Privy Council Appeal No. 33 of 1976

David Adolphus Walton – – – – – – *Appellant*

v.

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

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH OCTOBER, 1977

Present at the Hearing:

LORD SALMON
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
SIR GARFIELD BARWICK
SIR RICHARD WILD

[*Delivered by* LORD KEITH OF KINKEL]

This is an appeal by special leave *in forma pauperis* from a judgment dated 12th March 1976 of the Court of Appeal of the Barbados Supreme Court. The appellant was tried in the Barbados High Court before Williams J. and a jury upon an indictment charging him with having, on 2nd February 1974, murdered Cynthia Allder. The appellant pleaded diminished responsibility. On 18th October 1974 the jury returned a unanimous verdict of guilty of murder, and the appellant was sentenced to death. He appealed to the Court of Appeal of Barbados upon the grounds that the trial judge misdirected the jury upon the issue of diminished responsibility and that in so far as the jury rejected that defence their verdict was unreasonable or could not be supported having regard to the evidence. By the judgment now appealed from the Court of Appeal dismissed the appeal.

The facts disclosed by the evidence at the trial were as follows. On 2nd February 1974 the appellant's girl-friend Margareta Watson and her mother were at the races. The appellant collected them there in order to drive them home in his car. In the course of the journey Miss Watson got the appellant to stop the car because, so she said, he was "acting funny", and the two women got out. They waved down a passing car driven by one Stephen Catlyn, who happened to be giving a lift to Cynthia Allder, then aged 16 years, and got into it. The appellant approached the car and, after talking briefly with Mr. Catlyn, fired two shots from a pistol, of which one killed Miss Allder and the other wounded Mr. Catlyn in the neck. Both Mr. Catlyn and Miss Allder

were complete strangers to the appellant. A struggle ensued between the appellant and Miss Watson. This was broken up by some passers-by, and the appellant then drove away in his car and later gave himself up to the police.

The appellant made an unsworn statement from the dock and in support of his defence of diminished responsibility led the evidence of two medical practitioners and a clinical psychologist. The first of these, Dr. Patricia Bannister, was a psychiatrist attached to the Mental Hospital, Barbados. She saw the appellant in prison on a number of occasions from 9th April 1974 onwards. The important parts of her evidence in chief, as recorded in the notes of the trial judge, were as follows:

> "He did not tolerate frustration well. He did not tolerate stress. He became confused if he was stressed or pressured. He showed paranoia. Extremely suspicious and interpreting internal stimuli as coming from outside of himself. He showed some loss of memory for certain events. And the conclusion I formed was that he suffered from an extremely immature personality. The history on which I based these conclusions spanned from childhood. State of paranoia would have existed for years. I don't think the McNaghten rules apply here. I would say that from his personality structure he would not have been responsible wholly. I would not say there was any damage or injury to his brain. Pretty normal during first few years of life. I would say that his development has been retarded in certain respects. I refer to the mind here. I would refer to his condition as abnormality of mind. In my opinion this would substantially impair his responsibility for his acts. My feeling is that his emotions at level of a 3 year old . . . In my opinion not a violent person but reacts in a primitive fashion to real or imagined provocation in an attempt to protect what he thinks is threatened. 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."

In the course of quite a long cross-examination Dr. Bannister agreed that the statement made by the appellant sounded rational and coherent, as from a person of average intelligence. She described a fairly detailed account of the incidents of 2nd February which the appellant had given her, tending to exculpate himself. She expressed the opinion that the appellant could be certified, and that he should spend a long time in a mental hospital, and finally, in response to a suggestion that the appellant might be malingering, she said it was very difficult to tell if a person was malingering, but that she would say the appellant was not.

The second medical witness, Dr. Lawrence Blair Bannister, a prison medical officer, said that he treated the appellant in prison for depression and recommended that he see a psychiatrist as he was not responding well to treatment.

The clinical psychologist, Mr. Richard Browne, administered a number of tests to the appellant, and said that on certain of these no features of confusion or disorientation were evident, average intellectual ability was indicated and also sound observational ability and clear thinking. He went on to say that on the basis of another test he would describe the appellant as having an inadequate personality enhanced by emotional immaturity and low tolerance level, meaning by the latter that he would get vexed more easily than the average person, and react in an extra-ordinary way and with less provocation. He described this as an emotional disorder.

The appellant, in the course of his unsworn statement from the dock, said that in the past he had suffered from severe headache, blackouts and

loss of memory. His girl-friend had accused him of beating her and his mother of burning her new curtains, but he did not remember doing these things. Miss Watson gave evidence that the appellant had beaten her and later claimed not to remember having done so, and that he had had blackouts.

No medical evidence was led for the Crown.

The defence of diminished responsibility was introduced into the law of Barbados by the Offences against the Person (Amendment) Act, 1973–11, which added to the Offences against the Person Act, 1868 a new section 3A, subsection (1) of which is in the same terms as section 2(1) of the English Homicide Act 1957, viz.

> " Where a person kills or is 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 his mental responsibility for his acts and omissions in doing or being a party to the killing ".

Subsection (2) places the burden of proof of diminished responsibility, where the charge is murder, upon the accused.

It was argued by Mr. Murray, for the appellant, that in the light of the uncontradicted medical evidence to the effect that the appellant suffered from an abnormality of mind which substantially impaired his mental responsibility for his acts, the jury was bound to accept that the defence of diminished responsibility had been established, and that the trial judge should have so directed them. Mr. Murray relied upon *R. v. Matheson* (1958) 42 Cr. App. R. 145 and *R. v. Bailey* 1961 Cr. Law Rev. 828. In the first of these cases the accused, who had a long recorded history of conduct indicative of mental abnormality, had killed a fifteen year old boy under peculiarly revolting circumstances. Three medical witnesses testified at the trial that they were satisfied that the accused's mind was so abnormal as substantially to impair his mental responsibility, giving their reasons for that view, and no medical evidence was led in rebuttal. The jury returned a verdict of guilty of murder. The Court of Criminal Appeal quashed that verdict and substituted one of manslaughter. Lord Goddard C.J., delivering the judgment of the Court, having referred to the medical evidence, said (at p. 151):

> " What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctor's evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'."

After considering other circumstances of the case Lord Goddard continued:

> " If then there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear that can displace or throw doubt on that evidence, it seems to the court that we are bound to say that a verdict of murder is unsupported by the evidence ".

In *R. v. Bailey* (*supra*) the appellant, who was just seventeen years of age at the time, had met a girl aged sixteen years and with no apparent motive had battered her to death with an iron bar. In support of a defence of diminished responsibility the evidence of three medical witnesses was led, including a senior prison medical officer. All expressed the opinion that the appellant suffered from epilepsy, which substantially impaired his mental responsibility. The prison medical officer thought it highly probable that the appellant was at the time of the killing in an epileptic upset or fit. The Court of Criminal Appeal substituted a verdict of manslaughter for the jury's verdict of murder. Lord Parker C.J., delivering the judgment of the Court, said:

> "This Court has said on many occasions that of course juries are not bound by what the medical witnesses say, but at the same time they must act on evidence, and if there is nothing before them, no facts and no circumstances shown before them which throw doubt on the medical evidence, then that is all that they are left with, and the jury, in those circumstances, must accept it."

These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality. It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence. As was pointed out by Lord Parker C.J. in *R. v. Byrne* (1960) 44 Cr. App. R. 246, at p. 254, what the jury are essentially seeking to ascertain is whether at the time of the killing the accused was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way.

In the present case their Lordships are of opinion that, in so far as they can judge of the medical evidence from the trial judge's notes, the jury were entitled to regard it as not entirely convincing. Dr. Patricia Bannister, whose evidence was subjected to quite lengthy cross-examination, expressed an opinion as to the appellant's state of mind which in terms satisfied the statutory definition. The particular mental abnormality which she identified was that of an extremely immature personality. Mr. Browne, the clinical psychologist, found the appellant to be of average intellectual ability with good observational ability and clear thinking. He supported Dr. Patricia Bannister's evidence by describing the appellant as having an inadequate personality enhanced by emotional immaturity and a low tolerance level. The evidence of Dr. Lawrence Bannister was merely to the effect that he treated the appellant for depression, with disappointing results. It is plain that the quality and weight of this medical evidence fell a long way short of that in *Matheson's* case (*supra*) and in *Bailey's* case (*supra*). The jury also had before them evidence about the conduct of the appellant before, during and after killing, including that of a number of conflicting statements about it made by him to the police and to Dr. Patricia Bannister. They may well have thought there was nothing in that evidence indicative of a man whose mental state bordered on insanity. There was also the appellant's unsworn statement regarding his having suffered in the past from severe headache, black-outs, sleeplessness and lack of memory, supported to some extent by Miss Watson, but no objective evidence of any history of mental disorder. In both these aspects the case is in marked contradistinction to *Matheson's* case (*supra*).

Having carefully considered the relevant evidence, their Lordships have come to be of opinion that in all the circumstances the jury were entitled

not to accept as conclusive the expression of opinion by Dr. Patricia Bannister that the appellant's mental condition satisfied the statutory definition of diminished responsibility, and to conclude, as they did, that the defence had not on a balance of probabilities been established.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

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In the Privy Council

DAVID ADOLPHUS WALTON

v.

THE QUEEN

DELIVERED BY
LORD KEITH OF KINKEL

Printed by HER MAJESTY'S STATIONERY OFFICE
1977