

16 of 1977

IN THE PRIVY COUNCIL

No. 33 of 1976

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O N A P P E A L

FROM THE COURT OF APPEAL OF BARBADOS

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B E T W E E N:

DAVID ADOLPHUS WALTON

Appellant

- and -

THE QUEEN

Respondent

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CASE FOR THE APPELLANT

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Record

1. This is an Appeal in forma pauperis from the Judgment and Order of the Court of Appeal of the Barbados Supreme Court (Douglas C.J., Worrell, J. and Johnson, J.), dated 12th March, 1976, whereby the Appellant's Appeal against his conviction for murder in the Supreme Court (High Court) (Williams, J., sitting with a Jury) on 18th October, 1974 was dismissed.

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2. The principal grounds of this Appeal are as follows:

- (a) that as the only evidence adduced at the trial in relation to the issue of diminished responsibility was undisputed and sufficed to establish that Defence on a balance of probability, the learned Trial Judge erred in failing to direct the Jury that the Defence must therefore succeed, and
- (b) that the learned Trial Judge ought, as an evidential basis for the same had been

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established, to have left to the Jury the defence of automatism.

p. 1, 11.  
10-17

3. The indictment charged the Appellant as follows :-

" STATEMENT OF OFFENCE

Felony Murder

PARTICULARS OF OFFENCE

David Adolphus Walton, on the 2nd day of February, 1974, in the parish of St. Michael in this Island, murdered Cynthia Allder."

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Pp.64-65

4. The facts giving rise to the Appellant's prosecution are conveniently summarized at the commencement of the Judgment of the Court of Appeal of Jamaica.

P.32,11.  
6-22

5. The Appellant did not give evidence but made an unsworn Statement from the dock. In his said Statement he said

"I told Sergeant Taitt that what happened was cloudy in my mind and I did not remember what happened after my girl friend and her mother left the car. I did not tell Sergeant Taitt that I went to the car and fire off some shots and I don't know who get shoot. The Statement Sergeant Taitt said I signed is not exactly what I told him. I told him the same as I told Phillips. I did not describe things happening after Maggie and her mother left the car. I am now taking tablets prescribed by the doctor. Before this incident occurred my girl friend accused me of beating her which I didn't recall doing. I suffered in the past from severe headache, black outs, sleeplessness and loss of memory. My mother told me she caught me burning her new curtains last December. She showed me the remains of them. I do not recall burning them. That is all I have to say."

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Pp.32-35

6. On behalf of the Appellant three expert witnesses were called to give medical evidence. The first witness Doctor Patricia Bannister stated that she had seen the Appellant in prison on some eight occasions. It was her opinion that the Appellant did not tolerate stress and showed paranoia, which

10 was of long standing. The witness excluded that there was any damage or injury to the Appellant's brain and that the M'Naughten Rules were not applicable. It was her conclusion that the development of the Appellant's mind had been retarded and that this would substantially impair the Appellant's responsibility for his acts. Dr. Bannister placed the Appellant's emotions as being at the level of a three year old. The Witness concluded her evidence in chief by stating -

P.33,11.  
27-30

"He may build up an enormous rage where he is not responsible for subsequent actions and after such an outburst it is likely he will not remember the details."

20 In cross-examination Dr. Patricia Bannister stated that the Appellant was suffering from a disease of the mind. The witness gave an account to the Court of what the Appellant had told her regarding the facts giving rise to the prosecution. Dr. Bannister stated

P.34,11.  
41-44

"He had psychotic breakdown. A very severe mental illness in which he was out of touch with reality. Depressed and hearing voices."

and

P.34,1.49  
-P.35,1.2

30 "Very difficult to determine whether person malingering. Two things can happen. Person can malingering. A person can suffer from illness which is like madness but it can be detected. I would say he is not malingering."

The Appellant respectfully submits that it is clear that a suggestion was put to the witness that the Appellant might have been malingering, but that this suggestion was rejected by the witness.

40 7. Dr. Lawrence Blair Bannister was called as a witness on behalf of the Appellant. He stated that he was a prison medical officer and had seen the Appellant on a number of occasions whilst he had been in Glendairy Prison. He treated him for psychosis amongst other ailments. The witness recommended him to see a psychiatrist because the Appellant was not responding as well as the witness would have liked to his treatment. His evidence

Pp.35-36

Record

does not appear to have been challenged during cross-examination.

Pp.36-37 8. Mr. Richard Browne, a Clinical Psychologist, was the final witness called on behalf of the Appellant. He stated that he had seen the Appellant at the request of Dr. Patricia Bannister. The witness described the Appellant as having

P.36,11. " . . . an inadequate personality enhanced  
28-30 by emotional immaturity and a low tolerance level." 10

In cross-examination the witness elaborated as follows

P.36,1. "I mean by low tolerance level I mean he got  
32-P.37, vexed quick. Would get vexed more easily  
1.2 than the average person. Result of insecurity in early childhood. I would expect that he would get vexed if he thought somebody was taking away his girl friend. He would react in an extraordinary way. And he would also react with lesser provocation. An emotional disorder. It would affect his thinking to the extent I indicated before. But not his intelligence." 20

Pp.38-41 9. The learned Trial Judge commenced his summing-up by dealing with the law in relation to criminal trials in general and murder in particular. He continued by dealing with the Defence of Insanity and withdrew, it is submitted correctly, this issue from them. It was then pointed out to the Jury that it was necessary for them to be sure that the Appellant had killed Cynthia Allder. The evidence in relation thereto was reviewed. The learned Trial Judge then directed the Jury on the Defence of accident. 30

P.42,1.1  
- P.46, 1.33  
P.46,1.35  
-P.47,1.13  
P.47,11. 10. The learned Trial Judge then turned to what he stated was "the essential issue" of diminished responsibility. It is respectfully submitted that the way the learned Trial Judge dealt with this aspect of the case was unsatisfactory. The learned Judge commenced by reading the statutory provision of the Offences Against the Person (Amendment) Act, 1973. In a way, which it is submitted, must have been misleading for the Jury, the learned Trial Judge quoted from authorities to put a gloss upon the statute. The Appellant respectfully submits that the learned 40

P.47,1.39  
-P.51,1. 26

Trial Judge ought to have explained to the Jury the issues that they were called upon to decide in terms that they might readily understand. The learned Trial Judge then, it is submitted correctly, posed the questions that it was necessary for the Court to consider vis a' vis the evidence upon this issue. Those questions were as follows

10                    "The question therefore is was the accused at the time, that is, on the 2nd February, 1974, suffering from an abnormality of mind? And was the abnormality such as to substantially impair his mental responsibility for his act in doing the killing?" P.51,11. 27-32

11. The learned Judge then read the unsworn Statement that the Appellant had made. He went on to make the following comment P.51,L.37 -P.52,1. 10

20                    "One of the things which you will have to decide is whether these things which he has spoken about, the severe headaches, the blackouts, sleeplessness and loss of memory, indicate that something was wrong with his mind, or whether they are being feigned for the purpose of evading his responsibility for what he has done." P.52,11. 11-17

30                    It is respectfully submitted that although the Statement had not been open to cross-examination, and accordingly was not evidence as such, the learned Judge ought not to have made the said comment. It is so submitted because the evidence of Dr. Patricia Bannister in relation to the alleged malingering was uncontradicted.

40                    12. The learned Trial Judge then reviewed the medical expert evidence called on behalf of the Appellant. The learned Trial Judge then continued his summing-up by adverting to evidence that had been given in the course of the Prosecution case that was consistent with his Defence. He stated as follows P.52,1.18 -P.54,1.7

                      "the girl Margareta Watson had given evidence in which she said that the accused used to complain of headaches, that he used to have blackouts, and that at one of the blackouts she was present and he fell on the ground. That she shouted for a neighbour, Mr. Hinds. She said that the accused used to beat her and tell her P.54,1.8 -1.15 (The evidence itself is at P.17, 11.30-42)

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afterwards that he did not remember doing it."

P.54,11.  
17-19

The learned Judge then reverted to considering the questions that he had earlier posed in relation to the Defence of Diminished Responsibility . To the question as to whether or not the Appellant had a disease of the mind, the answer, he acknowledged was, according to Dr. Patricia Bannister, affirmative. The learned Trial Judge then fell into error by asking the Jury the following question

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P.54,11.  
24-28

"A question which you will obviously ask yourselves is: Was he feigning or malingering and trying to make his way out of something which he did by pretending about things. Or is there a genuine illness?"

P.54,11  
28-35

The learned Judge then by implication invited the Jury to disregard the medical evidence by comparing it with other evidence in the case. It is respectfully submitted by so doing the learned Judge erred for he was inviting the Jury to substitute their own view of an essentially medical problem in place of Dr.

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P.54,1.36  
-P.57,1.30.

Patricia Bannister's clinical assessment. Thereafter in the summing-up the Jury was reminded of the various accounts given by the Appellant outside the Court of the incidents leading to the death of Cynthia Allder.

P.57,1.31  
-P.59,1.4.

13. Thereafter the learned Judge posed a series of questions doubting Dr. Patricia Bannister's evidence and in the course of it expressly invited the Jury to consider rejecting the evidence of Dr. Patricia Bannister in these words

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P.57,11  
48-49

"Is he really having disease of the mind which produces abnormality, or is he malingering?"

and

P.58,11.  
7-14

"You must consider his defence of diminished responsibility, and decide if he did have an abnormality of the mind, whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury, and whether this abnormality of mind was such as to substantially impair his mental

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responsibility for his act."

10 14. It is respectfully submitted that the learned Trial Judge erred in the directions quoted above. He ought, the Appellant submits, to have told the Jury that because there was the uncontroverted evidence of the Defence expert witnesses that there was an abnormality of the mind, they must take it as proven. Such a condition, on the balance of probabilities, ought to be taken as being likely to have impaired the Appellant's mental responsibility at the material time, and the Jury should have been so directed.

20 15. It is further respectfully submitted by the Appellant that the factual basis for the Defence of automatism was clearly revealed by the various accounts given by the Appellant to the police and to the medical witnesses as well as in his own Statement from the dock; accordingly the learned Trial Judge erred in failing to direct the Jury about the same.

16. At the conclusion of the summing-up the Jury retired and on their return convicted the Appellant of murder and he was sentenced to death. P.38,11. 1-5

17. By Notice and Grounds of Appeal dated 23rd October, 1974 the Appellant gave notice of Application for Leave to Appeal. The Grounds of Appeal were as follows Pp.60-61

30 "(1) Under all the circumstances of the case the verdict is unsatisfactory. P.61,11. 30-39

(2) The learned Trial Judge erred in that he

(a) misdirected the jury; and

(b) omitted to give necessary directions to the jury

during the course of his summing-up."

Particulars of alleged Misdirection were served separately. Pp.62-63

40 18. The Appellant's Appeal to the Court of Appeal Barbados (the Appellant, it seems, having been granted Leave to Appeal) came on for hearing on 12th March, 1976. The Appellant's Appeal was dismissed and his conviction and sentence Pp.64-71

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- Pp.64-67 confirmed. The Judgment of the Court was delivered by Douglas, C.J., with whom Worrell and Johnson J.J. concurred. The learned Chief Justice commenced his Judgment by reviewing the evidence called below. The learned Trial Judge's direction to the Jury was then summarized.
- P.67,1.40  
-P.68,1.17
- P.68,11.  
17-48
19. The learned Chief Justice then went on to consider whether or not the verdict was unreasonable or could not be supported having regard to the evidence. Reference was made to R. v. Matheson [1958] 2 All E.R. 87 and 1 W.L.R. 474. The learned Chief Justice then went on to consider whether or not there was unchallenged evidence of abnormality of mind and consequent substantial impairment of mental responsibility. He stated
- P.69,11.  
4-7
- ". . . regard must be had to the cross-examination of Dr. Patricia Bannister by counsel appearing for the Crown at the trial."
- It is respectfully submitted by the Appellant that any challenge that may have been made to Dr. Patricia Bannister failed and that therefore there was unchallenged evidence of abnormality of mind.
- P.70,11.  
9-39
20. The learned Chief Justice then went on to compare and contrast, it is submitted erroneously, the instant case with Matheson's case (loc.cit.supra). The learned Chief Justice then quoted the passage in R. v. Lloyd, 50 C.A.R. 67 which had been referred to in the summing-up, and concluded, it is submitted erroneously, that a proper direction had been given on the main issue as to whether there was a substantial impairment of the Appellant's mental responsibility for his acts.
21. The learned Chief Justice then considered the evidence in this way
- P.70,1.39  
-48
- "On this issue [i.e. "substantial impairment"] the Appellant's conduct on the 2nd February and the conflicting statements given by him to the police and to the doctor had to be considered, because it was open to the jury to conclude on the basis of that conduct and those statements that whatever the abnormality of mind he may have been labouring under, it did not substantially impair his mental responsibility for his act."



The Appellant respectfully submits that the Jury were not entitled to conclude on the basis of the Appellant's conduct and his said statements that there was no substantial impairment of his mental responsibility, and that the Court accordingly erred.

22. On the 15th November, 1976 the Appellant was granted Special Leave to Appeal in forma pauperis to Her Majesty in Council.

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23. The Appellant respectfully submits that this Appeal should be allowed, that the judgment of the Court of Appeal be reversed, and that the conviction and sentence imposed on the Appellant be quashed for the following, among other;

R E A S O N S

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- (1) BECAUSE there was no evidence to justify rejection of the evidence that he suffered from an abnormality of mind at the material time.
- (2) BECAUSE there was no evidence to justify rejection of the Appellant's contention that his mental responsibility was substantially impaired by his abnormality of mind.
- (3) BECAUSE the Jury were not properly directed as to how to approach the Defence of diminished responsibility.
- (4) BECAUSE the Defence of automatism was never left to the Jury.

NIGEL MURRAY.

IN THE PRIVY COUNCIL No. 33 of 1976

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