ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

TSIGOS

v.

THE QUEEN

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY, 14th APRIL 1965

A. C. Brooks, Government Printer, Melbourne
C.7639/60

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JUDGMENT BARWICK C.J.

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The appellant was found guilty on the 25th day of February, 1964 by a jury in the Central Criminal Court at Sydney of the murder of his wife. His appeal to the Court of Criminal Appeal against his conviction and seeking a new trial was dismissed. He moves this Court for special leave to appeal upon the grounds, first, that there was sufficient evidence adduced at his trial to require the question of whether or not on the day he shot his wife his actions in obtaining an automatic rifle from the boot of his car, removing it from its case, loading it with ten rounds of ammunition, and discharging five of them at, or in very close proximity to, his wife, of which some caused her death, were voluntary or involuntary, to be specifically submitted to the jury, and, second, that there was evidence of provocation by grossly insulting words, sufficient to entitle the jury to return a verdict of manslaughter.

The trial judge withdrew from the jury any issue of "automatism" in the performance of the acts I have mentioned, and left to them a defence of provocation. But his instruction to the jury on the matter of provocation was defective having regard to the decision in Parker's case which had not been given at the date of the applicant's trial.

I am clearly of opinion that there was no material at the trial on which the jury could be allowed to find that the applicant was at the relevant time in such a state that his acts were automatic and involuntary and therefore the trial judge was not required to submit that question to them. I am also clearly of opinion that there was no evidence of provocation by grossly insulting words sufficient to satisfy the requirement of Section 25 of the Crimes Act (N.S.W.) and of the Common Law with respect to provocation. The deficiency in the summing up on this aspect of the case is therefore presently immaterial. I would therefore agree with the conclusions reached by the Court of

Criminal Appeal and find no need to consider, whether had I differed from them, the case is a proper one in which to give special leave.

However, in the course of the hearing of the applicant's motion, another question emerged, one which had not engaged the attention of the Court of Criminal Appeal or been the subject of any objection at the trial. That question is the propriety of a portion of the summing up which I shall later quote.

Apparently the applicant's counsel had proposed to address the jury advocating the view that at the time of the events which immediately led to the shooting of the applicant's wife, the applicant had become "disassociated" so that he was not conscious of and not in control of his before mentioned acts. But as a result of a discussion in the absence of the jury as to whether or not there was any evidence of insanity or of automatism, the applicant's counsel did not address them on either of these defences. It is clear from the course of that discussion that his Honour did not propose to direct the jury that they could not acquit the applicant altogether, but to express to them his personal view that they could "hardly return a verdict of acquittal on the facts".

In an early portion of his summing up, and no doubt with an idea of giving what he said a good deal of prominence, his Honour said -

> "When we resume I shall call to your mind the evidence that has been given in this case; the facts which are not contradicted or which are contradicted, and it is for you to make up your mind on the facts as they have been given in evidence here without fear of favour on your part, to say whether or not the Crown has proved the charge of murder or, if you are not satisfied of that, you then consider the question of manslaughter. I think I should tell you this, gentlemen, on the

evidence before the court it is my duty to tell you that you will be flying in the face of the oath you took, namely to return a verdict on the evidence, if you were to return a verdict of acquittal, because on the evidence I can see no escape of the verdict of guilty of murder or manslaughter."

The question which has exercised the Court's mind is whether by these expressions, taken in the context of the trial and of the summing up as a whole, his Honour conveyed to the jury that they could not, as distinct from should not, acquit the applicant. If I thought that the jury acquired or could have acquired this impression from the summing up, I should not be deterred from holding that the applicant's conviction should be set aside by the circumstance that the propriety of the summing up had not been raised before the Court of Criminal Appeal or that counsel had not taken any exception at the trial to this portion of the summing up. The departure from the fundamentals of a regular trial constituted by a direction to convict would be so great and its effect on the general administration of the Criminal Law so serious that the case would clearly be one for special leave.

But the critical question remains, whether the expressions used by his Honour in the context of the trial were such as might have led the jury to think that they were being told in point of law that they could not acquit this applicant.

The question is not without difficulty. I am sure the trial judge did not intend to tell the jury that in point of law they could not acquit. He was entitled, and indeed was bound, to withdraw from them the defence of automatism. He was entitled to tell them that they could not acquit the applicant on the ground that his act was involuntary. At the same time he was bound to tell them that the intent to murder must be found by them according to the criminal standard of proof; and this he did. He did not in so many words tell them, as well he might

have done, that in any case, whether or not they accepted the defence of provocation, they could return a verdict of manslaughter: but in substance he did so. What he did tell them in this respect was, in my opinion, sufficient. He told them quite clearly, and at their request reminded them, of all the elements essential to a verdict of murder and to one of manslaughter.

He was entitled to express to them his own view of the facts, reminding them that none the less they were the sole judges of them and at liberty to discard his views. This he did tell them. He was entitled to remind them of their oath to return a verdict according to the evidence.

In my opinion, in the circumstances of this case, in expressing himself as he did he was doing no more than he was entitled to do, however direct and forceful the language in which he conveyed his observation, and however unnecessary, as I think it was, in this case to speak as he did. I do not think the summing up as a whole was calculated to or would convey to the jury that in point of law they must convict the applicant either of murder or of manslaughter.

Accordingly, in my opinion, the application for special leave should be dismissed.

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JUDGMENT OWEN J.

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I agree with the Chief Justice that the application should be dismissed.

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JUDGMENT WINDEYER J.

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I agree in the view of this matter that the Chief Justice has expressed. I think that special leave should not be granted.

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JUDGMENT TAYLOR J.

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I agree that for the reasons given by the Chief Justice the application should be dismissed.

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JUDGMENT KITTO J.

I have the misfortune to take a different view as to the meaning which the passage quoted by the Chief Justice from the trial Judge's summing-up would be likely to convey to the jury. I realize that one has to remember the context in which these words were uttered, not only the context of the summing-up itself but the context of the whole trial, and particularly to remember that the defence of automatism had been raised without any real evidence to support it. But the defence of no intention to kill had also been raised, and the facts as to the killing itself were not accepted by the accused, who had asserted in his evidence that he had no recollection of that precise event.

It was essential, I think, for the Judge to make clear to the jury that the question whether the applicant killed his wife and with what intention he acted were entirely for them, not only in considering whether a conviction should be of murder or of manslaughter (as to this the jury was sufficiently instructed) but also in considering whether the accused should be acquitted altogether. The summing-up would not, of course, be necessarily vitiated by an expression, even a strong expression, of his Honour's own opinion on these questions of fact, so long as he made it clear that he was not denying to the jury the right and the duty of giving effect to their own views whether they agreed with his or not.

I express with diffidence my own opinion as to the effect that the passage I have read would be likely to have on the minds of the jury, because that opinion is not shared by my brethren. But I think that

the passage was apt to be understood by the jury to mean that because of the view the Judge took of the evidence their sworn duty obliged them to convict the applicant of either murder or manslaughter. If there was any substantial likelihood of the jury gaining that impression the trial must have miscarried in a fundamental respect. It is because I think that there was such a substantial likelihood that I would have ordered a new trial.