ST. VINCENT

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.12 OF 1995

BETWEEN:

BERTRAM ABRAHAM

Appellant

v

THE QUEEN

Respondent

Before:

The Rt. Hon. Sir Vincent Floissac — Chief Justice
The Hon. Mr. C.M. Dennis Byron — Justice of Appeal
The Hon. Mr. Albert Matthew — Justice of Appeal [Ag.]

Appearances: Mr. Joseph Delves for the Appellant
Mr. Brian Cottle for the Respondent

1995: December 13;
1996: February 12.

JUDGMENT

BYRON, J.A.

The appellant was convicted of the murder of Raymond Hewitt (the deceased) and sentenced to death on 30th June 1995 after a trial by jury presided over by Cenac J. His appeal raises questions on the defence of insanity, and the directions on intent necessary for murder.

FACTS

The evidence revealed that on the 20th December 1993, the appellant rushed into the deceased's yard at Sion Hill, with a small piece of steel in his hand and asked the children there for a glass of water to drink adding "don't throw anything in the water, all you don't kill me". He was described as looking wild and as saying that "town was going to burn down". He drank some water then threw away the glass and waited until the deceased came home, when he said that he had come for a hair cut. The deceased told him to go down to the shop but the appellant did not go. The deceased tried to get him out of the yard. The appellant took up a piece of steel from the yard and was swinging it at the deceased who tried to block it with a piece of plank. The witnesses

described this as "sword fighting". While this was going on the deceased asked the children to go inside for his gun. The appellant struck the deceased with the steel across his jaw and after he fell he took up the plank and beat him. The appellant ran away but was captured soon after. He made a statement to the police in which the issues of a lack of intention to kill, self defence and provocation were all raised. The doctor who conducted the post mortem observed multiple fracture of the jaw bone and a broken neck which was the injury that caused death.

The appellant's mother gave evidence to the effect that for a few days before the incident the appellant had been complaining of being attacked by a man [when no one was there], using a bible and cross to keep him off, and saying that his grandmother who had been dead for some four years was keeping off the man. Dr. Debnath a psychiatrist also gave evidence to the effect that he saw the appellant shortly after and he diagnosed him to be mentally ill with schizophrenia a severe mental illness characterised by disorders including hallucination, delusion, the inability to perform as adequately as he used to perform before and also a bizarre pattern of behaviour.

The learned trial Judge directed the jury to consider inter alia the defences of self defence and provocation. No complaints were made about the directions or verdict on these issues.

INSANITY

Insanity was the main defence at the trial. Counsel for the appellant expressed incredulity at the verdict which rejected it particularly as Dr. Debnath testified in unequivocal terms that the appellant was suffering from schizophrenia. He also complained that the learned trial Judge wrongfully excluded evidence that members of the appellant's family had suffered from mental illness and in particular his brother was an inmate of the Mental Hospital suffering from schizophrenia. He argued that the hereditary factor in such illness if explained was an additional factor which could have caused the jury to conclude that the appellant was insane.

The law is well settled that insanity as a defence to crime is different from insanity as a mental illness as recognised by medical science. As a defence to crime it requires proof that at the time of committing the act, the party accused was labouring under such a defect

of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong [*The M'Naghten Rules*].

It follows that testimony which merely supported the conclusion that the appellant suffered from a mental illness but did not address the issue of his criminal responsibility was insufficient to prove legal insanity. Further, it is the jury who are empowered to arrive at a verdict on this issue and they are entitled to arrive at one which differs from the opinion expressed by men of medical science.

I can do no better than explain these principles in the words of Lord Goddard in the case of **R v Rivett** (1950) 34 Cr. App. R. 87 at p.93:

> "But the importance of this case, and it is one of importance, is that it gives this Court the opportunity to emphasise, if emphasis be necessary, two matters of cardinal importance in the criminal law. The first is that in considering whether a person is to be excused from the consequence of his crime, be it murder or any other, the question is not merely was he suffering from a defect of reason due to disease of the mind, but whether that defect was such as to render him not responsible for his action... The second matter for emphasis is that it is for the jury and not for medical men of whatever eminence to determine the issue.....Unless and until Parliament ordains that this question is to be determined by a panel of medical men, it is to a jury, after a proper direction by a Judge, that by the law of this country the decision is to be entrusted. The jury have heard the indications that have led the medical witnesses to their conclusion; they have also heard all the other facts relating to the man and the crime, including the evidence of the doctor who saw the man very soon after it was committed. That he knew he had done wrong is evidenced by the fact that he not only told his friend what he had done and indicated the consequences that would follow to himself, but gave himself up to the police for having committed murder. Let it be assumed he suffered from schizophrenia, or whatever doctors may call it; let it b e assumed that he killed the girl on a sudden impulse; a jury of is country are satisfied that he was responsible, and it is not for this Court to say that he was not."

The evidence of Dr. Debnath who expressed the opinion that the appellant was suffering from schizophrenia was much stronger evidence of his mental condition than evidence that members of his family suffered from that illness. The rejected evidence therefore was not strong enough to justify suspicion that it could have created any difference in the conclusions reached on the insanity of the appellant.

This conclusion is consistent with **R v Jesshope** (1910) 5 Cr. App. R 1 where the appellant had been convicted of murder and argued an appeal that his defence of insanity was handicapped because evidence of the family history of insanity was shut out of the trial. The court did not consider the probative value of the excluded evidence to be high enough to influence any change in the verdict in the face of the other evidence in the trial. The Lord Chief Justice said:

> ".....Whatever may be said as to the weak condition of the man, we have the clearest evidence that he entertained vindictive feelings against the deceased. We should require very strong evidence of general insanity to satisfy us that he did not know what he was doing."

In any event counsel was unable to show the relevance of the rejected evidence. He had not taken any proof of the doctor's opinions as to the effect of his mental illness on his ability to reason, or on his awareness of the nature and quality of his act, or his appreciation of whether it was right or wrong. He was unable to produce any other scientific or any jurisprudential material on the subject. This was important because in dealing with the defence of insanity the real question which the jury had to answer is not whether the appellant suffered from mental illness but whether that illness rendered him not responsible for his actions. The learned trial Judge explained this very clearly to the jury. Counsel for the appellant conceded that the directions on this issue were impeccable. They heard the evidence in the case including the testimony of the appellant's conduct before, during and after the act causing death.

It may have been significant to them that he made a statement to the police on the same evening in which he raised very clearly the issues of self-defence, provocation and his lack of intention to kill or cause serious harm. There was also evidence that after inflicting the injury he ran away.

In my view, even if the jury believed the testimony of Dr. Debnath that he was mentally ill, the other testimony in the case could have provided a rational basis for concluding that the appellant knew what he was doing and that it was wrong.

In these circumstances I can find no justification for interfering with the verdict on this issue.

INTENTION

Counsel for the appellant submitted that there were serious misdirections on the specific intent required to establish the crime for murder and argued that if the jury had been properly directed they were unlikely to have concluded that the appellant acted with malice aforethought which would have resulted in a conviction for manslaughter rather than murder.

In St.Vincent and the Grenadines Section 159 of the Criminal Code prescribes that the specific intent required for murder is "malice aforethought". The statutory requirements for establishing such malice aforethought represents a codification of the common law. It is described in Section 159[2] as follows:

> (2) For the purpose of this section, malice aforethought shall be deemed to be established by evidence proving either -
>
> (a) an intention to cause the death of, or to do grievous bodily harm to, any person, whether such person is the person actually killed or not; or"
>
> (b) knowledge that the act or omission causing death will probably cause the death of or the grievous bodily harm to some person, whether such person is or is not the person actually killed, although such knowledge is accompanied by an indifference whether or not death or grievous bodily harm is caused, or by a wish that it may not be caused."

Against this legislative background the learned trial Judge directed the jury on the specific intent required for murder in this way:

> "What is intention? Intention is not capable of proof. You cannot determine what is operating in a man's mind. You can decide intent by deciding what the Accused did or did not do and by what he said or did not say. You should look at his intentions or his actions before, at the time of, and after the alleged offence. Consider too the weapon or the object he used. These things may shed light on his intention at the critical time. The prosecution only had to prove that the Accused had the necessary intention at the time of the alleged offence, that it need not been a long standing intent and that it is sufficient for the intention to have been formed in a matter of seconds, say in a sudden flash of temper.
>
> You must decide whether the Accused intend, whether he did intend or foresee the result by reference to all the evidence, drawing such inferences from the evidence as appear proper to you in the circumstances."

In my view there was justification in the criticisms levied at these directions.

The direction that intention is not capable of proof, and that a man's intention cannot be determined is inconsistent with the statutory requirements for proof of the specific intent necessary for murder and must have confused the jury despite the succeeding sentences.

The passage did contain a reference to the need to determine the appellant's intention, but it emphasised the employment of an objective approach by looking at what was said and done and the weapon used. The omission to explain that the jury should determine whether the appellant, in his particular mental condition acted with malice aforethought was a serious error.

It seems to me that the learned trial Judge concentrated on explaining intention by reference to Section 159[2][a] and did not bring home to the jury with sufficient force the important issues of foresight and probability.

The prosecution did not adduce any evidence that the appellant had any motive, or desire or reason for killing the deceased. The case was presented on the basis that in accordance with Section 159[2][b] malice aforethought should be deemed to have been established by proof that the appellant knew that striking the deceased with sufficient force to have caused the injuries described by the doctor would probably have caused him death or grievous bodily harm. The dominating issue therefore was whether the appellant knew that it was probable that death or grievous bodily harm would have resulted from what he did.

It is a well established principle that criminal intent is subjective to the accused person, although the method of determining that subjective intention usually involves the objective process of drawing inferences from what he said and did and the relevant surrounding circumstances.

In this case the expert evidence that the appellant was suffering from schizophrenia, and the evidence of his unusual appearance and behaviour, were special circumstances requiring further explanation and emphasis that it was necessary

for the jury to determine whether they could be sure that he had the necessary intent, in the sense that he appreciated that death or grievous bodily harm would probably have resulted from what he did.

The jury should have been directed to determine his intention by reference to his own particular mental capacity at the time and not by

any other standard. This was a relevant distinction because the evidence could have led to the view that in his condition the appellant was less able to foresee the consequences of his action than a reasonable person who was not suffering from any mental illness or hallucinatory disorder.

The method of assisting a jury in such cases was examined by Lord Lane C.J. in **R v Nedrick** (1986) 83 Cr. App. R. 267 at 270:

> "When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions: (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?
> If he did not appreciate that death or really serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he had not intended to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result.....
> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.
> Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence."

In my opinion the treatment of this aspect of the case by the learned trial Judge

was inadequate. Although the jury rejected the defence of insanity it is difficult to be sure how they would have responded to directions requiring them to assess the appellant's foresight that death or grievous bodily harm would probably have resulted from what he did. The circumstance that after the deceased received the fatal blow with the steel, the appellant threw away the steel and continued to strike him with

the plank raises the need to examine whether he appreciated the gravity of the injury his conduct was likely to cause.

I cannot be sure that, if the jury were directed to consider these issues, they would have returned a verdict of murder rather than of manslaughter.

In the circumstances I would conclude that the conviction for murder is unsafe and unsatisfactory. Accordingly, I order that it be set aside and substitute therefor a verdict of manslaughter.

In considering the appropriate sentence for this serious crime, the only potentially mitigating factor is really a double-edged sword. The evidence of the appellant's mental illness is a circumstance which could invite leniency and mercy. On the other hand, there are no favourable answers to the legitimate concern that he may constitute a continuing threat to the safety of members of the public. I can see no reasonable alternative to a prolonged period of incarceration and would impose a sentence of 15 years imprisonment.

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C.M. DENNIS BYRON
Justice of Appeal

I Concur.

.....
SIR VINCENT FLOISSAC
Chief Justice

I Concur.

.....
ALBERT MATTHEW
Justice of Appeal [Ag.]