H. C. OF A. 1936. Moss v. Moss.

These circumstances are sufficient to justify the exercise of the Court's discretion to hear the petition, notwithstanding the lapse of time since the decree absolute, in the appellant's favour.

The appeal should be allowed.

Appeal allowed. Order of the Supreme Court of Queensland of 2nd August 1935 set aside, and in lieu thereof it is ordered that the appellant, the plaintiff in the proceedings before the Supreme Court, be at liberty to file a petition in the Supreme Court for permanent maintenance. The respondent will pay the costs of this appeal and the costs in the Supreme Court.

Solicitors for the appellant, *Carruthers, Hunter & Co.*

Solicitors for the respondent, *McLachlan, Westgarth & Co.*

Appl *Michael Andrew Curren* 27 ACrimR 49 | Foll *R* v *Weeks* (1993) 66 ACrimR 466 | Cons *Question of Law Reserved (No1 of 1997)* (1997) 70 SASR 251 | Refd to *Ward* v *R* (2000) 23 WAR 254 | Foll *R* v *McDermott* (2003) 172 FLR 1

J. B.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

PORTER.

H. C. OF A. 1933. CANBERRA, *Jan.* 31; *Feb.* 1. Dixon J.

Criminal Law—Insanity—Temporary—Charge of murder.

Charge to the jury upon a plea of temporary insanity set up to an indictment for murder.

TRIAL on Indictment.

On 31st January and 1st February 1933 (before the passing of the *Seat of Government Supreme Court Act* 1933) Bertram Edward Porter was tried on indictment for murder at Canberra before *Dixon* J. sitting in the original jurisdiction of the High Court under sec. 30B of the *Judiciary Act* 1903-1932.

It appeared that the prisoner had administered strychnine to his infant son aged eleven months and had then attempted to take strychnine himself but had been interrupted by the entry of the police. The child died, and this was the murder with which he was charged. His defence was that he was insane at the time he committed the act.

The facts set up in support of the defence were briefly as follows :— After a period of separation from his wife during which he looked after the child, he had made desperate but unsuccessful efforts to effect a reconciliation. He became extremely emotional and showed symptoms of a nervous breakdown. He was sleepless, and took quantities of aspirin, phenacetin and caffein. He then travelled with the child from Canberra to Sydney in circumstances which made it probable that he was without sleep for three nights. On his return he had a final interview with his wife, in which he appeared to have lost all control of his emotions. On her refusing to have anything to do with him or the child, he told her he would poison himself and the child and hastened away to obtain the strychnine. She informed the police, who found him shut in his house, sobbing. He had just given the strychnine to the child and was about to take it himself.

P. V. Storkey, for the Crown.

O'Sullivan and *Hidden*, for the prisoner.

DIXON J., in summing up, said :—

The accused stands charged under the name of Bertram Edward Porter, for the murder of his child, Charles Robert Porter, committed on 28th November 1932. The crime of murder is committed when, without any lawful justification, without any excuse, without any provocation, a person of sufficient soundness of mind to be criminally responsible for his acts intentionally kills another. To begin with, every person is presumed to be of sufficient soundness of mind to be criminally responsible for his actions until the contrary is made to appear upon his trial. It is not for the Crown to prove that any man is of sound mind ; it is for the defence to establish

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inferentially that he was not of sufficient soundness of mind, at the time that he did the actions charged, to be criminally responsible. On the other hand, every person is to be presumed to be innocent of the actions charged against him until it is proved to the satisfaction of the jury beyond any reasonable doubt that he committed them.

You will see, gentlemen, that the presumptions are not of equal strength. The criminal law requires that, when a crime is charged, the things which constitute that crime shall be proved to the complete satisfaction of the jury; that they shall be so satisfied that those things were done that they have no reasonable doubt about it. On the other hand, when that is proved, and the jury turn from the consideration of the question whether the things which constitute the crime were done to the question whether the man who did them was criminally responsible for his actions or was not, because of unsoundness of mind at the moment, it is necessary for the accused person to make out positively, upon a balance of probability, that he was not criminally responsible, and that he was not of such a mental condition at that time as to be criminally responsible. He has not got to remove all doubt from your minds. He, or rather his counsel, has merely to make it appear to you as more probable on the whole that that was the state of his mind at the time he did the things charged, than otherwise.

You will therefore see that the first questions in this case for your consideration are these: Did the prisoner administer strychnine to his infant son with the intention of causing his death; and, did its death result from his so doing? Unless you are so satisfied, beyond reasonable doubt, that he did administer strychnine to the child with the intention of causing his death, and that death resulted from strychnine, then it is your simple duty to return a plain verdict of not guilty, because he would not have done the things which constitute murder.

Probably you will have no difficulty at all in arriving at the conclusion that the prisoner did administer strychnine to his son with the intention of causing its death, and that death did result from the strychnine. I am bound to add that it is entirely for you to give effect to that evidence, and, if you think the evidence is not

so strong as I and the Crown Prosecutor have suggested it is, you will stop the case at that stage. You will not go any further and consider the question of insanity.

[His Honour referred to the facts material to the commission of the acts constituting the crime and proceeded :—]

The facts, as I have said, appear to me to be clear, but if you disagree with that, you should give effect to your disagreement by finding the prisoner not guilty. The responsibility is yours, and not mine. If, on the contrary, you are satisfied beyond reasonable doubt, to the exclusion of all doubt, of these three matters—(1) that he did administer strychnine to the child ; (2) that he did so with the intention of killing it ; and (3) that the child's death did result from that administration—then you will turn and proceed to consider whether, at that particular time when he did those things, his state of mind was such as to make him criminally responsible for his act. That means, has it been made out to your reasonable satisfaction that, at the time, the prisoner's faculties were so disordered that he is not in law criminally responsible for what he did. If you form the opinion that his faculties were so disordered that he is not criminally responsible, you will find a verdict of not guilty on the ground that the prisoner was insane at the time the offence was committed. You do not find him guilty but insane, as they do in some British countries. According to the law in this country the technical verdict in such a case is : Not guilty on the ground of insanity at the time of the commission of the offence charged. It is your function specifically to state that ground for your verdict of not guilty, because the legal consequences are quite different from those which follow a plain verdict of not guilty on the ground that the prisoner did not do the things charged. If you think it is not proved that the prisoner poisoned his child and brought about his death, your verdict, of course, will be simply not guilty, and he will be completely free. If, however, you think that he did the things charged against him, but that, at the time, his mind was so disordered that he could not be held responsible, then you will find him not guilty on the ground of insanity at the time of the offence charged.

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There is a legal standard of disorder of mind which is sufficient to afford a ground of irresponsibility for crime, and a ground for your finding such a verdict as I have indicated. It is my duty to attempt to explain that standard to you. It is plain from what passed in the witness-box this morning, when Dr. Henry was giving evidence, that the legal standard is a matter which he himself wished to discuss, but I prevented him, and kept him to his medical function. In my judgment, from remarks which have been made at the Bar in the course of speeches, it appears that some difference of opinion between learned counsel exists as to what that legal standard is. You will take my explanation of it, and disregard the attempts which have been made elsewhere to explain it, because mine is the responsibility of laying down what the law is. Yours is the responsibility of applying it to the facts.

Before explaining what that standard actually is, I wish to draw your attention to some general considerations affecting the question of insanity in the criminal law in the hope that by so doing you may be helped to grasp what the law prescribes. The purpose of the law in punishing people is to prevent others from committing a like crime or crimes. Its prime purpose is to deter people from committing offences. It may be that there is an element of retribution in the criminal law, so that when people have committed offences the law considers that they merit punishment, but its prime purpose is to preserve society from the depredations of dangerous and vicious people. Now, it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds. The law is not directed, as medical science is, to curing mental infirmities. The criminal law is not directed, as the civil law of lunacy is, to the care and custody of people of weak mind whose personal property may be in jeopardy through someone else taking a hand in the conduct of their affairs and their lives. This is quite a different thing from the question, what utility there is in the punishment of people who, at a moment, would commit acts which,

if done when they were in sane minds, would be crimes. What is the utility of punishing people if they be beyond the control of the law for reasons of mental health? In considering that, it will not perhaps, if you have ever reflected upon the matter, have escaped your attention that a great number of people who come into a Criminal Court are abnormal. They would not be there if they were the normal type of average everyday people. Many of them are very peculiar in their dispositions and peculiarly tempered. That is markedly the case in sexual offences. Nevertheless, they are mentally quite able to appreciate what they are doing and quite able to appreciate the threatened punishment of the law and the wrongness of their acts, and they are held in check by the prospect of punishment. It would be very absurd if the law were to withdraw that check on the ground that they were somewhat different from their fellow creatures in mental make-up or texture at the very moment when the check is most needed. You will therefore see that the law, in laying down a standard of mental disorder sufficient to justify a jury in finding a prisoner not guilty on the ground of insanity at the moment of the offence, is addressing itself to a somewhat difficult task. It is attempting to define what are the classes of people who should not be punished although they have done actual things which in others would amount to crime. It is quite a different object to that which the medical profession has in view or other departments of the law have in view in defining insanity for the purpose of the custody of a person's property, capacity to make a will, and the like. With that explanation I shall tell you what that standard is.

The first thing which I want you to notice is that you are only concerned with the condition of the mind at the time the act complained of was done. That is the critical time when the law applies to the man. You are not concerned, except for the purpose of finding out how he stood at that moment, what his subsequent condition was or what his previous condition was. He may have been sane before and he may have been sane after, but if his mind were disordered at the time to the required extent, then he should be acquitted on the ground of insanity at the time he committed the offence. It is helpful in finding out how he was

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at the time to find out how he was before and after. It is merely because it is helpful that we go into it in this case, not because it is decisive.

The next thing which I wish to emphasize is that his state of mind must have been one of disease, disorder or disturbance. Mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or of long standing. If that existed it must then have been of such a character as to prevent him from knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong. You will see that I have mentioned two quite different things. One state of mind is that in which he is prevented by mental disorder from knowing the physical nature of the act he is doing; the other is that he was prevented from knowing that what he was doing was wrong. The first relates to a class of case to which so far as I am concerned I do not think this case belongs. But again, that is my opinion of a matter of fact and it is for you to form your opinion upon it. In a case where a man intentionally destroys life he may have so little capacity for understanding the nature of life and the destruction of life, that to him it is no more than breaking a twig or destroying an inanimate object. In such a case he would not know the physical nature of what he was doing. He would not know the implications and what it really amounted to. In this case, except for the prisoner's own statement from the dock that after a certain time he remembered nothing of what he did, there seems to be nothing to support the view that this man was in such a condition that he could not appreciate what death amounted to or that he was bringing it about or that he was destroying life and all that is involved in the destruction of life. It is for you to form a conclusion upon that matter, but I suggest to you that the evidence of what he said to the police when he was found after he had given the poison to the child and was about, apparently, to administer it to himself, shows that he understood the nature of life and death and the nature of the act he was doing in bringing it about. But you are at liberty to take into account that he said

he knows nothing of what he did at that time. If you form the conclusion that notwithstanding the evidence which I have mentioned the mental disorder of this man was such that he could not appreciate the physical thing he was doing and its consequences, you will acquit him on the ground of insanity at the time he did the thing charged.

The other head is of quite a different character, namely, that his disease or disorder or disturbance of mind was of such a character that he was unable to appreciate that the act he was doing was wrong. It is supposed that he knew he was killing, knew how he was killing and knew why he was killing, but that he was quite incapable of appreciating the wrongness of the act. That is the issue, the real question in this case. Was his state of mind of that character? I have used simple expressions, but when you are dealing with the unseen workings of the mind you have to come to close quarters with what you are speaking about, and it is very difficult to be quite clear as to what is meant in describing mental conditions. I have used the expression "disease, disorder or disturbance of the mind." That does not mean (as you heard from the doctor's replies this morning to certain questions I asked him) that there must be some physical deterioration of the cells of the brain, some actual change in the material, physical constitution of the mind, as disease ordinarily means when you are dealing with other organs of the body where you can see and feel and appreciate structural changes in fibre, tissue and the like. You are dealing with a very different thing—with the understanding. It does mean that the functions of the understanding are through some cause, whether understandable or not, thrown into derangement or disorder. Then I have used the expression "know," "knew that what he was doing was wrong." We are dealing with one particular thing, the act of killing, the act of killing at a particular time a particular individual. We are not dealing with right or wrong in the abstract. The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason

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about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by "wrong"? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. If you think that at the time when he administered the poison to the child he had such a mental disorder or disturbance or derangement that he was incapable of reasoning about the right or wrongness, according to ordinary standards, of the thing which he was doing, not that he reasoned wrongly, or that being a responsible person he had queer or unsound ideas, but that he was quite incapable of taking into account the considerations which go to make right or wrong, then you should find him not guilty upon the ground that he was insane at the time he committed the acts charged. In considering these matters from the point of view of fact you must be guided by his outward actions to a very large extent. The only other matter which can help you really is the medical opinion. I think the evidence may be described as his outward conduct and the medical opinion. It is upon this you must act. The medical opinion included explanations of the course of mental conditions in human beings generally.

[His Honour reviewed the circumstances affecting the question of the prisoner's state of mind at the time of the commission of the acts charged and the medical evidence and proceeded:—]

In conclusion I go back to what I consider the main question of the case and it is whether you are of the opinion that at the stage of administering the poison to the child the man whom you are trying had such a mental disorder or diseased intelligence at that moment that he was disabled from knowing that it was a wrong act to commit in the sense that ordinary reasonable men understand right and wrong and that he was disabled from considering with some degree of composure and reason what he was doing and its wrongness. If you answer that question in his favour you will find him not guilty on the ground of insanity at the time of the commission of the offence charged. If you answer the question against him, and you have already formed a conviction on that question, that he committed the actual act which constituted murder with the necessary intention of bringing about death, you will find him

guilty of murder. I repeat that the burden of establishing to your complete satisfaction to the exclusion of all reasonable doubt that he did all the acts with the requisite intention of killing which constitutes murder and brought about death, is upon the Crown. I think upon the evidence you will have little difficulty on that point. The burden of establishing to your reasonable satisfaction, not to the exclusion of all doubt, but on the balance of probability, that his state of mind was one which I have described is upon the prisoner. If you are in the condition of mind of being quite unable to answer that question it will be your duty then to find him guilty, assuming that you have arrived at the conclusion that you are convinced that the act, if that of a sane man, would amount to murder. Three verdicts upon this view of the case are open to you. You may find him completely not guilty, which would mean that you are not satisfied beyond reasonable doubt that he caused the death intentionally by administering strychnine. You may find him not guilty on the ground that he was insane at the time he committed the act, which would mean that you were satisfied beyond reasonable doubt that he administered strychnine and that it caused the death but at the time his intelligence was so disordered that he was in such a state that he was not criminally responsible for his act. Finally, you may find him guilty of murder.

You will now retire to consider your verdict.

The jury returned the following verdict:—

Not guilty on the ground of insanity at the time of commission of the act charged.

Solicitor for the Crown, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitor for the prisoner, *Felix Mitchell*, Cooma.