Privy Council Appeal No. 6 of 1972

Graham Edwards alias David Christopher Murray – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE 1972

Present at the Hearing:

LORD WILBERFORCE
LORD PEARSON
LORD SALMON
SIR EDWARD MCTIERNAN
SIR RICHARD WILD

[*Delivered by* LORD PEARSON]

The appellant was tried before the Chief Justice of Hong Kong and a jury and was convicted of murder, and on appeal to the Full Court the conviction was upheld. Having heard the present appeal, their Lordships have humbly advised Her Majesty that the conviction for murder should be reduced to a conviction for manslaughter. The reasons will now be given.

In the course of a struggle which took place in the early hours of Tuesday 1st December 1970 in a hotel bedroom in Hong Kong, the appellant inflicted on the deceased, Dr. Coombe, many knife wounds, from which he died, and the appellant himself sustained several knife wounds.

Some facts were not in dispute at the trial. The deceased and his wife, Mrs. Coombe, and their two children lived in Perth, Western Australia, and so did the appellant, who was a young man of nineteen years of age. There were divorce proceedings between Dr. Coombe and Mrs. Coombe. The first petition was presented by Dr. Coombe, alleging adultery between Mrs. Coombe and the appellant. The second petition was presented by Mrs. Coombe alleging that Dr. Coombe had cohabited and committed adultery with another woman. Dr. Coombe did not wish to defend Mrs. Coombe's petition and certain terms were arranged between them.

On or about Thursday, 26th November 1970, Dr. Coombe travelled from Perth to Hong Kong on the first stage of an intended world trip, and he stayed in room 1223 of the Hong Kong Hotel at Kowloon. The appellant followed him on the next day, Friday, 27th November, and stayed in the Sun Ya Hotel.

An important question of fact at the trial was, why did the appellant follow Dr. Coombe in this way? The theory of the prosecution was that the appellant went to Hong Kong with the deliberate intention of killing Dr. Coombe, and that he carried out that intention by taking a knife to Dr. Coombe's bedroom in the early hours of 1st December 1970 and stabbing him to death. The alleged motive was that on the death of Dr. Coombe a superannuation payment of about A$100,000 would be payable to his estate and would go to his wife, and the appellant was in league with Mrs. Coombe.

On the other hand, the appellant's explanation at the trial was that he went to Hong Kong with the intention of blackmailing Dr. Coombe, and that when they met in Dr. Coombe's bedroom in the early hours of 1st December and the appellant pressed for payment of the sum previously demanded Dr. Coombe swore at him and attacked him with a knife and inflicted several wounds, but the appellant wrested the knife from Dr. Coombe and was in a blind rage, a "white-hot" passion, and must have stabbed Dr. Coombe so that he was fatally wounded. The contention on behalf of the appellant was that he acted in self-defence or under the influence of such provocation as would reduce the crime to manslaughter.

As to what happened in Australia, the Hong Kong police made enquiries of the Western Australian police, but the only direct evidence was that of the appellant. His evidence, by no means necessarily reliable, was to this effect: He had been staying at Mrs. Coombe's house as a lodger and committing adultery with her and carrying on a "call-girl business" in conjunction with her "escort business", and was planning to go on a trip to the United Kingdom with her, but was not intending to marry her, though he had said jokingly that he would do so; he was indignant that Dr. Coombe had reduced from A$5,000 to A$3,500 the cash payment to be made by him to Mrs. Coombe as part of the terms arranged in respect of the divorce; the appellant decided to blackmail Dr. Coombe, having learnt from Mrs. Coombe that Dr. Coombe engaged in perverted sexual practices and kept a collection of indecent photographs in his flat; the appellant and another man broke into that flat, and the appellant found the collection of indecent photographs and took out one showing Dr. Coombe in a highly indecent situation; the other man photographed this photograph for the appellant and returned it to him but kept the negative so that copies could be made from it; the appellant stole the passport of a friend of his named David Christopher Murray and assumed that name for his journey to Hong Kong, and wore a dark brown wig over his own very blond hair; the appellant was provided with A$600 by Mrs. Coombe to pay his fare to Hong Kong and back to Australia; the appellant inserted the stolen photograph of Dr. Coombe in a photograph album, which he took with him in a suitcase to Hong Kong. There was independent evidence that the appellant did use the name of David Christopher Murray in Hong Kong, and that he did wear a dark brown wig, and that there was in his suitcase in his room in the Sun Ya Hotel a photograph album.

As to what happened between 27th November and 1st December, there was evidence from the staff of the Hong Kong Hotel. At 9.00 p.m. on 27th November the appellant came to the room attendant on the 12th floor of the Hong Kong Hotel and asked where room 1223 was

and if the occupant was in the room, and on being invited to go and knock on the door himself said "Don't bother, I don't wish to trouble him" and then went down in the lift. At about 6 p.m. on 28th November the appellant came to the no. 1 room boy on the 12th floor and asked where room 1223 was and went to the door and knocked but got no answer and went to the lift to go down. On 29th November at 4.30 p.m. the no. 1 room boy on the 12th floor went into room no. 1223 and found the appellant there, and he telephoned to the manager, and the manager came and took the appellant down to the office; the appellant gave the name of David Christopher Murray and his address at the Sun Ya Hotel; he went to the toilet under guard of Securicor men, and he was wearing a dark brown wig, but he emerged from the toilet without his wig, showing his blond hair; at 6.30 p.m. Dr. Coombe came in and recognised and spoke to the appellant, and both Dr. Coombe and the appellant apologised to the manager for the trouble caused.

The appellant said in evidence that he had spoken to Dr. Coombe on the telephone on the previous day (28th November) and told him he had some property taken from Dr. Coombe's flat which Dr. Coombe might wish to buy and otherwise copies of it would be sent to his friends and associates; and that on 29th November at about 4.30 p.m. when he was found in room 1223 he left his brief case containing the photograph in the bathroom, lest he might be questioned about it; and that after Dr. Coombe had come to the hotel at about 6.30 p.m. on that day (29th November) they went up to room 1223 and the appellant retrieved his brief case and showed the photograph to Dr. Coombe and said "If you do not wish this to be sent around to all your friends and wish it back, it will cost you $3,000 in cash within 24 hours". There was doubt whether the appellant's evidence of this visit with Dr. Coombe to room 1223 was consistent with the manager's recollection of the appellant's and Dr. Coombe's movements, but as the manager was not present in the hotel lobby all the time the visit might have occurred in his absence.

Then on the following day (Monday 30th November) at about 10.40 p.m. both the no. 1 room boy and the room attendant on the 12th floor saw the appellant go along the corridor in the direction of room 1223 carrying a brief case and afterwards return without the brief case. The appellant said in his evidence that after knocking on the door of no. 1223 and receiving no answer he went to the fire escape and hid the brief case containing the photograph behind some material that was there, because he was afraid that Dr. Coombe might have informed the police of the attempted blackmail and he did not wish to have the brief case in his possession if he was stopped by the police. The prosecution theory was that the brief case contained the knife with which the appellant intended to kill Dr. Coombe.

The appellant said that after hiding the brief case and returning to the ground floor of the hotel he went back to the Sun Ya Hotel and packed his bags, meaning to leave Hong Kong on the following morning, and that he made telephone calls at intervals of 20 to 30 minutes to Dr. Coombe's room and eventually received an answer at about 12.30 and proposed to come to the lobby of the Hong Kong Hotel and receive the money there but Dr. Coombe said "Come up and get it". The appellant said he then went to the Hong Kong Hotel, went to the fire escape, found the brief case, took out the photograph and put it in the waistband of his trousers, and then waited a considerable time to see if there were any police in the corridor. Eventually he knocked on the door and Dr. Coombe opened it.

As to what happened in room 1223 after that, the only evidence, apart from that of the appellant, was that of hotel staff and a hotel guest saying what they heard from outside, and medical evidence of the wounds inflicted on the two men.

At about 2.30 a.m. on Tuesday, 1st December, the room attendant on duty on the 12th floor of the Hong Kong Hotel heard a commotion in room no. 1223 and rushed to the door. It was very noisy inside, and what he heard sounded like some object hitting the drawer. He also heard a noise of what sounded like a struggle. So he went to his counter and telephoned to the office. He then went back to the door of no. 1223, and there were still noises there. He telephoned again and returned to the door of no. 1223. There were still noises from the inside but when he knocked on the door and said " What is happening?" the noises stopped. Somebody came up from the office, but as the noises had stopped and there was a " Do not disturb " notice on the door, no entry was made until about 8.50 a.m. when there was no answer to a telephone call.

A hotel guest occupying a room on the 14th floor was awakened at about 2.30 a.m. on 1st December by loud screaming with a shout of " Help me, help me ". He looked out of the window and saw nothing, but he went again a little later and saw someone walking on a cement ledge along the outside of the bedroom windows of the hotel and disappearing round the far end of the building. The person whom he saw was in fact the appellant.

The medical evidence with regard to the body of Dr. Coombe was that he had been stabbed 27 times, and that the stabs were on the face, neck, arms, left hand, thighs and chest, and three of the chest wounds, penetrating to the lungs, were fatal, and that there were areas of abrasion near the right eye region. The medical evidence with regard to the appellant was that he had cut wounds on the ring finger and little finger of his left hand and an abrasion on his left arm and two cut wounds above his left knee. The cut wounds on the fingers affected the tendons, and the knee wounds cut part of the muscle as well as the skin.

The appellant's version of the events inside room 1223 was that there was an angry and vituperative altercation and then, he said, " All this happened in a very short time, a few seconds. Dr. Coombe then came towards me with a knife which I assumed was at that time in his hand. He was still cursing and swearing at me during this time, and his wife. Instinctively I went into the defence against an underarm thrust. . . . What happened after that I can only say was I felt an extremely searing pain in my left hand. I then immediately forgot all of the unarmed combat I had learned, and resorted to brawling tactics. I have a very quick temper. What happened after this is very confusing. All I can say is I remember seizing Dr. Coombe's arm with the knife in it with both my hands and attempting to wrest the knife from him. From the evidence at hand it can be seen that I succeeded, and in fact did use this knife on Dr. Coombe." He was asked " By that time what was the state of your temper? " and he replied " White hot, sir ". The appellant added " I will say this, that during the whole course of the fight . . . witnesses say that it took from 10 to 15 minutes. My own conscious recollection of this fight would place the time factor at between 10 and 15 seconds. I quite realise that this is impossible. This is in my own mind, in my own opinion, how long the fight took place, for me. I was not at any time conscious that I had the knife in my hand."

The appellant climbed out of the window and made his way perilously, leaving a trail of blood from his wounds, along the cement ledge past the windows, climbing from the twelfth to the seventeenth floor, and then through a bathroom window and up the stairs to the roof, and then down scaffolding on the side of the building to the ground. After that he was anxious to avoid the police but in need of hospital treatment and eventually he received hospital treatment but was questioned by the police. He told a number of different stories to account for his movements. First, he said " This will teach me not to get involved in a fight when playing cards ". Secondly, he said that he had gone to a bar with a Chinese and while there had a fight with four Europeans and was injured. Thirdly he told a story of a fight over contraband goods. Fourthly he said that Dr. Coombe had made a homosexual attack on him, and he the appellant had picked up a knife and struck at Dr. Coombe. Fifthly he told the story of attempted blackmail, of which he afterwards gave evidence at the trial.

As to the motive alleged by the prosecution—that on Dr. Coombe's death there would be a superannuation payment of about A$100,000 owing to Dr. Coombe's estate and this would come to Mrs. Coombe and the appellant was in league with Mrs. Coombe—there was no satisfactory evidence. The Hong Kong police had made enquiries in Australia, but there was no witness from Australia nor were any Australian documents produced. At an interview on 9th December Senior Superintendent Harris in the presence of Senior Inspector Gravener put to the appellant certain points arising from the information received in or from Australia. Then by 14th December the appellant had composed a " statement listing five reasons why the death of Ronald Alan Coombe cannot be construed as a result of a pre-meditated murder plot by his wife and myself ". In the course of the statement he set out from memory the terms of the divorce settlement between Dr. Coombe and Mrs. Coombe. The terms set out included among others a cash settlement of A$3,500 and weekly maintenance and " (c) Transfer of Certain Insurance Policies (Details Unknown) ". Later in the statement he calculated that from the maintenance Mrs. Coombe stood to make in 30 years in the vicinity of A$150,000 tax free. Then he said " By her husband's death she would receive, if my information is correct, A$100,000 less probate, currently at 25 per cent, the estate and other taxes. Her total gain would be in the vicinity of A$60,000." At the trial Senior Superintendent Harris was asked in cross-examination " In that interview did you suggest the motive of insurance? " and he said " Yes ". Senior Inspector Gravener was asked in re-examination with regard to the sum of A$100,000 referred to in the appellant's statement. He said " Yes, there was a sum, approximately A$95,000 which was part of a Superannuation scheme of the West Australian Institute of Technology. This scheme was part of the conditions of service of the deceased and on his death the sum, as I say, in the region of A$95,000 would be due to his estate." The appellant gave evidence on this point in cross-examination as follows: " Q. I suggest it was the 90,000 Australian dollars that you and Mrs. Coombe had in mind when you planned this expedition to Hong Kong. A. That is quite incorrect, sir. Q. You did know that on the death of Dr. Coombe, his estate would benefit by about 100,000 Australian dollars, didn't you? A. I did not, sir, not until I was informed by Mr. Harris. Q. That was the first time you knew anything about it? A. That is correct, sir."

Thus the only evidence about the A$100,000 was hearsay. Senior Inspector Gravener was only repeating what he had been told in or from Australia, and the appellant was or may have been only repeating what he had been told by somebody, who may well have been Senior Superintendent Harris. The defect in the evidence is not merely technical.

There was no evidence to show that the superannuation payment, if it existed and if it belonged to Dr. Coombe's estate, would come to Mrs. Coombe. Dr. Coombe might have made a will leaving his residuary estate, or at any rate the capital, to his children, or if he was intestate the law of Western Australia (of which there was no evidence) might give the children an interest in it. There was no evidence to show that, if the sum existed and if it would come to Mrs. Coombe, the appellant could expect any substantial benefit from it. There was no evidence that the appellant knew of this sum until the police told him of it.

Counsel for the prosecution in his closing speech repeatedly and emphatically relied on the alleged motive. For instance he said " It is of course the prosecution case that he came here not to blackmail Dr. Coombe but in order to kill him so that Dr. Coombe's estate would benefit by approximately A$100,000. He came here as part of a conspiracy with the deceased's wife."

Counsel for the defence maintained the plea of self-defence, but mainly contended for a verdict of manslaughter on the ground of provocation.

The Chief Justice in summing up to the jury reviewed the main body of the evidence in considerable detail and with great accuracy, but in reminding the jury of the case for the prosecution he did not point out the inadequacy of the evidence relating to motive. His review of the evidence brought out very clearly the sequence of five different stories which had been told by the appellant. Plainly it was open to the jury to find that his fifth and final story, the possibly rather melodramatic story involving attempted blackmail, was no less fictitious than the four previous stories which had been told and then abandoned by the appellant. On the other hand the Chief Justice's review of the evidence also brought out a number of points in favour of the defence, namely (1) the fact that both the men had knife wounds tended to show that the knife had changed hands, (2) the evidence from the hotel staff showed that there had been a protracted struggle, (3) if the appellant intended to murder Dr. Coombe it would be surprising that he should pay several visits to the Hong Kong Hotel and speak to the hotel staff and especially that he should first wear a disguising wig and then take it off at the hotel, (4) if the appellant intended to murder Dr. Coombe it would be surprising that he should do it so inefficiently, (5) the attempted blackmail would be in itself a serious offence and the appellant might seek to conceal it by telling other stories to account for his wounds. Although the Chief Justice duly left the question to be decided by the jury, he indicated or strongly hinted that in his own opinion a verdict of manslaughter would be appropriate.

The jury unanimously found the appellant guilty of murder.

On appeal the Full Court held that there were two errors in law in the directions given by the Chief Justice to the jury, but that there had been no miscarriage of justice and so " the proviso " was to be applied and the conviction for murder should be upheld. Their Lordships agree as to the two errors of law but not as to the applicability of " the proviso " in this case.

The first error in law was in directing the jury that, if the appellant acted in self-defence but used more force than was necessary, the proper verdict would be not a conviction of murder but a conviction of manslaughter. As there was no argument on this question in the present appeal, it is enough to say that the direction was not in accordance with the decision of their Lordships in *Palmer v. The Queen* [1971] A.C. 814 preferring the West Indian decision in *De Freitas v. The Queen* [1960] 2 W.I.R. 523 to the Australian decision in *Reg. v. Howe* (1958) 100

C.L.R. 448. The error is understandable because the judgment in *Palmer v. The Queen* was give on 15th February 1971 and the Chief Justice was summing up on 24th March 1971 and *Palmer v. The Queen* was apparently not cited.

The second error in law was in directing the jury to the effect that the plea of provocation reducing the crime from murder to manslaughter was not available to the appellant in this case because according to his own evidence he was attempting to blackmail Dr. Coombe. The Chief Justice said to the jury: "In my view the defence of provocation cannot be of any avail to the accused in this case. Provocation . . . is undoubtedly a valid legal defence in certain circumstances, but you may well think that it ill befits the accused in this case, having gone there with the deliberate purpose of blackmailing this man—you may well think that it ill befits him to say out of his own mouth that he was provoked by any attack. In my view the defence of provocation is not one which you need consider in this case." That direction was held by the Full Court to be erroneous in relation to the facts of this case, and their Lordships agree with the Full Court. No authority has been cited with regard to what may be called "self-induced provocation". On principle it seems reasonable to say that—

(1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing of the victim from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with a fist;

(2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer;

(3) there would in many cases be a question of degree to be decided by the jury.

In the present case, if the appellant's version of the facts be assumed to be correct, Dr. Coombe, the person sought to be blackmailed, did go to extreme lengths, in that he made a violent attack on the appellant with a knife, inflicting painful wounds and putting the appellant's life in danger. There was evidence of provocation and it was fit for consideration by the jury. *Parker v. R.* [1964] A.C. 1369, 1392. The burden of proof would be on the prosecution to satisfy the jury that the killing was unprovoked. If the evidence raised in their minds a reasonable doubt whether it was provoked or not, the proper verdict would be a conviction for manslaughter. *Bullard v. The Queen* [1957] A.C. 635.

The Full Court however held that this was a proper case for the application of the proviso to section 81 (2) of the Criminal Procedure Ordinance, which is: "Provided that the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." The Full Court's reason for applying the proviso was that "By their verdict the jury necessarily rejected the possibility that the deceased attacked the appellant in this way . . . In our view the verdict of murder which was returned shows that the jury was satisfied that the deceased did not attack the appellant first." The argument is that if the jury had thought that the appellant might have been acting in self-defence but used excessive force, they would in accordance with the direction given to

them (though it was erroneous) have returned a verdict of manslaughter, and therefore their verdict of murder shows that they rejected the appellant's version of the struggle in room 1223. There is however a difficulty in " delving into the minds of the jury " and speculating as to what the exact mental processes of the jury in fact were and what they would have been if a different question had been presented to them for decision. *Bullard v. The Queen* [1957] A.C. 635 at pp. 643–4. They might have found the plea of provocation more plausible than the plea of self-defence, when the appellant had stabbed Dr. Coombe 27 times and on his own showing had done so after he had wrested the knife away from Dr. Coombe. There is the further point that the jury might have taken a different view of the case generally, if it had been appreciated that the alleged motive relied on by the prosecution was unproved. In their Lordships' opinion this was not a proper case for the application of the proviso.

When the proviso is not applied, the case is one of unlawful killing which has not been proved to be murder, because there was some evidence of provocation fit for the consideration of the jury and the question of provocation was wrongly withdrawn from the jury. Accordingly a conviction for manslaughter should be substituted for the conviction of murder, as in *Bullard v. The Queen* (*supra*).

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DELIVERED BY
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