31 August 1932

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Oris.

K I N G S B U R Y v R E X

JUDGMENT

RICH J.

DIXON J.

EVATT J.

McTIERNAN J.

49/1932

This is an application for special leave to appeal by a prisoner from a judgment of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal dismissing his appeal from a conviction for feloniously wounding with intent to murder. At his trial it was not disputed that the prisoner discharged a shot gun at the prosecutor inflicting a serious wound upon his arm. According to the prosecutor's evidence the prisoner's attack on him was unprovoked and without cause. The prisoner had invited him upon an expedition in search of beer. The prosecutor consented to come, not, as he says, intending to participate in consuming the

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beer,having taken no drink for some considerable time. After the prisoner had obtained beer he drove back to the house where he had picked the prosecutor up,whence,after the company had drunk some beer,he drove him to the prisoner's own house : he there requested the prosecutor to bring a bottle of beer inside and,when he had thus inveigled him in the house,he procured a shot gun,informed him with sanguinary epithets that now he had got him where he wanted him, and fired the gun at his head-- hitting him on the arm and side of the body. There was no eye witness so far as is known of the ocurence,but the prisoner's son,a boy of eleven,was in the house and probably when the men entered was in the room, which he then left. At the trial he was not called as a witness. The

prisoner himself did not give evidence on oath but made an unsworn statement. According to him the prosecutor asked to be taken to the prisoner's house to see his wireless and then after being there for half an hour asked the prisoner to drive him home. The prisoner refused, whereupon the prosecutor went off threatening to return with some notorious characters as auxiliaries to avenge the insult. In twenty minutes he returned but unaccompanied. He again demanded to be driven home and upon a second refusal picked up a chair and attacked the prisoner. The prisoner picked up his shot gun which was near by and the prosecutor, placing his hand in his coat pocket as if to fire a pistol, threatened to shoot him. The prisoner then

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shot at his arm in order,as he said,to protect his own life.

Neither of these rival stories possesses much verisimilitude. A plain clothes constable of police who,with a uniformed constable, arrested the prisoner within half an hour of the affair,said in his evidence that he would certainly say that the prisoner was under the influence of some drug,that he was in a sort of doped condition,that he was rather excited,that he would say that he was what he would term nearly mad.

Upon this material it is evident that one or other of three different explanations of the prisoner's conduct might have been adopted. He might have been considered the perpetrator of a purposeless act of violence to which he was driven by drink and drugs.

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But if his condition was thought to be more rational and sober,it might have been found that he attempted to murder or maim for reasons which both he and his victim chose to suppress. Again on the same hypothesis,his version of the incident might have been accepted and self protection might have been assigned as the motive for his use of fire arms.

The Crown case seems to have been based at the trial on the first view of the matter,notwithstanding that the formation of an intention to murder might be considered incompatible with a condition of frenzy.

The prisoner's case was represented by the third view of the matter,although,if the jury rejected the notion that he did not intend

to kill in the process of protecting himself,his account of the apprehended danger to his life afforded slender justification for killing. The two constables of police gave very different accounts of the conduct of the prisoner when they arrested him. According to the uniformed constable,who was called by the prisoner,he offered no resistance and uttered no threats. According to the plain clothes constable,who was called for the Crown,the prisoner greeted the constables with the statement that he had shot the prosecutor and would shoot them too and moved towards the gun ; that he struggled and was handcuffed only by force ; that he said that the prosecutor had broken in and was wrecking the place and he shot him. In his summing up the trial Judge commenced by stating the nature of the 66

charge and that the accused set up self-defence ; he proceeded to deal with the inferential proof of intent and said that every person is supposed to intend the necessary and reasonable consequences of his own acts. He next stated some of the evidence representing the prosecutor's version of the incident :then he pointed out that it did not appear that the prisoner possessed a pistol: next he turned to the evidence of the plain clothes constable and emphasised its importance, concluding his treatment of the Crown case with the observation that it depended entirely on the prosecutor's evidence supported by that of the plain clothes constable. He then turned to the prisoner's version. He directed the jury that if the prosecutor did say he would shoot and lead the prisoner to believe that he had a pistol in

his pocket,the accused would be perfectly right in endeavouring to defend himself ; they would find him not guilty,if they found it was true that the prosecutor had a pistol in his pocket and was going to fire at him ; if the prisoner believed that,it would be sufficient to acquit him. It is by no means clear whether this means that the prosecutor must have had a pistol and the prisoner must have believed it,or that it was enough that the prisoner believed it although erroneously. The circumstances made it at least desirable that the jury's attention should be drawn to the fact that the plea of self defence became only relevant when and if they decided that the prisoner shot with the intention to kill. If they accepted the view that he intended only to injure,the possession by the prosecutor of

a pistol and the prisoner's belief upon that subject became unimportant questions. This,however, was not done. Again, although properly considered the evidence of the plain clothes constable tended to support the prisoner's statement that he shot in self defence,but not his statement that he fired at the arm,yet it was relied upon as contributing much of the strength of the Crown's case. No doubt this was because it ascribed to the prisoner a state of great and homicidal excitement WHICH extending beyond the prosecutor, threatened the entire Police Force. But this very fact at once raises the question whether the prisoner's condition of mind might not have been incompatible with the formation of an intent to murder.

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The learned Judge gave no direction to the jury upon the question how far the complete absence of motive and the evidence of the frenzied condition of the prisoner arising probably from drugs as well as drink should be regarded by them as negativing the necessary intent. Whether it did so or not would depend largely upon matters of degree, but in the course which the case took, it was extremely desirable that pointed attention should be drawn to the question. We cannot think that the fact that the prisoner adopted another view of the matter could relieve the learned Judge from the task of dealing adequately with the true tendencies of the evidence in support of the Crown case, including that of the plain clothes constable upon which he laid so much emphasis against the prisoner.

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The evidence of the uniformed constable was put before the jury as contracdictory of that of his comrade and requiring the jury to choose between them. Indeed it is not unlikely that the jury were left with the impression that a critical step in pefforming their duty was to determine which of these witnesses was committing perjury,and their verdict might upon the Judge's charge be taken to imply a belief in the testimony of the plain clothes constable. After the trial and before the hearing of the appeal in the Supreme Court an enquiry was held by a police inspector into the conflict between the two constables. He took much evidence and made a report and all this material was laid before the Supreme Court. The Supreme Court also took,as further evidence,the

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testimony of the prisoner's son,who supported much of his father's story. The conclusions of the police inspector were that the uniformed constable answered truthfully,as it appeared to him,all questions put to him : that the plain clothes constable's evidence in regard to the prisoner's resistance of arrest and violence generally was much exaggerated. He considered that if the prisoner used some of the expressions attributed to him " it was just wild vapouring; it had no purpose behind it ". The Supreme Court dismissed the appeal substantially on the grounds that the conflict between the constables was an issue fought at the trial and that the additional evidence was available and consequently that it could not be said that there was a miscarriage of justice. We think their Honours' attention was not brought to the matters we have referred to in the

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learned Judge's charge and to the manner in which the jury's verdict may, because of that charge,be said to depend upon the jury's belief in the plain clothes constable. The voluminous depositions upon the Police enquiry throw a great deal of light upon the conflict between the constables and a convenient course was followdd in placing them before the Supreme Court. There is much reason to fear that the Inspector's opinion is correct and that upon a matter treated as of great importance at the trial the jury were misled. Such a fear may perhaps not be enough in itself to warrant interference with the verdict. But the manner in which the case was presented to the jury was for the reasons we have given far from satisfactory. Briefly stated,the result was that while to some material aspects of the case the jury's attention was not drawn,and from

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others it was diverted,upon a matter presented as most material subsequent investigations show that they may have been gravely misled.

In these circumstances we think the conviction should be set aside upon the ground of miscarriage of justice and a new trial ordered.

Special leave will be granted. The Appeal will be allowed. The judgment of the Supreme Court will be discharged,the conviction will be quashed and a new trial will be ordered. This does not mean that the Crown may not,if it is so advised,proceed upon a new indictment instead of going to a new trial upon the old one.

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KINGSBURY v R E X

O R D E R

Special leave to appeal frc the order of the Supreme Court as a Court of Criminal Appeal granted. Appeal allowed. Order of the Supreme Court discharged. Conviction quashed. New trial ordered.

Applin. for bail to be made to the Supreme Court. (Judge)