th March. The Appellant said he had not hit Gay, he had just wanted to get onto the roof to let people know how he was being treated by the administration. The Appellant had previously worked under him and complained of headaches on three or four occasions.

p.109 5. The Appellant gave evidence on his own behalf. He was 26 and a carpenter. He had five scars on his head, the first caused when he was a child and the second when he fell off a tractor in 1956. He was convicted of murdering Samuel Williams with a knife in 1957. On 17th February 1960 he was working in the prison when he had a headache. He took some aspirin. He still felt unwell and asked to go to his cell about 2 p.m. He carried his cot up to his cell escorted by Gay. While waiting at the door, there was a running up and down and

at about that time he saw blood. He did not remember having a knife in his hand or anything else until the following Tuesday, the 24th. He then felt giddy and asked to see the doctor. He had previously complained about his cot but had never been given a mattress. He frequently had headaches and pains in the back. Sometimes he had double vision, and he had seen for the last nine years things at night which others didn't. At about the time of the previous murder he had been followed by various people and had complained to the police about it. In cross-examination he said he thought people were still trying to harm him. He had complained to the doctor of headaches more than twenty times since 1957. He had been seeing things since a fall he had in 1951. He often felt giddy. He could not remember any falls or blackouts since 1951, until 17th February. He did not remember seeing the doctor on the 18th or 19th February.

6. The Appellant called evidence including the following:-

(i) Police Corporal Errington Hepburn said that on some occasions in 1957 the Appellant had come to a police station and complained of being followed. There was no-one about and the man seemed excited and mentally unbalanced. p.132

(ii) Dr. Mary Etheridge said she was a L.R.C.P. and F.R.C.S. and had specialised in neuro-surgery and neuro-psychiatry. She had examined the Appellant. He had a history of delusions and hallucinations. She noticed the scars on his head. X-rays showed evidence of fractures of the skull. She diagnosed the probability of brain damage, which could be called a punch-drunk syndrome. Cross-examined she said the Appellant was not insane and more often than not knew right from wrong. Careful investigation was necessary to diagnose paranoia. The Appellant's intellect had been impaired and when committing the murders he had no moral responsibility at all. The Appellant had told her of a delusion of a woman bending over his bed in prison. She could not certainly say there was brain damage but the symptoms complained of by the Appellant pointed to it. The Appellant's amnesia could have been caused by the sight of Rigby running and the sight of blood, because of the Appellant's mental condition. It was probable that the Appellant had done all the things proved in evidence during amnesia. When the Appellant was normal he was a borderline case of p.134

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intellectual capacity. It was probable he could have homicidal tendencies during amnesia of which he was not aware.

p.166 7. Dr. Podlewski was recalled to give evidence in rebuttal. Punch drunkenness was a chronic condition. On the 30-40 occasions he had examined the Appellant between 1957 and 1960, he had seen no sign of serious mental illness. There had been no indication of paranoia or reference to further delusions. He had tried to get the Appellant a more comfortable bed. There were no complaints of headaches after he had ceased working on a rock crushing machine. On 13th February 1959 the Appellant had been the same as usual. He complained of pain in the back which was probably due to his bed sagging in the middle. There were no signs then of serious mental illness. After the 17th February he was seen on 17 occasions. He would not discuss the events of the 17th but his conduct was consistent with remembering what had happened. There was no sign of serious mental illness on the 17th such as would substantially diminish his responsibility for his actions. On 19th February he spoke of a hallucination of a white woman bending over his bed.

pp.177 - 200 8. The learned Chief Justice began his summing up by defining the elements of murder and particularly referring to intention to kill, as defined in the Bahamas Criminal Code. The evidence went to show the accused had stabbed the deceased. He dealt with the question of common design on the part of the accused Ingraham and went on:-

p.182 l.12 "Now, let us look briefly - because this is again most important, let us look briefly - at Rose's case. He is pleading and, as you have heard, very ably argued he is pleading what is now called diminished responsibility. In diminished responsibility we have now enacted that

p.182 l 19. '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 arrest 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.'

That, gentlemen, is a matter which you must decide

yourselves. I will go briefly through the medical evidence which has been produced before you. That defence, gentlemen, is for the defence to show, not for the prosecution. It is for the defence to show it. What we call the onus of that defence is upon the accused; but I must point out to you this difference. With the prosecution they have to prove their case to you strictly, completely, to your satisfaction; but where the defence have to prove such a thing as this diminished responsibility it may be discharged by proving what would be good enough to support a verdict in a civil action, that is to say, the preponderance of probability may constitute sufficient grounds. Do you think - you ask yourselves when you are considering this intention - do you think there is a preponderance of probability that this man suffered from this desease or injury as substantially impaired his mental responsibility. It is not beyond doubt, beyond all doubt, to your satisfaction, if he establishes this preponderance of probability. If you're satisfied about that, then you may think that he is, he was, suffering from such an abnormality of mind as substantially impaired his mental responsibility. Now, while we're thinking of that, 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 :-

> '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.' p.183 l.15

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

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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.

p.183 l.43

'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 was suffering from this abnormality?"

In this case there was a conflict between the medical evidence for the prosecution and for the defence, unlike the English case which had been quoted. The jury would have to solve the contest as best it could. The learned Chief Justice continued :-

p.184 l.34

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

The facts in the case regarding King's death were beyond dispute. There was a preponderance of evidence that the deceased had been stabbed by the Appellant, and the learned Chief Justice reviewed the evidence against each accused in detail. The prisoners who gave evidence against the Appellant had no axe to grind. As to the Appellant's defence of diminished responsibility there was evidence that he had suffered from delusions and headaches. No question of delusions had been raised in his previous trial for murder. Dr. Etheridge had given lengthy evidence as to the conditions from which the Appellant might have been suffering. Did the jury think he did show the characteristics of such conditions? Dr. Podlewski's evidence was that there was nothing wrong with the Appellant. The learned Chief Justice said :-

"You contrast those two medical experts. It's for you to say who you believe, and on that belief for you to say do you think that he comes within this section, or doesn't he? That is his defence, that he is suffering from diminished responsibility. It's not a question of insanity it's a question of this borderline. Do you think he is a borderline case? Do you think he comes within that section, or within the description that I read to you, a borderline case of insanity? If you do, then don't hesitate. If you think that he has established this preponderance of probability that he was suffering from that then you must take that and come to the conclusion that he has got this diminished responsibility. p.197 l.46

On the other hand, genlemen, if you come to the conclusion that Dr. Etheridge is mistaken and that Dr. Podlewski's ideas, that his findings, are the most probable on the evidence that we've got, then you must remember the whole of the sequence of events of which Dr. Podlewski tells us so very clearly, that there is no evidence of diminished responsibility. You will remember the emphatic words in which Dr. Podlewski spoke about the question of punch drunkenness this post traumatic constitution, and the rest of it.

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Finally, gentlemen, we've got the statements which are alleged to have been made by the two accused when they were in the cells, and when they were going back to gaol. I have warned you about those. They, to my mind, if they are to be taken as evidence at all, they're evidence against the person making them. The interesting part of the amnesia is the behaviour, for example of Rose between the time when the offence was committed and when he said himself, that he came to himself, the next week Tuesday, it's a long time. You will remember the doctor's evidence about all that, how the following day he was truculent, swearing he was unpleasant; the next day he was quite different, as though he realised exactly what he'd done. You'll remember his reply to Mr. Moir - something about Jesus Christ. Do you think that is the reply of a man in amnesia? Do you think that his conduct throughout is suggestive of not knowing anything even in the face of the medical evidence? If you do, gentlemen, as I said, don't hesitate, but if you don't equally, don't hesitate. I don't think that you can have much doubt that it was his 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.199 ll.26-41 The learned Chief Justice concluded by reminding the jury that the burden of proof was on the prosecution except when considering the defence of diminished responsibility and that their verdict must be unanimous.

9. The jury found both the Appellant and Ingraham guilty of murder and they were both sentenced to death.

10. The Respondent respectfully submits that the summing-up of the learned Chief Justice was correct and in particular the directions as to the defence of diminished responsibility were correctly expressed. The defence is a statutory defence and, it is submitted, the jury should in the first place themselves consider the words of the statute. It is not improper to assist the jury by giving them some guidance as to the meaning of such words, and it is submitted that the guidance so given by the Chief Justice was correct in law in referring to "the borderline of insanity", and telling

the jury the meaning of insanity in criminal law. It is submitted that both in English law and Scots law (to which reference has been made in decided cases on this topic) insanity has only one meaning which is that set out in the McNaughton Rules. There could have been no confusion in the minds of the jury between the defences of insanity and diminished responsibility as the defence of insanity was never put forward.

11. The Respondent respectfully submits that the Appellant has suffered no miscarriage of justice. The principal issue in the case was over the medical evidence relating to the defence of diminished responsibility. The verdict of the jury showed that they accepted the evidence of the prosecution on this issue and rejected that of the defence. The issues on the medical evidence were fully and properly left to the jury in the summing up; and the effect of the summing-up as a whole was to direct the jury properly both as to the onus of proof and the matters required to support the defence of diminshed responsibility.

12. The Respondent respectfully submits that the conviction of the Appellant should be confirmed and that this Appeal should be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the summing up of Henderson C.J. read as a whole was correct.

2. BECAUSE the law as to the defence of diminished responsibility was correctly put to the jury.

3. BECAUSE the Appellant has suffered no injustice.

L.G. SCARMAN

MERVYN HEALD

No. 61 of 1960

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CASE FOR THE RESPONDENT

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