

HIGH
PRIORITY

112 SP.
IN THE COURT OF APPEAL OF NEW ZEALAND 10/3 C.A. 263/91

THE QUEEN

150
v.

McCARTHY

Coram: Cooke P.
Casey J.
Greig J.

Hearing: 7 February 1992

Counsel: M.R. Radford for Appellant
T.M. Gresson and Kathleen Gibbons for Crown

Judgment: 27 February 1992

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This appeal turns primarily on s.366(1) of the Crimes Act 1961, which provides:

366. Comment on failure to give evidence - (1) Where a person charged with an offence refrains from giving evidence as a witness, no person other than the person charged or his counsel or the Judge shall comment on that fact.

On trial before the Chief Justice and a jury in the High Court at Timaru in July 1991 the accused, the present appellant, was found guilty of murdering McMurtrie at Oamaru on 3 March 1991.

The evidence was that there was a party at an Oamaru house in the early hours of the morning. McMurtrie was an invited guest. An uninvited group of persons intruded into the party. The accused was among them, but when it was indicated that they were not welcome he left the house and sat on a bank outside. Some difficulty was experienced in getting all the intruders to leave. Ultimately they did so, but one of them, probably a 15 year old girl, threw a glass from outside, breaking a window. McMurtrie and most of the others in the house rushed outside. Coming upon the accused, McMurtrie apparently jumped to the conclusion that he was responsible for the window-breaking and attacked him. There is evidence of a headlock and a blow or blows to the face or head; also that the accused had blood on his face. Evidently McMurtrie became satisfied that the accused was not to blame and went on looking for the culprit. After an interval the accused ran back into the house, making the excuse to a girl who was apparently alarmed about his intentions that he was only going to the toilet; said something to the effect of 'I'm going to get him'; pulled out a knife and fork drawer under the sink; took from it a knife with a blade of seven or eight inches; went outside again; ran down to McMurtrie who was standing in a group of people; possibly kept the knife out of sight by holding it down by his leg; then stabbed McMurtrie from the side just below the ribs. The knife went in to the hilt, severing the aorta.

At the trial the defences were lack of murderous intent (on which we need say nothing), insanity and provocation. The accused did not give evidence himself. As witnesses for him there were called a friend who had been a bystander; Dr G.D. Hammond-Tuck, neurologist; Mr B.E. Longmore, neuropsychologist; Dr P.E. Mullen, professor of psychiatry at the University of Otago; and Dr J.B. Hannah, visiting psychiatrist at Ashburn Hall. The Crown called expert evidence in rebuttal from Dr S.F. Avery, neurologist, and Dr J.R.M. Rogers, consulting psychiatrist.

In 1985 the accused had undergone a heart transplant in London. At or about that time he suffered permanent brain damage. Although the extent and significance of this was in dispute among the medical witnesses, they were all agreed that he was suffering from a disease of the mind at the time of the killing. He had also been drinking (later blood alcohol count 152), had apparently suffered a blow or blows to the head, and had falsely been accused by the deceased of having broken the window. On the other hand there was a degree of deliberation about his actions before and perhaps after the stabbing which enabled the Crown to advance the contention that this was a cold-blooded, planned killing. There were several issues to which the medical evidence was relevant. As to insanity, the issue was whether the accused was incapable of knowing that his act was morally wrong, having regard to the commonly accepted standards of right and wrong (s.23(2)(b) of the Crimes Act). As to provocation which would reduce the crime to manslaughter, the issues were whether in the circumstances the assault and apparent accusation by the victim were sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and whether they did in fact deprive him of the power of self-control and thereby induced him to commit the act of homicide (Crimes Act, s.169).

As to insanity, the onus of proof on the balance of probabilities was on the defence. As to provocation, while the defence had to point to an evidential foundation, the burden of disproof beyond reasonable doubt was on the Crown. The opinions of the experts differed and on both sides there were some concessions in cross-examination. Clearly, though, the Chief Justice was right in leaving provocation to the jury. Clearly, too, there was expert evidence on which they could have found insanity. Although the Crown case was strong, it was not overwhelming under either head. The verdict of the jury was not surprising, but it is convenient to say at this point that, considering the evidence alone, we would not

be able to accept the argument for the Crown to the effect that the proviso should be applied on the ground that no substantial miscarriage of justice has occurred. To do so on the evidence in this case would be to usurp the function of a jury.

Interviewed by the police some hours later, the accused was warned more than once that he was not obliged to say anything and that anything he did say might be used in evidence. He declined to say anything, mentioning that he had spoken to his solicitor and had nothing to say. When interviewed at later dates by the Crown medical witnesses he told Dr Avery that he had been instructed not to speak of matters including the night in question; although Dr Rogers elicited more from him about his condition generally, he likewise told Dr Rogers that he had been instructed not to talk in any way about the night of the alleged offence. Among his own medical witnesses he told Professor Mullen that he looked down the road and saw a group attacking his friend, recalled being in the house and opening some drawers, could not really remember thinking about anything, and the next thing he remembered was people lying on top of him kicking and punching.

At the hearing of the appeal a ground to the effect that the verdict was unreasonable and could not be supported having regard to the evidence was abandoned. On consideration Mr Radford also abandoned a ground alleging a shortcoming in the summing up regarding provocation. The remaining ground was stated in the notice of appeal as follows:

3. The Crown made repeated and pointed reference to the failure of the accused to
 - (i) make an explanation of his conduct to the police
 - (ii) make an explanation of his conduct to medical witnesses
 - (iii) give evidence at the trial and that those references went beyond the bounds of propriety and were not cured by the Judge's summing up.

That ground refers to the agreed facts that on three occasions during his final speech the Crown prosecutor commented on the failure of the accused to give evidence. The first was a general reference. The second and third were accompanied by references to the accused's failure to say anything to the police or the Crown doctors about the events of the evening. On one of the latter occasions the Crown prosecutor was dealing with the defence of insanity, on the other with the defence of provocation. His own reconstructed version of what he said is contained in a letter dated 16 December 1991:

It was mainly in relation to the provocation issue that during my closing address I submitted *inter alia*:

"1. The only evidence regarding the circumstances leading up to the stabbing itself and the accused's conduct after the stabbing, with one exception, is from Crown witnesses. That evidence has been virtually unchallenged.

2. Professor Mullen's and Dr Hannah's opinions are highly fanciful, certainly not borne out by the evidence. They did not stand up to close scrutiny and common sense. In addition, their opinions cannot be tested in any way against what the accused has said.

3. The accused must have known whether he lost his self control but there has been no explanation from him at all.

4. He said nothing to the Police (that was his right). He also chose to say nothing to the Crown Doctors about the events of the evening (also that is his right). He also has elected not to give evidence in this case (that is his right). The end result of him electing to remain silent means the Doctors' opinions cannot be tested against the accused's explanations. As the evidence stands, the only way of testing their opinions is against all the other evidence. When that is scrutinised, his deliberate and intentional actions, his actions after the killing, only one conclusion can be reached. Surely if he wished to rely on this defence (provocation) and say he had lost his self control, there would have been some sort of explanation. Indeed, given that it was beyond dispute he stabbed McMurtrie, it is in his interests to give an explanation. As the Doctors said, he must have known what he had done. Surely he would have wished to provide some

sort of explanation for the killing. Suggest the reason he has not given any explanation is because he is unable to explain the killing for this reason".

With regard to paragraph 4, counsel for the appellant says that he does not recall the words, put in brackets, about the accused's rights. He contends that whether or not they were said is immaterial in relation to the damaging effect of such comments.

Counsel for the Crown acknowledges that his references to the failure of the accused to give evidence were in breach of s.366(1) and explains that they resulted from a mistaken account given to him of *R. v. Smith* [1989] 3 N.Z.L.R. 405. In that case this Court held that an exculpatory statement by an accused to a defence psychiatrist was not admissible as evidence of the truth of its contents: the psychiatrist could testify to it only as the basis for his opinion: in the absence of evidence of its truth from the accused (or some other admissible source) the weight to be given to the expert's opinion could be diminished, and indeed in the circumstances of that case was totally destroyed. The judgment did not deal at all with s.366(1). That statutory prohibition of comment by counsel for the prosecution on a refraining by the person charged from giving evidence is absolute.

The furthest that counsel for the prosecution could properly go would be to submit to the jury that the expert's opinion is not supported by factual evidence. Even a submission to that effect has to be made in restrained terms so as to avoid the risk of being seen as an implied prohibited comment. Counsel for the prosecution is entitled to submit that the account given by the experts of what the accused told them is not evidence that what he told them was true: it is no more than the basis on which the experts formed their opinions. Beyond that the matter is best left to the trial Judge, who is free to comment and may give the jury an appropriately balanced direction.

For example, if the expert evidence has been founded to a significant extent on an account given to him by the accused but not given in evidence, it is perfectly appropriate and may well be desirable for the Judge to tell the jury that the accused is not bound to give evidence and that they must not assume that he is guilty merely because he has not done so; but that what he told the doctor is not evidence, because an accused is not allowed to get self-serving statements indirectly before the jury when he cannot be cross-examined about them. In relation to a defence of insanity, as the onus is on the accused it may on occasions be proper and fair for the Judge to say that if he does not go into the witness box, he runs the risk of not being able to prove his case: see *R. v. Bathurst* [1968] 2 Q.B. 99. For a somewhat stronger suggested direction, which might occasionally be justified, see *Bradshaw* (1985) 82 Cr.App.R. 79, 83.

Those two cases deal with the English defence of diminished responsibility. We think that, although providing some analogy, they have to be applied with caution if there is reason to suppose that the defendant's mental condition may handicap him in doing justice to himself in the witness box. In the ordinary run of cases trial Judges are not to be discouraged from exercising their right of comment - see *R. v. Accused* (C.A. 227/91) 7 C.R.N.Z. 407, 419 - and we think that criticism of the one-sided effect of the so-called 'right to silence' will be less justified if Judges bear this in mind. Silence certainly does not give rise to an inference of guilt; but, depending always on the particular facts, the prosecution evidence and natural inferences from it may more easily be accepted if not contradicted by evidence from the accused or other evidence called for the accused. In general, and subject again to the particular facts, the Judge is well entitled to explain this to the jury. It may well be desirable to do so to prevent 'the right to silence' from being over-exploited.

Where sanity is in issue, however, special care is required. Even then, it may be right for the Judge to warn the jury against accepting as proved an account by the accused which has not been given by him in evidence. Much must turn on the particular circumstances and the Judge's discretion.

The topic of comment by the prosecution on the accused's unwillingness to make a statement to the police was dealt with by this Court in *R. v. Coombs* [1983] N.Z.L.R. 748. There it was pointed out that even at the stage of questioning before the administration of a caution there may be intimidating circumstances explaining a suspect's reticence. It was said at 752 that there had been an unfortunate attempt by the prosecution to make something of a refusal to answer questions at the police station after earlier arrest and caution at the house raided by the police. In the present case the police evidence is that, although not immediately arrested, from the outset the accused was warned that he was not obliged to say anything and that he indicated that he was acting on legal advice. To say that silence in these circumstances should be counted against him is to treat the warning with cynicism. The Crown should not have advanced this argument.

Comment by the prosecution on the accused's unwillingness to give his account of the events to the prosecution doctors was less objectionable, but should still have been tempered by mentioning that he was acting on instructions (presumably from his legal adviser). It was not enough to leave defence counsel with the responsibility of pointing that out to the jury.

All in all, the comments in the final address for the prosecution were in breach of the Crimes Act and unfair. Not surprisingly a complaint was made to the Chief Justice in chambers, and in his summing up he did what he thought right to remedy the prosecution's errors. That is a necessary course for the trial Judge if he decides not to discharge the jury: see *R. v. Naudeer* [1984] 3 All E.R. 1036. In

this instance no application to discharge the jury was made by either counsel. It is wholly understandable that the Chief Justice did not take that course. But the approach of counsel meant that both sides took a risk as to whether or not, in the event of a verdict of guilty of murder, the prosecution's errors would vitiate the verdict.

It is clear that the learned Chief Justice fully appreciated that the line of argument followed by counsel for the prosecution created problems to be dealt with in a summing up sufficiently complicated and difficult without them. In summing up he spoke several times of the accused's right not to give evidence and not to answer questions from the police or the Crown doctors. The tenor of what he said is perhaps best conveyed by quoting his last reference to the topic:

What the doctors said the accused told them is not to be regarded by you as evidence of the truth of that for other purposes in the case. If the accused had wished to put statements of that kind before you as to his past behaviour and past events, his change of patterns following the heart transplant and so on, then it was open to him to do so by giving evidence himself. That was a matter of choice for him. He is not obliged to, and, as has been explained to you several times, it's his right not to. But he can't get evidence of that kind before you in a second-hand way for purposes of strengthening his position on provocation. Let me make it quite clear that an accused is within his rights in not giving evidence; and in declining to give any account of events to the Crown's doctors, that too was within his rights.

He had also said clearly that a person suspected of an offence is not obliged to give an explanation to the police.

It is inescapable nevertheless that the errors of the prosecution had placed the trial Judge in a most difficult situation. The difficulty is brought out by two passages in the summing up. Almost at the beginning there was the following:

I said the case had been conducted very fully and I should add, in my observation, that it has also been conducted very fairly. In the final addresses you heard this morning one or two things were said which perhaps on calm reflection might have been better left unsaid such as assertions that undue zeal had been shown but it is a heavy responsibility making the final address in a murder trial and one must not be too critical about every word that is used.

It is common ground between counsel that the 'undue zeal' referred to a comment by defence counsel about certain police evidence and had no reference to the speech of prosecuting counsel. Thus the jury could have been left with the impression that the Crown was entitled to argue as it did.

Later the learned Chief Justice said:

The right of silence is not to be whittled away and if an accused exercises the right of silence and remains silent, then that should not be the subject of comment against him. The position regarding the burden of proof and regarding the calling of evidence relating to the defence of insanity is more complicated and I will say something more about that a little later. You should regard Mr Gresson's remarks about the absence of an explanation from the accused as relating to that particular situation.

Very properly Mr Gresson has told us that his remarks were not directed to the defence of insanity only. They were directed separately as well to the defence of provocation, and to the case for the accused generally. Further, even on the insanity issue they should not have been made. The prohibition enacted by Parliament admits of no exception. This part of the summing up was no doubt a damage-control exercise, but regrettably the Judge was forced into a position where in order to avoid highlighting the matter or criticising the conduct of the Crown case he was evidently forced to confer on the Crown argument some measure of endorsement. No more than on any other issue was the Crown prosecutor entitled

on the issue of insanity to remark on an absence of explanation from the accused, whether in the witness box or to the police after caution.

In short the position is that before the jury the Crown prosecutor relied on an argument prohibited to the Crown by Act of Parliament and an associated argument in disregard of the purpose of the police cautions. These arguments were so interwoven with the Crown case as a whole that they cannot be dismissed as minor irregularities. No indication was given to the jury that the Crown was not entitled to rely on them: it could have been confusing if the trial Judge had embarked on an explanation of the effect of s.366(1). Since the hearing of the appeal counsel for the respondent has asked by memorandum that a report should be requested from the trial Judge 'on the issue of the perceived impact of my comments which were in breach of s.366(1) of the Crimes Act'. But the effect of the comments on the jury could not necessarily be perceived. Of course the jury would be free in their deliberations to take into account the silence of the accused, but the Crown was not entitled to urge them to do so. Even disregarding the point about the police cautions, for a breach of the statute as clear and repeated as this the consequence must normally be the setting aside of a guilty verdict. We are not persuaded that a different consequence can properly be permitted by this Court in the present case. To leave the verdict standing without a retrial could be seen as treating the Act as a dead letter when it prohibits comment by the prosecution. The appeal must be allowed, the conviction quashed, and a new trial directed.

As there is to be a new trial, we should not part with the case without saying something on a subject which Mr Gresson raised towards the end of his submissions. On the issue of provocation difficulty can be experienced, and was apparently experienced by the Chief Justice in summing up in this case and by the jury in their deliberations (as shown when they returned with a question), in applying the words of s.169(2)(a) of the Crimes Act 'sufficient to deprive a person

having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control'. The difficulty stems largely from observations added to the judgment of this Court in *R. v. McGregor* [1962] N.Z.L.R. 1069. The passage in question is at pp.1080 to 1083.

That case was concerned with a killing by shooting in circumstances of an underlying tension between neighbours. The essence of the decision of this Court is contained in the following words in the judgment at 1080:

In truth, what happened was that in his somewhat alcoholic condition he got matters out of perspective, quarrelled with his father, and then became very angry and emotional about past wrongs, and after an interval, went out and shot Whiteford.

The Court went on to say:

It may well be that earlier happenings between the appellant and Whiteford could be taken into account in determining whether a subsequent comparatively trivial act of provocation on the part of Whiteford could cause slumbering fires of passion to burst into flame, but in the present case, Whiteford did or said nothing to arouse the passion of the appellant and all that can really be said is that the circumstances surrounding his father's visit to Whiteford induced in him a sudden passion of anger which clearly is not enough: *R. v. Duffy* [1949] 1 All E.R. 932.

That was the ground on which the case was actually decided. The observations added thereafter were clearly obiter, although expressed after full argument. They include:

Moreover, it is to be equally emphasised that there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or

conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test. Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity. Though he might in all other respects be an ordinary man, provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control. So too, if the colour, race or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon. Thus, it would not be sufficient, for instance, for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again, the provocative act or words require to be directed at the particular characteristic before it can be relied upon.

Special difficulties, however, arise, when it becomes necessary to consider that purely mental peculiarities may be allowed as characteristics. In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would, as we have earlier indicated, deny any real operation to the reference made in the section to the ordinary man, and it would, moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. There must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers. Beyond that, we do not think it is advisable that we should attempt to go.

Among the cases showing that these observations have caused continual difficulty are *R. v. Tai* [1976] 1 N.Z.L.R. 102; *R. v. Taaka* [1982] 2 N.Z.L.R. 198; *R. v. Nepia* [1983] N.Z.L.R. 754; *R. v. Lafaele* (1987) 2 C.R.N.Z 677; and *R. v. Trounson* [1991] 3 N.Z.L.R. 690. In the judgment in *Trounson*, delivered by Casey J., it was forecast that this Court might have to revisit *McGregor*. The powerful criticism of *McGregor* in *Adams on Criminal Law*, 2nd ed.

paragraphs 1264 to 1269, is well known. It is a matter of weighing the arguments there stated against the equally full discussion in *McGregor* itself.

The trend of the line of decisions just collected is in the direction that the added observations in *McGregor* may have unduly restricted the ambit of the provocation that under the current New Zealand section may reduce murder to manslaughter. The added observations appear to have been influenced by the view that diminished responsibility had not been accepted by the New Zealand Parliament; yet, within a limited field, this may be seen as the inevitable and deliberate effect of the statutory changes embodied in s.169 of the Crimes Act 1961.

In our view it has to be respectfully said, in the light of judicial experience of the operation of s.169, that the added and obiter observations in *McGregor* go somewhat too far and add needless complexity to the application of the section. We do not think that they have been found workable or followed closely in practice. A racial characteristic of the accused, his or her age or sex, mental deficiency, or a tendency to excessive emotionalism as a result of brain injury are, for the purposes of s.169(2)(a), examples of characteristics of the offender to be attributed to the hypothetical person. In a case where any of them apply, the ordinary power of self-control falls to be assessed on the assumption that the person has the same characteristics. The question under the paragraph is whether a person with the ordinary power of self-control would in the circumstances have retained self-control notwithstanding such characteristics. It can be a difficult question, like others which are left to the common sense of juries, but we cannot avoid thinking that the difficulty is unjustifiably aggravated by the suggestion that provocation must be 'directed at' a particular characteristic. We evidently share with the jury at the first trial of this case difficulty in comprehending or applying that suggestion.

On the second trial, assuming that provocation is relied on, one issue will be whether the accused in fact lost self-control by reason of the alleged provocation, the onus of proving that he did not lying on the Crown. That is the issue under s.169(2)(b) and as is quite often the case it may conveniently be considered before the issue under s.169(2)(a). If he did, or if that question is in reasonable doubt, the test under (a) will also have to be considered. For that purpose the hypothetical person is to be endowed with the accused's brain damage and any personality consequences that it may have except as to the power of self-control, and to be faced in the circumstances of the crime with the alleged provocation by the victim which preceded the crime. Only the effect of alcohol, being transitory and not a characteristic, is to be ignored for the purpose of para.(a), although it falls to be taken into account under para.(b) in deciding whether the accused in fact lost self-control. In short the questions are whether the alleged provocation in fact caused the accused to lose self-control to the extent of committing the homicide, and whether a person with the accused's characteristics other than any lack of the ordinary power of self-control could have reacted in the same way.

We hope that this outline may be of some assistance to the Judge required to preside at the second trial.

R B Lorne P.

Solicitors:

Crown Solicitor, Timaru, for Crown