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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 138/76

THE QUEEN

v.

ANDREW ROBERT BARRY ROGERS

Coram: Woodhouse J.
Richardson J.
Quilliam J.

Hearing: 14 March 1978

Counsel: B. McClelland, Q.C. and
A.G. McNeill for Appellant
P.W. Graham for Crown

Judgment: 14 March 1978

ORAL JUDGMENT OF THE COURT DELIVERED BY WOODHOUSE J.

In September 1976 the appellant, Andrew Robert Barry Rogers, appeared in the Supreme Court in Dunedin on a charge of murdering a 14 year old boy named Brian Alexander Johnson. The killing took place at Oamaru on the afternoon of 18 May 1976. At that time the appellant himself was aged 17 years. He was convicted and now seeks leave to appeal.

The first ground is that at the trial no reasonable jury could have reached a verdict other than not guilty on the grounds of insanity. There is a second ground which relates to the conduct of the prosecution. In submissions today, Mr McClelland has acknowledged that if

that first ground were to be considered in isolation from certain other matters that will be mentioned, he cannot argue that there was no medical evidence to suggest the conclusion of the jury that the appellant had not been shown on the probabilities to be insane. However, he has advanced an argument that when those other matters are taken into account, including issues arising in relation to the second ground of appeal, this Court should rule that there has been a miscarriage of justice.

The circumstances surrounding the death of the young boy, who admittedly was killed by the appellant, do not need much elaboration. They knew one another and on the afternoon in question they had both been in the same location, together with some other boys, fishing at the Oamaru Wharf. Later in the afternoon the appellant and the deceased went with two of the other boys, Scott and Cunningham, to a nearby park. The appellant apparently went quite soon to the rear of a shelter shed with the deceased, Johnson, and for some reason began to attack Johnson. This attack took place during two brief periods. During the first of them the other two boys heard banging sounds and then they were joined by the appellant and Johnson. The latter appeared to be distressed, if not frightened. Then the appellant made Johnson return to the back of the shed once again. The other two boys were concerned but felt unable to interfere. However, they did go into the shed and peered through some broken framing of the rear wall. They saw the boy Johnson on the ground, half throttled, with a belt held round his neck and blue in the face. They

told the appellant to stop but he appeared not to have heard them. The boy Scott said in evidence that he saw the appellant stab Johnson twice in the back with a knife. The other two boys went away and at some stage were told by the appellant that he had killed Johnson. The appellant said the same sort of thing to others. It seems that after he left the playing ground he went off and played pool in a billiard saloon. That evening, disguising his voice, he telephoned the police to inform them that a body could be found at the playground and in addition to that, he took steps to meet a lawyer the following morning. Throughout all of the period he appeared to be quite calm and unconcerned.

That same impression was conveyed to police officers when they interviewed him concerning the matter. At the interview he admitted orally, and in writing, that he had stabbed the boy Johnson to death. He said in the course of the written statement made the following day that he had not been sure what happened "but I just went mad and took to Brian behind the shed. I don't know what exactly happened there. I can remember stabbing him once with my knife. I do not know what Brian was doing when I did that." He went on to remark in the statement that he had told the other two boys "I have just finished killing Brian but I do not think they believed me."

The medical evidence disclosed that before the deceased's death he had in fact, been partially strangled with what the pathologist described as a ligature. It was

obviously the batteaen by Scott and Cunningham. The evidence was, too, that the deceased had been stabbed on as many as 22 separate occasions. It is probably right to say that there was no apparent motive for this violent crime.

The evidence in favour of an insanity verdict depended upon the appellant's medical history and the conclusions of a highly qualified psychiatrist, Dr Robyn Howland. For present purposes it is not necessary to discuss all this evidence in any detail. In essence, it can be said that at least since the age of 14 years, the appellant has been quite seriously mentally ill. At that age he became a certified patient of a mental institution and he remained in that institution for about eighteen months. It is clear enough that at times he was moved to violence and irrational anger. With good reason his family were obviously concerned about him. And at the trial, both Dr Howland and Dr Moore, another expert in the field and called by the prosecution, expressed a firm opinion that for a long period this youth had been mentally unstable and had been suffering from a disease of the mind.

It is at that point, however, that the two doctors differ. Dr Howland was satisfied that at the relevant time the appellant did not know what he was doing. That he could not deliberate on the moral nature of his actions and that the violence of the whole episode occurred

when he was legally insane. But Dr Moore took a different view. He agreed that the youth was suffering from a serious personality disorder and as mentioned, that it amounted to a disease of the mind, but not to the extent that it would have left him deprived of his reason. In effect, his opinion was that the killing took place impulsively, in a fit of ungovernable temper but that the appellant knew what he was doing and he also knew that it was wrong. In passing, it should be mentioned that Dr Moore happened to be the medical superintendent of the mental institution where this appellant had been a committed patient for the period of eighteen months referred to, and in terms of his responsibility Mr McClelland felt obliged to draw our attention to that fact as something to be weighed in the balance when evaluating the proper significance to be given to Dr Moore's evidence. Of course, we do not overlook that circumstance but it would be wrong to assume against a professional witness of his competence and standing, that he may have allowed that matter to influence the opinion he expressed at the trial.

It is necessary now to turn to certain incidents that occurred during the trial. The first of them concerns the fact that when this appellant was called upon to plead, he pleaded guilty. Obviously this was a matter of some surprise to counsel and it may be regarded as an abberation of the moment. In any event, quite properly, counsel immediately went to discuss the matter with this youth standing in the dock and as the result of that discussion the appellant then pleaded not guilty. All this occurred in

the presence of the jury panel. Then, during the progress of the trial itself, there were moments when the appellant clearly appears to have exhibited signs of extreme mental disturbance. Dr Newland who was present, became sufficiently anxious to arrange for certain sensible precautions to be taken in order to ensure that the youth would be kept under adequate restraint. As a part of these manifestations of mental illness, the appellant shouted or called out during the trial, on two or possibly more occasions.

Finally, there was a worrying and dramatic disturbance. While Dr Newland was being cross-examined, the youth suddenly shouted some obscenities, threw over the table at which he was seated, and leapt to his feet. Two constables who were seated on each side of him endeavoured to restrain him but he was, nevertheless, able to thrust forward to the end of counsels' table, a distance of about twenty feet. During all that time he was shouting. He was finally subdued by four or five police officers. Then he was forcibly escorted from the Court. By that time the Judge himself had left the Bench but the jury were still present and at about that moment there was an unfortunate exchange between counsel, all of whom were naturally troubled by what had been occurring, in addition to being affected by the natural anxieties associated with the progress of a trial of this sort. In the course of this exchange, which though of short duration was somewhat heated, Crown counsel remarked in a loud voice words to the effect that if the appellant had been left to plead guilty in the first place, the dramatic incident referred to would not have taken place. We do not think it necessary

to say more about that matter than to remark that the interchange obviously occured on the sudden. Nobody concerned need have any recriminations concerning it and we feel sure there are none. But it has some significance in the present context.

It is said by Mr McClelland that this unusual development may well have affected the outcome of the trial itself. He puts forward that submission for two reasons. In the first place the argument is that the jury may have heard the remark of Crown counsel and then have considered that the appellant had been persuaded to plead not guilty when his own instinct, even desire, was to plead guilty as at first he had done. The second reason relates to the dramatic nature of the struggle and the obvious anger that had been displayed at the time by the appellant before the very eyes of the jury. Here the argument is that the appellant had confirmed by his actions the very views that were subsequently expressed by Dr Moore as an opinion - that is to say that here was a simple case of a youth who could not control his temper.

In addition, we are asked to keep in mind the circumstances of the killing itself. As mentioned, it occurred in broad daylight, in front of two witnesses. He ignored a request that he stop. And he then went off to play pool without any suggestion of emotion or concern for what he had done.

Then there is a third factor. It happens that on the morning after the altercation in the Court, counsel saw the Judge in chambers in order to inform the Judge what had happened in Court after he had retired. On that occasion no request was made that the jury be discharged because of the various matters already mentioned; and here today, Mr McClelland has felt obliged to say that in failing to ask for the discharge of the jury, he may have made a mistake. As to that matter we say at once that such a decision of counsel would not persuade us to take one view of the matter rather than another. An honest mistake of that description should not prevent justice being done, but it should be said that despite the views of counsel expressed here today, the decision that he actually decided to act upon was a reasonable one in all the circumstances of the case. In any event, we are satisfied that this aspect of the matter cannot bear upon the real issues.

For the reasons indicated earlier in this judgment, an assessment of the question of insanity obviously was a straight out factual question for the jury. That is accepted by Mr McClelland. Then when the other matters to which we have referred are considered in relation to that factual question, we do not think there can be any reason for regarding the verdict as unsatisfactory or unsafe. The evidence in thecase, in our view, was clear cut. The issue between the two doctors may have been a narrow one, but it was for the jury to evaluate the difference between them. And we do not think that any of

the difficulties that arose during the case, or in any other respect, bear in any serious way upon the verdict that was given.

Before leaving the case we should mention that without formally receiving certain affidavits of events that have occurred since the trial and relating to the appellant's present mental condition, we have, as a matter of precaution, read them. At present he is a committed inmate of a mental institution. It seems probable that he will remain in that institution for a long time. But it is clear that the grounds which persuaded the medical authorities that he should be kept in that institution do not amount to insanity in the legal sense but at the most, to what lawyers would describe as "irresistible impulse."

Undoubtedly this is an unhappy case. Mr McClelland, in terms of his considerable responsibility, has said everything that could possibly be said in favour of this appeal. For the reasons we have given we are satisfied that leave to appeal should be refused and is refused accordingly.

A.D. Williams J