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SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 1 of 1991

BETWEEN

HILARY PATRICK TENCH - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Chief Justice Floissac - President
The Honourable Mr. Justice Byron J.A.
The Honourable Miss Justice M. Joseph J.A.(Ag.)

Appearances: Mr. M.B.G. Gordon for the Appellant
Mr. E. Walker for the Respondent

1991: Nov. 5,6,
1992: Jan. 27.

JUDGMENT

FLOISSAC, C.J.

The appellant was charged with murder of his father (Moses Tench) between the hours of 9.00 p.m. on Saturday the 23rd June 1990 and 6.30 a.m. on Sunday the 24th June 1990. The murder was alleged to have been committed in a house where the appellant and his father lived.

The prosecution's case was based partly on a voluntary extra-judicial statement signed by way of a mark by the appellant on the 24th June 1991 and partly on circumstantial evidence. In that statement, the appellant admitted that he altercated with his father on the night of the 23rd June 1990. He confessed that during the night and while his father was asleep, he struck his father twice on the back of the head with a heavy stick or piece of wood. He retired soon thereafter. He awoke the following morning and found his father lying on the bed in a critical condition. He then contacted his sister who congregated with others in the bedroom where the father lay dead.

At his trial before d'Auvergne J. and a jury, the appellant adopted his extra-judicial statement or confession and pleaded legal insanity. In support of his plea, he relied on the evidence of a psychiatrist (Dr. Cherki Raju) who had interviewed the appellant on the 16th February 1991 nearly eight months after the date of the alleged murder.

Dr. Raju's evidence-in-chief was to the effect that the

appellant was an idiot or mentally retarded person who knew that what he did was wrong and that he would be punished for it but who could not appreciate the full consequences of his act. The appellant could not imagine that his act would result in death. According to Dr. Raju: "One of the aspects of his problem is impulsivity, aggressiveness, short temperament, evasion, poor foresight". In Dr. Raju's opinion, the appellant had an intelligence quotient of a child aged six to eight years.

Under cross-examination, Dr. Raju said that he could not give evidence with respect to the accused's sanity in June 1990. In reply to a question from the jury, Dr. Raju ventured the opinion that it is quite possible that someone who is moderately retarded could kill another intentionally.

On the 4th March 1991 and notwithstanding Dr. Raju's testimony, the appellant was convicted of murder of his father and was sentenced to death by hanging. He now appeals against his conviction.

The central issue in the appeal is whether the learned trial Judge misdirected the jury on the defence of legal insanity and on the intent required for murder.

The direction on legal insanity

Counsel for the appellant submitted that in two respects, the learned Judge misdirected the jury on the defence of legal insanity. Firstly, she directed the jury in terms of English law (where one of the tests of legal insanity is ignorance of the nature and quality of the actus reus) instead of directing the jury in terms of Saint Lucian law (where one of the tests of legal insanity is ignorance of the nature or consequences of the actus reus). Secondly, she failed to advise the jury of the availability of the statutory special verdict. In support of his submission, Counsel for the appellant relied on sections 21 and 1020 of the Criminal Code of Saint Lucia

Section 21 provides as follows:-

"A person accused of crime shall be deemed to have been insane at the time he committed the act in respect of which he is accused, -

- (a) if he was prevented, by reason of idiocy, imbecility, or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused, or if he did know it, he did not know that what he was doing was contrary to law;

(b)....."

Section 1020 provides as follows:-

"Where, in any indictment, any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission was made, then, if it appears to the jury, before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

In view of the language of section 21, the learned Judge should have directed the jury to return a special verdict under section 1020 if the jury were satisfied that the appellant had proved on balance of probabilities that at the time of the commission of the assaults, the appellant was ignorant of the nature, consequences or unlawfulness of the assault and that such ignorance was caused by disease affecting the mind.

Although the learned Judge read section 21 to the jury, her repeated isolated references to and emphasis on the difference between right and wrong may have left the jury with the impression that legal insanity is confined to ignorance of the unlawfulness of the actus reus and does not extend to ignorance of the nature or consequences of the actus reus. Further, Counsel for the prosecution conceded that the learned Judge did not inform the jury of the special verdict prescribed by section 1020. The learned Judge therefore misdirected the jury in those two respects.

However, I feel sure that had the jury been properly directed, they would not have returned the special verdict. Dr. Raju's evidence in examination-in-chief, his answers under cross-examination and his answer to the single question from the jury fell short of proof on balance of probabilities that at the time of the commission of the assault, the appellant was suffering from the alleged legal insanity. Significantly, Dr. Raju refrained from expressing an opinion as to the state of mind of the appellant at the relevant and crucial time of the commission of the assault.

In R v Matheson (1958) 2 A.E.R. 87, Lord Goddard C.J. said at p. 89:

"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 doctors' 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".

In my opinion there were facts which entitled the jury to disagree with the expert opinion of Dr. Raju that the appellant was an idiot or was mentally retarded to the degree of legal insanity.

The jury had the benefit of the testimony of Peter Celestin who stated that the deceased was the godfather of his child. Celestin said: "I know the accused very well and I saw him often. I would say accused is a normal type of person. I never noticed he was stupid in the head". The jury also had the benefit of the testimony of two sisters of the appellant. Neither of them testified to the idiocy or mental retardation suggested. The jury also had the benefit of the appellant's lengthy extra-judicial confession. Having regard to the totality of the evidence, the jury must have concluded that notwithstanding the opinion of Dr. Raju, at the time of the commission of the assaults, the appellant was not mentally retarded to the degree of legal insanity. A proper direction to the jury would not have resulted in a special verdict. There was therefore no miscarriage of justice as a result of the learned Judge's misdirection on the issue of insanity or as a result of her failure to advise the jury of the availability of the special verdict.

The direction on intent

Counsel for the appellant further submitted that the learned Judge misdirected the jury on the intent required for murder. Counsel contended that the learned Judge's directions to the jury on that intent were inadequate and confusing.

Sections 71 to 75 inclusive of the Criminal Code of Saint Lucia deal with various circumstances which may surround a person's act and from which it may be inferred that that person intended that act and the consequences thereof. For the purposes of this case, the relevant sections are sections 71, 72 and 75.

Section 71 provides that:

"If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event within the meaning of this Code although he does not do the act for the purpose of causing or of contributing to cause the event."

Section 72 provides that:

"If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or

that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

Section 75 provides that:

"If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also belief, the act is unlikely to cause or to contribute to cause the event."

These sections in effect provide that a person who voluntarily commits an act intends a consequence of the act if he believes in the probability of the consequence or commits the act with the purpose of achieving the consequence. The questions therefore arise as to whether the belief is required to be subjective or objective, what degree of probability is required and whether the learned Judge properly directed the jury on the requisite belief and degree of probability.

Subjective or objective belief

In Reg v Hyam (1975) A.C. 55 at p.94, Lord Diplock said:

"Intention can only be subjective. It was the actual intention of the offender himself that the objective test was designed to ascertain. So long as the offender was not permitted to give evidence of what his actual intention was, the objective test provided the only way, imperfect though it might be, of ascertaining this. The Criminal Evidence Act 1898 changed all this. A defendant to a charge of felony became entitled to give evidence in his own defence. The objective test no longer provided the only means available in a criminal trial of ascertaining the actual intention of the offender; but it had been so for so long that this House overlooked the historical fact that the objective test did not define the relevant intention as to the consequences of a voluntary act. It was no more than one means of ascertaining the relevant intention, to which the Criminal Evidence Act 1898 added another - the defendant's own evidence of what his actual intention was."

Lord Diplock's dictum was approved in Frankland v The Queen (1987) A.C. 576. There, Lord Ackner (delivering the opinion of the Privy Council) said at p. 594:

"Their Lordships, having had the benefit of extended argument, and, particularly in the light of the recent cases, have concluded that the decision in Director of Public Prosecutions v. Smith (1961) A.C. 290, insofar as it laid down an objective test of the intent in the crime of murder, did not accurately represent the English common law. It therefore follows that the trial judges in both trials were in error in directing the jury that they were entitled to ascertain the intent of the accused by reference to an objective test."

The subjective test of intention propounded by Lord Diplock and adopted by the Privy Council in *Frankland v The Queen* predominates in sections 71 and 72 of the Criminal Code. Section 71 equates a person's subjective intention in regard to a consequence with that person's subjective belief in the probability of the consequence. Section 72 creates a presumption of subjective belief and resulting subjective intention in regard to the probability of a consequence. Although that presumption is based on objective conduct (i.e. hypothetical "use of reasonable caution and observation"), it is expressly made rebuttable by proof of subjective state of mind (i.e. subjective disbelief in the probability of the consequence). The subjective test of belief and resulting intention therefore dominates both sections 71 and 72.

In *Jaganath v The Queen* (1967) 11 W.I.R., 315 at p. 321, A.M. Lewis, C.J. said:

"The presumption which arises under s. 72 (Supra) is not an absolute one and may be rebutted by proof that the accused "believed that the act would probably not cause, or contribute to cause" death. This provision, which directs the inquiry subjectively to the state of mind of the accused at the time he committed the act which resulted in death, is, in our view, the answer to the submission of the learned Attorney-General that an accused person who inflicts a wound with a dangerous weapon cannot be heard to say that he did not intend to cause the injuries which he in fact caused."

In explaining section 71, the learned Judge did not tell the jury that the belief referred to therein is subjective. In explaining section 72 and in applying it to the appellant's extra-judicial confession, she said:

"So when we are looking at the statement we will see whether he said anything which would rebut that presumption that one would normally presume because this presumption, this Section 72 is an objective test that is applied to the reasonable man and the ordinary man and the normal consequences that would flow."

The failure to mention the subjective test in relation to section 71 and the emphasis placed on the objective test in relation to section 72 must have left the jury with the impression that the requisite intent for murder is objective. This was a serious misdirection of the jury.

The degree of probability

In explaining sections 71 and 72 to the jury, the learned Judge said nothing about the word "probably" which appears in both sections. The learned Judge should have pointed out to the jury that there are degrees of probability.

In R v Hancock (1986) 1 A.E.R. 641 at pp 650 and 651, Lord Scarman said;

"I agree with the Court of Appeal that the probability of a consequence is a factor of sufficient importance to be drawn specifically to the attention of the jury and to be explained. In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability: if the likelihood that death or serious injury will result is high, the probability of that result may, as Lord Bridge noted and Lord Lane C.J. emphasised, be seen as overwhelming evidence of the existence of the intent to kill or injure. Failure to explain the relevance of probability may, therefore, mislead a jury into thinking that it is of little or no importance and into concentrating exclusively on the causal link between the act and its consequence. In framing his guidelines Lord Bridge emphasised that he did not believe it necessary to do more than to invite the jury to consider his two questions (see (1985) 1 All A.E.R. 1025 at 1039, (1985 (A.C) 905 at 929. Neither question makes any reference (beyond the use of the word 'natural') to probability. I am not surprised that when in this case the judge faithfully followed this guidance the jury found themselves perplexed and unsure. In my judgment, therefore, the Moloney guidelines as they stand are unsafe and misleading. They require a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached on a consideration of all the evidence."

In this case, the defence was legal insanity. Evidence was adduced with the object of establishing that defence. Although the jury must have concluded that the appellant was not mentally retarded to the degree of legal insanity, they may have accepted the evidence that the appellant was in fact stupid and mentally retarded. This retardation must necessarily have adversely affected the appellant's foresight of a high degree of probability that two blows to his father's head with a stick would result in the father's death. I do not know what degree of foresight the jury would have ascribed to the appellant if they were advised as to the significance of the degree of the probability of the father's death and the appellant's foresight thereof.

The verdict of murder

In the particular circumstances of this case, I do not feel sure that the jury would have returned a verdict of murder if they had been properly directed on the issue of intent to kill and on the circumstances of subjective belief and probability from which such intent may be inferred. They may have concluded that the appellant did not assault his father with the purpose of killing him. In that case, the verdict of murder could only have been

based on the conclusion that the appellant believed that his assaults would probably result in his father's death. Had the jury's attention been directed to degrees of probability and to the appellant's subjective foresight thereof or subjective belief therein, they may have concluded that the degree of probability which the appellant foresaw or believed in was not sufficiently high to justify a verdict of murder. For this reason, I cannot allow the verdict of murder to stand.

However, section 168(1) of the Criminal Code provides that "Whoever causes the death of another person by unlawful harm is guilty of manslaughter". There can be no doubt that the appellant caused the death of his father by unlawful harm. Accordingly, acting under section 362 of Act No. 17 of 1969 and without allowing or dismissing the appeal, this Court should substitute the verdict of manslaughter for the verdict of guilty of murder and should set aside the sentence of death and instead thereof should sentence the appellant to fifteen (15) years' imprisonment.

MONICA JOSEPH, J.A. (Acting)

I have read and concur with the judgment of the learned Chief Justice. The appellant, whose defence at the trial was of insanity, appeals against his conviction. I shall deal with three of grounds of appeal argued: Grounds 3, 4 and 5.

The third ground is that the direction on provocation and insanity were inadequate and would have confused the jury. Counsel for the appellant submitted that the law on insanity in the United Kingdom is radically different from the law in St. Lucia, in that in the former country the test of insanity is the M'Naghten Rule, that is, whether at the time of the commission of the act, the accused was in a sufficient mental state to know the nature and quality of his act he was doing, or, if he did know it, whether he knew the act was right or wrong.

Counsel contended that the difference is that, whereas in the English rule the use of the word "and" between the words "nature and quality" is conjunctive, the use of the word "or" in the St. Lucia code is disjunctive. Once insanity is raised, Counsel submitted, it is incumbent on the Judge to direct the jury on the law of insanity in terms compatible with the law in St. Lucia rather than in terms compatible with English law. It was Counsel's submission that the test used by the learned trial Judge was "Did the appellant know right from wrong" which is the English test.

In section 21 of the Code (the text of which the learned Chief

Justice has given), there is a presumption of insanity if, at the time of the commission of the offence the Accused was an idiot, or an imbecile or if he was suffering from a mental derangement or a disease which so affected his mind that he was unable to appreciate one of three things: 1) the nature of his act; 2) what consequence flows from his act: 3) if he did know what he was doing he did not know that what he was doing was contrary to law.

The learned Judge, although correctly defining the law, went on to explain to the jury the insanity test to be applied, that is, the accused's knowledge of the 'nature and quality' of his act, which is the test enunciated in the M'Naghten case, which test differs from what the Code provides, so that there was a misdirection on the issue of insanity.

As regards the fifth ground, the Director of Public Prosecutions conceded that there was a misdirection in law in that the Judge did not place before the jury the alternative special verdict provided in section 1020.

I think that the jury properly directed would not have returned the special verdict. The jury had before them the evidence of Dr. Raju, the appellant's sisters and Peter Celestin. Dr. Raju was not in a position to express a view as to the state of mind of the appellant at the time he committed the offence as he had not examined him around that time.

On the other hand, there was no evidence from the appellant's sisters and Peter Celestin who knew him well of any idiocy or condition affecting his mind to satisfy the jury on a balance of probabilities that he was insane within the meaning of section 21.

Though there were misdirections on the insanity test to be applied, and also on the omission to place before the jury the alternative special verdict, there has been no miscarriage of justice as a jury properly directed would not on the evidence before them have returned the special verdict.

The fourth ground is that the directions on the requisite intent for the crime of murder were inadequate and confusing to the jury. Counsel submitted that the learned Judge failed to direct the jury that, in determining the issue of intent, it was necessary to consider whether the accused foresaw the probable consequences of his action, and to explain to them that there are degrees of probability in the consideration of the existence of the requisite intent as asserted in *R v Hancock* (1986) 1 A.E.R. page 641.

Proof of the intent referable to this case is dealt with in sections 71 and 72 of the Code, the texts of which have been set out in the judgment of the Learned Chief Justice.

The evidence of the accused was that, after his father quarrelled with him about not cooking his dinner and threatened to put his things out of the house, his father went into his bedroom.

Accused remained outside for a while, then entered the bedroom, took a stick and gave his sleeping father two lashes: on the side of his neck and behind his head. The Doctor's evidence confirmed that the deceased received two blows - one blow to the left shoulder and one back to the head.

Having explained to the jury the test of the reasonable man as is required by section 72, it was necessary for the learned Judge to turn to the subjective test and to direct the jury that they should consider the state of mind of the accused at the time of the commission of the offence; to ascertain whether there was any evidence to displace the presumption of intent to cause the death of his father, and that in doing so they should determine what was the belief held by the appellant at that time.

Regarding the intent presumption and the subjective test to be applied, A.M. Lewis, C.J. in *James Jaganath v The Queen* (1968) 11 W.I.R. page 315 at page 321, letter 'D' had this to say;;

"The presumption which arises under s. 72 is not an absolute one and may be rebutted by proof that the accused "believed that the act would probably not cause, or contribute to cause" death. This provision which directs the inquiry subjectively to the state of mind of the accused at the time he committed the act which resulted in death, is, in our view, the answer to the submission of the learned Attorney-General that an accused person who inflicts a wound with a dangerous weapon cannot be heard to say that he did not intend to cause the injuries which he in fact caused."

It was the duty of the learned Judge to direct the jury on the meaning of probability and the degree of probability required, in ascertaining whether the accused realised the likely result of his act. The probability of the result of an act is an important matter for the jury to consider and can be critical in their determining whether the result was intended. (*R v Hancock* at page 650 letter "g" which appears in the Learned Chief Justice's judgement).

It was particularly important to direct the jury on the required degree of probability of the consequence of the appellant's act in order for them to conclude whether or not he had formed the necessary intent in view of the evidence of Dr. Raju that he is mentally retarded.

It may well be that the jury might have come to the conclusion that, although the appellant was not insane, the condition of his mind was such that he did not foresee that striking his father with that stick would cause his death.

Failure to direct the mind of the jury to the subjective test and to refer them to the degrees of probability are both misdirections.

I agree that the verdict of manslaughter should be substituted for the verdict of murder and that the sentence be as stated by the Learned Chief Justice.

V.F. FLOISSAC,
Chief Justice

I concur.

C.M.D. BYRON,
Justice of Appeal

M. JOSEPH
Justice of Appeal (Acting)