J A M A I C A

IN THE COURT OF APPEAL

CRIMINAL APPEAL No. 108/1973

BEFORE: The Hon. Mr. Justice Luckhoo, J.A., (Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Swaby, J.A.

R. v. KENNETH FORDE

Mrs. Marva McIntosh for the applicant.

G. Andrade for the Crown.

February 20, 1974

LUCKHOO, J.A.:

On February 20, 1974 we dismissed this application for leave to appeal against a conviction for murder in the St. Thomas Circuit Court on July 6, 1973 before Chambers, J. and a jury.

The deceased Melmac Dacres, a farmer, died at the Isaac Barrant Hospital on February 25, 1972 of shock and haemorrhage resulting from an incised wound of the scalp inflicted on him by the applicant Kenneth Forde on February 23, 1972. The wound was inflicted with a machete wielded, according to Dr. Cottrell who performed a post mortem examination upon the deceased's body, with a great degree of force. The case for the prosecution was to the effect that on February 23, 1972 the deceased was accompanied to his cultivation at Wheelerfield by one Cordell Warburton. They spent some time there and as they were leaving the cultivation by way of the parochial road the applicant was seen coming from the main road towards the deceased's cultivation. He was carrying a bag. On approaching Dacres and Warburton the applicant put down the bag and picked up two stones whereupon the deceased asked him why he had dug his

food out of his ground. The deceased and the applicant began to quarrel. The applicant dropped the stones and walked off. The deceased and Warburton continued on their way along the parochial road towards the main road. The applicant then came towards the deceased. He was now armed with a machete. The deceased appeared to observe the applicant's approach for he drew away towards where some cane was growing. The applicant then chopped him across the head. The deceased fell to the ground. The applicant made as if to chop the deceased again when Warburton picked up a stone and flung it at the applicant striking him at the side of the head. The applicant staggered back and the machete fell from his hand. With Warburton's assistance the deceased reached the main road and was eventually taken to the Isaac Barrant Hospital where he was admitted a patient. He died there on February 25, 1972. The cross-examination of Warburton by the applicant's counsel suggested firstly, that it was not the applicant who chopped the deceased and secondly, that it was the deceased who picked up two stones and threw them at the applicant. Both of these suggestions were denied by Warburton.

Dr. Kenneth Royes a medical practitioner attached to the Bellevue Hospital was called on behalf of the applicant in an endeavour to set up the defence of diminished responsibility. He said that he had examined the applicant on July 19, 1972 and on February 16, 1973 these dates being subsequent to the arrest of the applicant in respect of this matter. Dr. Royes said that his examination of July 19, 1972 over a period of fifty minutes revealed that the applicant tended to speak in an unusual manner and he considered that this was no indication of any mental disorder or defect by reason of the fact that it appeared to have been done deliberately. His examination of February 16, 1973 - some 5 months before the date of the trial - extending over a period of one hour and fourteen minutes revealed

that the applicant did have a partial disorder of reasoning and of understanding so that his appreciation of and his responsibility for his actions was less than normal. In the doctor's opinion the disorder from which the applicant was found suffering on February 16, 1973 though partial was not substantial in the sense that substantial means more than a little - that is to a large extent. In the doctor's view the applicant appeared to have a tendency to have a mental disorder which had been greatly precipitated by events that occurred and also by his period of custody. The doctor found that it was not possible for him to come to any firm conclusion as to whether the applicant was suffering from this partial disorder of reasoning and understanding in February, 1972 - that is at the time of the infliction of the injury on the deceased. Indeed implicit in the doctor's opinion that this less than substantial disorder of reasoning and understanding was partly due to the applicant's incarceration on this charge is his opinion that at the time of incident, if the applicant was suffering from any disorder of reasoning and understanding it would also be less than substantial.

> The applicant when given his rights had this to say - "I have nothing to tell them. You couldn't look to bring those people to embarrass me. I don't know nothing about it. There is a doctor man. Ask that man sitting there. This is the barrister man working for me."

It was thereafter that Dr. Royes was called to testify for the defence.

The learned trial judge left for the consideration of the jury all of the"defences" suggested by counsel for the applicant including those of provocation and diminished responsibility.

At the hearing of this application it was urged before us that the learned trial judge failed to direct the jury adequately

on the question of diminished responsibility inter alia -

(i) the learned trial judge failed to direct the jury as to the meaning to be attached to the words of s.2 of the Homicide Law, 1957;

(ii) the learned trial judge did not apply the law relating to diminished responsibility to the facts before the jury and so failed to give them any assistance with regard to determining whether the plea of diminished responsibility could, in the circumstances, succeed;

(iii) the learned trial judge directed the jury that they could disregard the evidence of the doctor who had given evidence for the defence but did not assist them by indicating what other "material" they could use to determine whether the plea of diminished responsibility could succeed."

The language of s.2 of the Homicide Law, 1957 is identical with that of s.2 of the English Homicide Act, 1957. The learned trial judge, subject to what we have to say later in respect of the third ground of appeal argued, gave a full and correct direction on the law relating to a plea of diminished responsibility and related that direction to the facts of the case. Further, apart from Dr. Royes' evidence there was really no other material that could be used to determine whether the plea of diminished responsibility should succeed and the learned trial judge's direction which appeared to indicate that there might be some such other material was therefore more generous to the applicant than it might have been.

It was next submitted that the learned trial judge erred when he directed the jury on the question of insanity and invited them to contrast one statute with the other as this may have tended to confuse in the minds of the jury the two types of defences. As we pointed out during the course of the argument the learned trial judge was at pains to make the differences in those two types of defences quite clear to the jury and in so far as he endeavoured to do this it could not fairly be concluded

that they jury were in any way likely to be confused in their understanding of the nature of these two types of defences.

The third submission made on behalf of the applicant was that the learned trial judge misdirected the jury when he contrasted the defence of insanity with that of diminished responsibility and stated that the latter was a case where a man has nearly got to a condition that is merely insane but not quite insane where he is wandering on the borderline. This submission does not accurately reflect what the learned trial judge told the jury. He told the jury -

> "So now members of the jury, having told you in brief what insanity is, just as a matter of contrast with diminished responsibility I must tell you that there are some cases you may think, where a man has nearly got to that condition that is merely (sic) insane but not quite insane where he is wondering on the borderline. Poor fellows! He is not fully responsible for what he has done."

The word "merely" in that passage seems to be a typographical error and should have been recorded as "nearly". The learned trial judge proceeded -

> "Now, it is a matter entirely for you members of the jury, whether you think this is the meaning of the section of the Act. Such abnormality of mind that substantially impairs his responsibility. In other words he is not really responsible for what he is doing. His responsibility is not wholly gone - has been impaired. Bearing in mind that a man may know what he is doing and yet suffer abnormality of mind as substantially impairs his mental responsibility."

This direction obviously is taken verbatim from the summing-up by the trial judge Paull, J. in R. v. Walden reported at (1959) 43 Cr. App. R. at p.205 on appeal to the Court of Criminal Appeal. In that case complaint was made by the appellant that in giving such a direction the jury might think that Parliament meant that

something bordering on insanity had to be established, but it was dangerous to talk in terms of insanity. The Court of Criminal Appeal speaking through Hilbery, J. said that the words of the direction given closely approximate to the passage from the direction given by Lord Cooper in H.M. Advocate v. Braithwaite (1945) S.C. (J.) 55 cited by Lord Goddard C.J. in Spriggs (1958) 42 Cr. App. R. 69 and was only giving an illustration of the sort of thing that the jury might consider in deciding whether upon the facts the case came within the section and was not a misdirection by the judge.

After referring to the evidence of Warburton as to how the incident occurred and what Dr. Royes said he found on examination of the applicant and his conclusion that the impairment of responsibility from which the applicant was suffering at the time of his second examination was not substantial the learned trial judge proceeded -

> "But as I told you, you can differ from the doctor. So members of the jury, having examined all the evidence presented in this case, you examine the whole story told you and ask yourselves: do we think, looking at it as broadminded and commonsense people in a sensible way, do we think there was a substantial impairment of this man's responsibility in what he did. If the answer is 'yes', then you will find him not guilty of murder. But you are entitled to find him guilty of manslaughter. The same verdict would apply if you are not sure or are in doubt. If the anwer is no, there may be some impairment but we do not think it was substantial, we don't think it was something which really made any real difference although it may have made it harder to control himself, to refrain from crime, then you are entitled to find him guilty as charged."

The learned trial judge thereafter went on correctly to direct the jury on the nature of the burden of proof which rested on the applicant in relation to the defence of diminished responsibility.

Viewed in its entirety we can find no serious fault with the directions given the jury on this issue. The authority cited in support of the submission made on behalf of the applicant on this ground of appeal Rose v. R. (1961) A.C. 496 can easily be distinguished. In that case there were two conflicting medical views of the appellant's mental condition which the jury were called upon to consider in deciding whether on a balance of probability the defence had established the plea of diminished responsibility which would justify a verdict of manslaughter and the learned trial judge directed the jury to assess the degree of abnormaility of mind in terms of the borderline between legal insanity and legal sanity as laid down in the McNaughton Rules. The Judicial Committee of the Privy Council held that this was a serious misdirection. The position is quite different in the instant case. Apart from the fact that the evidence seemed all one way - that the applicant was not suffering at the material time from such a degree of abnormality of mind as could be regarded as substantially impairing his responsibility the learned trial judge did not direct the jury that they would have to find this case to be a borderline case between sanity and insanity before the defence was established. This ground of appeal also fails.

In respect of the fourth ground of appeal relating to the learned trial judge's directions on the question of provocation counsel was unable to point to any circumstance whereby it might be said that the issue of provovation really arose at the trial and in the circumstances no examination of the terms of summing-up in this regard was embarked upon. The fifth ground of appeal was abandoned at the hearing of this application.

For these reasons we refused leave to appeal against conviction.