CAYMAN ISLANDS

IN THE COURT OF APPEAL

Criminal Appeal

No. 25/86

10-12-87

OWEN BARRINGTON BRUCE

vs

R E G I N A

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BEFORE:

The Hon. Mr. Justice Zacca, P.
The Hon. Mr. Justice Georges, J.A.
The Hon. Mr. Justice Henry, J.A.

Appearances are:

Mr. P. Lamontagne, Q.C. for the Appellant.

Mr. Sharman for the Crown.

Heard August, 24-25th. 1987

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J U D G M E N T

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The appellant was convicted of having murdered Charles Evan Rankine on or about January 30th, 1986. He had elected to be tried by a Judge alone, a procedure made available by Act No. 3 of 1986 which amended the Criminal Procedure Code by introducing section 121(2), which reads:

> "If an accused person is of the opinion that due to the nature of the case or of the surrounding circumstances a fair trial with a jury may not be possible, he may, at any time before the jury is empanelled, elect to be tried by a judge alone".

The record nowhere states that the appellant did make this election and no issue turns on it. Having regard to the language of the section, however, it does seem requisite that the circumstances which appear to justify the election and the fact of the election should be formally recorded.

The events leading to the actual killing and the manner in which it took place were not in dispute. They appear in three statements which the appellant gave to the police, the first on February 25th, 1986, the second on February 27th, 1986 and the third under caution on February 28th, 1986.

The appellant is a Jamaican. He came to Grand Cayman in 1984 and while he was in hospital here he met Lensel Dixon who worked there and they became friends. The association continued after his discharge and he met other members of Lensel's family, his stepfather, Charles Rankine, the deceased, his mother, Natalie and his brothers Blandford, Christoper and Philip.

Sometime about mid-1985, while he was at the Rankine home he heard a discussion between Natalie, Lensel and Blandford. They were planning the murder of Charles. Each had a motive. Natalie complained that she could take no more of him. Blandford stated that he had destroyed his cocaine and Lensel said he was ill-treating his mother and not giving her enough money to run the house. The statement is silent as to whether the appellant took part in any way in this discussion. The narration conveys no sense that he was either surprised or outraged.

He stated that he heard no more of the matter until some time before Pirates' Week, when Lensel told him that Charles had intended to go to Jamaica and that he Lensel, planned to go there, sent by his mother, to kill Charles while he was in Jamaica. A killing there would result in no problems for the family in Grand Cayman. Charles did go to Jamaica and Lensel did go there ahead of him, but it would appear that an opportune moment for the killing did not present itself. Lensel gave him this information on his return from Jamaica and, again the information provoked no reaction from the appellant.

In the first week of January, 1986, the appellant stated he was at Blandford's house when Blandford told him that he would have to kill Charles to get his insurance money to build back up his drug business. That same week Natalie, Blandford, Lensel and Ira, another brother who had arrived from the United Kingdom, discussed at Natalie's house a date for the killing. On that occasion Natalie warned him to say nothing about the discussion else he would be "just as in it as the rest of them". Blandford asked him whether he would kill Charles. If he did, he would get $25,000.00 of the insurance money. He said he would not.

The plans for killing Charles began to take shape. A car would be needed to take Charles from the house to the place where he would be killed. The rented car which Lensel normally drove was too well-known and would easily be identified. It was arranged that Lensel's girlfriend would rent a black Mazda 323. This she did on a Saturday morning. That same day, Blandford procured a gun - a .38 special - which the appellant saw and handled. Blandford procured ammunition as well for use in that gun.

The rented Mazda was parked in the back of Blandford's house. Christopher, the youngest brother was there and it was important to arrange matters so that he would be unaware that the car had been moved. Lensel and the appellant left Blandford's house and went to a club where it had been agreed that they would rendezvous. At the club the appellant met his wife and her sister and they had drinks. Later, Christopher came by driving Blandford's car. He left a message that Blandford was to meet him back at Red Bay.

Lensel and the appellant left the club about midnight. Lensel attempted to make a telephone call to Natalie from a phone booth but failed. He lost the money he had put in the coin-box. The appellant tried to help by calling an operator whom he knew and asking her to make the connection. He did get the number but Lensel would not speak because he feared the operator may have eavesdropped. En route to Blandford's house he bought a six-pack of beer.

They met Blandford alone at home. He told the appellant that he would have to go with Lensel because he, (Blandford) had to stay home to make sure that Christopher, who was still out, would not switch on the outside light and note that the Mazda was no longer there. Blandford gave Lensel the gun and some bullets. Lensel put on gloves, loaded the gun and placed it in his waist. He removed the dark Mazda from where it had been parked and parked the car he had been driving in that spot. He transferred the beers to the dark Mazda. They drove off, eventually coming to the Queen's Highway. They turned off from this on to a side road shortly before reaching the Tortuga Club. A little distance down that road Lensel stopped and asked the appellant to wait while he got Charles. Having said that, he pondered for a while then asked the appellant to go and fetch Charles. He was to tell Charles that the boat was there and they needed his help.

The appellant set off as requested to Charles' house. He woke Charles up and greeted Natalie who had looked out. He gave the story he had been told to give. Charles asked where the boat was and he replied it was along the Queen's Highway. Charles offered him coffee but he declined. They set off, Charles having his fishing gear with him.

He drove to the side road down which Lensel had driven and parked. Lensel came up and was showing Charles where the boat was supposed to be, but Charles could see no boat. Charles said he would wait, took his basket from the back of the car and went to the beach where he started fishing.

The statement then continues:

> "I walk back down to the Beach Lensel came to me and said "You shoot him". I became very nervous at this point and I told him I couldn't do it. When I went back down to where Charles was standing on the beach I saw there was a fish on the land. I don't know if Charles was the person who had caught it or it was there be-

> fore. I took a knife from Charles basket started to cut the fish. Lensel called out to me and said what happen if you not going to kill the man. I said "no" he took out the gun pointed it at me and said to me, "either him or the two of una". So I became more nervous than I was before so I took the gun fixed (sic) one shot in Charles' direction saw him drop. I became extremely nervous drop the gun. Lensel shout at me and said "You na see the man na dead". I see him pick up the gun and I heard five more shots fired. I did not see where these caught him or if they caught him".

The statement subsequently tells of the eventual disposal of the gun and of the appellant's departure for Jamaica. There he was contacted by the police officers from Cayman and he gave the first of the three statements mentioned.

The body was discovered later that same day. The post-mortem showed five bullet wounds, three fired from behind and two while the victim was on the ground.

With these facts not in dispute the appellant in his defence relied wholly on the defence of diminished responsibility set out in section 172 of the Penal Code, which reads:

> "where a person kills or is a party to the killing of another, he shall not be convicted of murder if he is suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induce by disease or injury) as substantially impaired his mental responsibility for his acts in doing or being a party to the killing".

The learned trial judge held that the burden rested on the appellant to show on the balance of probabilities that he

suffered at the time of the commission of the offence from diminished responsibility. This ruling is not contested.

In deciding whether or not the appellant had discharged this burden the learned judge had to resolve an acute conflict of opinion between a psychologist, Dr. Ruth Rae Doorbar, and a psychiatrist, Dr. Frank Knight, each practitioners of accepted credibility in their fields.

Before embarking on a review of the expert evidence and the findings of the learned trial judge on it, it may be well to consider the powers of an appellate tribunal in circumstances such as those now under consideration.

This was a trial by a judge without a jury and the concept of the "lurking doubt" arising from the "general feel of the case" propounded by Widgery, L.J., in R v Cooper, [1969] 1 All E.R. 32 at p 33, does not seem applicable. A jury gives no reasons. It cannot be known what route was taken to the final verdict. An appellate tribunal examining the verdict can do no more than surmise. Against that background it is possible to harbour "lurking doubts". In this case, there have been reasons given by the learned judge. His method of approach, the facts which he accepted and those which he appears to have rejected can analytically be determined. The "lurking doubt" approach must be inappropriate.

Surer guidance is to be found in the approach of appellate tribunals to the findings of judges sitting at first instance without a jury in civil matters. Mr. Lamontagne cited from the well known cases of Yuill v Yuill, [1945] 1 All E.R. 183 and Watt (or Thomas v Thomas, [1947] 1 All E.R. 583.

In the latter case at p 587, Lord Thankerton summarised the principle on which appellate courts should act:

> " I Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge an appellate court which is disposed to come to a different conclusion on the

> printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the limited evidence.
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> III The appellate court either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court".

The circumstances of this case differ from those of Yuill v Yuill, and Watt v Watt, in both of which the trial judges had emphasised the manner and demeanour of the witnesses as an important factor contributing to the conclusions at which they had arrived on the evidence. In this case, the manner and demeanour of the two witnesses have not been relied on by the trial judge as a factor in his decision. It is based on an analysis of the evidence before him. He cannot be said to have enjoyed any advantage by reason of having seen or heard the witnesses. The appellate tribunal is, therefore, in as good a position as was the trial judge, to come to a staisfactory conclusion on the written record. If it can be shown that the reasons given by the learned trial judge are not satisfactory, this court would be entitled to consider the evidence itself and arrive at its own conclusions.

Mr. Lamontagne agreed that the trial judge had set out correct principles in his approach to deciding whether or not the defence of diminished responsibility had been proved on the balance of probabilities. His contention was that the trial judge had erred

in accepting the evidence of Dr. Knight instead of that of Dr. Doorbar.

On an issue such as this where one is faced with conflicting expert opinion, there is inherently room for a divergence of conclusions, each supportable by reference to the record. One of the crucial areas of disagreement between the experts was the weight to be attached to various tests administered by Dr. Doorbar. She considered that the results of these tests were decisive in establishing that the appellant was a psychopath, more so when seen against the background of his personal history and the way in which he became involved in the murder.

Dr. Knight as a psychiatrist placed little reliance on the tests. Although his training as a psychiatrist made him aware of these tests, his discipline did not place great emphasis on them. It was pointed out to Dr. Knight that he had served on an expert advisory panel to a Commission of Inquiry appointed in Jamaica to report on the condition of a number of persons convicted of murder and held pending execution of sentence of death in what has become known as "death row". Dr. Doorbar had also been a member of the panel. There, he had gone thoroughly into thought processes and, it would appear, had given greater weight to the tests, such as those carried out by Dr. Doorbar. Challenged with the report he explained that in multi-author reports there are inevitably compromises, so that one lets pass a formulation which may not be in total accord with one's conception, but not sufficiently divergent to merit a persistent pressure for change or dissent.

Dr. Knight also explained that the task of the Commission was different from the task of examining a defendant to form an opinion as to whether or not he may be suffering from some abnormality of the mind which may have resulted in diminished responsibility.

The judge cannot be said to have erred in accepting this explanation. Once he did, then Dr. Knight's failure to devote time to evaluating the results of Dr. Doorbar's tests would not be a failure of proper methodology. Dr. Knight would have been using a

different approach and one which he testified was accepted in his discipline.

We were at some disadvantage in that it was not possible to appreciate fully from the judge's notes the effect of the cross-examination of Dr. Knight. Passages were being read from the Report of the Commission. Comments were being made by the witness. With the best will and skill which could be expected of him, no judge could accurately record such cross-examination unless he slowed the process to a pace which would make it ineffective in practice. In a case such as this, where the consequences of conviction are potentially so grave, and in which a Court of Appeal may be asked to review the judge's reasons in a detailed manner with reference to the record, it is crucial that the record should be absolutely full and complete. The evidence should either be mechanically recorded and reproduced or should be taken down by stenographers so that a full question and answer version is available for review. Generally speaking, of course, this should apply to all serious cases, but it seems particularly important in a case in which a defendant on whom the death sentence may be passed, has been permitted to elect trial by a judge alone.

Dr. Doorbar had not, prior to this case, testified on the issue of diminished responsibility. Her experience had been in treatment. The trial judge in assessing her evidence noted that for this reason she tended to be non-judgmental. Added to this was a temperament which tended to be sympathetic and compassionate with the people with whom she dealt. Consequently, within the boundaries of her discipline, she tended to present the defendant in the most sympathetic light.

An inference on which she was cross-examined in some detail is illustrative. Dr. Doorbar was shocked when she met the defendant for the first interview after his arrest. He walked in with a towel tied around his head and in what she described as "an unusual manner". It appeared that it was like a turban. When he moved it she saw that he had cut all his hair off. The defendant had thick soft curly hair. Dr. Doorbar's experience had led her to

conclude, no doubt correctly, that such hair was highly regarded in Jamaica. Even males straightened their hair to make it soft and curly. She interpreted the cutting off of the hair as an act of self-destruction, self-mutilation on the defendant's part.

The appellant gave evidence and stated that when Mr. Doorbar first saw him his hair was shaved, as it was at the time he was giving evidence. He could give no reason for his having shaved it. In cross-examination Dr. Doorbar maintained that the motivation was self-mutilation, though the appellant may have been unaware of it.

The trial judge was impressed with the lack of dogmatism with which Dr. Knight gave his evidence. The essence of his approach seems encapsulated in a note which reads:

> "So that my reading of Mr. Bruce is that he does have features that would make us think of personality disorder - anti-social personality disorder - but in my particular judgment I would have reservations about classing him as a full blown so called psychopath. The term itself is pejorative. She [Dr. Doorbar] and I are pretty much agreed that it was no longer really current except that convenient to use with laymen - I would use sociopath or anti-social personality disorder.
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> He has been demonstrated to tell lies.
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> He has a weak ego. The weak ego would be related to his becoming involved in the criminal behaviour that we have evidence of. I don't know whether I can say not wanting to or not being able to resist criminal behaviour. People have been asking this for a long time.
>
> Eventually it is left to human judgment.
>
> No way of measuring it scientifically".

He then noted that the appellant had heard the discussions about killing Charles Rankine and did not draw back. He thought it correct

to say that the appellant did not draw back, rather than could not draw back.

Hours before, when the appellant agreed to go along and be present, Dr. Knight was of the view that he did not, rather than could not, draw back in terms of his ego.

At the scene of the shooting itself, it was Dr. Knight's view that other elements had come into play additional to the appellant's ego structure.

The trial judge accepted that view. The appellant had given evidence before him. There were no indications of border line insanity. The record of his evidence appears to confirm that.

Clearly the judge preferred the conservative approach advocated by Dr. Knight and it could not be said that he erred in so doing. There was a basis for his finding that Dr. Doorbar was presenting the facts in a way calculated to support a conclusion which she considered helpful to the appellant.

For these reasons, at the close of the argument, we announced that the appeal had been dismissed.

DELIVERED this 10th day of December 1987.