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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 87/87

UNIVERSITY OF OTAGO
20 JUN 1988

Set 2

THE QUEEN

v.

STEVEN GARY HARNEY

Coram: Cooke P.
Casey J.
Chilwell J.

Hearing: 20 August 1987

Counsel: L.H. Atkins for Appellant
G.A. Rea and Miss Bridget Coughlan for Crown

Judgment: 7 September 1987

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

The appellant, a youth of 18, was found guilty by a jury of murdering the deceased, another young man, by stabbing him in the abdomen in a street brawl in central Napier late on a Saturday night. The two defences at the trial were lack of murderous intent and provocation. The sole ground pursued on appeal has been that the summing up was incorrect in the way in which it dealt with s.167(b) of the Crimes Act 1961, the paragraph on which the jury's verdict was almost certainly based.

The essential facts can be stated very briefly. The evidence about details varies; we give the version most favourable to the appellant. The appellant and the deceased were apparently not previously known to each other. For reasons not entirely clear, a quarrel arose between the deceased and a group with which the appellant was associated. The group made towards the deceased, who

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knocked one of them, a man, to the ground. Then the appellant's girlfriend, perhaps trying to separate the parties, was also knocked to the ground by the deceased. The appellant became enraged and drew a knife. It was a pocket knife with the blade opened. Slightly crouching, he held it out in front of him pointing towards the deceased, the sharp edge of the blade upwards. According to the evidence of a friend of the deceased who was the closest of a number of eye-witnesses who gave evidence, the deceased made a quick movement or lunge towards the appellant. The stabbing then occurred.

Pathological and other medical evidence was that the wound was about three centimetres above the navel, inflicted with the blade of the knife upwards towards the head of the victim but nevertheless following a downward path in his body. The path may have been due to the fact that, as he claimed in answer to police questions, the appellant was aiming for the deceased's leg (although the deceased's friend already mentioned said that he had seemed to be aiming for the head), or to a lunging movement by the deceased, or to a combination of the two. Afterwards the appellant was described as standing back in either amazement or shock.

The appellant did not give evidence. A police officer gave evidence that the appellant admitted intending to stab the man and, when asked whether he had realised that he could have seriously injured or even killed him, replied:

> I was going for his leg but he must have moved. I knew I could have seriously injured him. I wasn't going to kill him.

The summing up as a whole was by no means unfavourable to the defence, but issue is taken with a few words in the following part of it:

> The second definition, to remind you again, is that culpable homicide is murder if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death and is reckless whether death ensues or not. The question is, did the accused intend to cause Irvine any bodily injury that was known to Harney to be likely to cause death and Harney was reckless whether death ensued or not. Again, a requirement of specific intent, as the law describes it. Here, however the intention must be to cause a bodily injury. Not to kill, but to cause a bodily injury known to Harney to be likely to cause death, and then he being reckless whether death ensues or not. Again, the inquiry must be as to the actual state of mind. Look at the circumstances here. Have the Crown satisfied you that Harney meant to cause a bodily injury which he knew was likely to cause death? To deliberately stab a person in the stomach, if that is where he intended to stab him, you may think you can infer such a state of mind. If, however, he intended only to stab him in some less vital place, say the leg, or you are left in some doubt as to where the blow was intended to land, then you may think the Crown have not satisfied you to the standard required as to the second murderous intent. If you are satisfied that Harney meant to cause bodily injury likely to cause death, and that really requires you to find a specific intention to cause bodily injury to a vital region, then the additional element of recklessness has to be considered. Now, you won't have much trouble with recklessness in the circumstances of this case. Recklessness is present when someone does an act which creates an obvious risk for the safety of another, and when he does that act he either has not given any thought to the possibility of there being any risk, or has recognised some risk involved and has nonetheless gone ahead with it.
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> The primary inquiry in the second definition of murder is whether the Crown have satisfied you that Harney intended to cause Irvine a bodily injury that was known to Harney to be likely to cause death. If

> you are so satisfied then the recklessness element really follows. If you are not so satisfied then you do not have to consider the reckless element.

After the jury had been in retirement for about an hour and a half, they asked for a definition of the second head of murder, i.e. that covered by s.167(b) and the foregoing directions, and the Judge said:

> I intend to read you the definition as contained in Section 167 as it relates to the second state of mind, and then to add some points that I gave you in my summing up this morning, and I intend to have those typed out so that you may have them in front of you so that you, Mr Foreman, may have them in front of you, and I have done that after consulting with counsel.
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> Section 167 of our Crimes Act says:
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> > "Culpable homicide is murder in each of the following cases:
> >
> > (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death and is reckless whether death ensues or not."
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> Did the accused intend to cause Irvine any bodily injury that was known to Harney to be likely to cause death and is reckless whether death ensues or not? Again a requirement of specific intent. Here however the intention must be to cause a bodily injury that is known to Harney to be likely to cause death and he is reckless whether death ensues or not. Again the inquiry must be as to the actual state of mind. That is just a passage or passages from my summing up this morning. I intend to have the definition typed out with those additional passages in front of you because that will, I think, assist you in the most helpful way.

Further, the Judge took the precaution of causing to be typed and delivered to the jury at 12.20 p.m. the following paper:

S.167. Murder defined - Culpable homicide is murder in each of the following cases:
...
(b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:

Did the accused intend to cause Irvine any bodily injury that was known to Harney to be likely to cause death and is reckless whether death ensues or not.

Again a requirement of specific intent. Here however the intention must be to cause a bodily injury that is known to Harney to be likely to cause death and he is reckless whether death ensues or not.

Again the inquiry must be as to the actual state of mind.

They returned with their verdict at 8.07 p.m. Their deliberations were therefore quite long for a case within narrow compass, but it must be remembered that they had the issue of provocation to consider as well as murderous intent.

The argument presented by Mr Atkins is that in the passage already quoted from the main summing up the words 'he either has not given any thought to the possibility of there being a risk' should not have been included. Counsel also makes some point of the sentence a little earlier beginning with the words 'If you are satisfied that Harney meant to cause bodily injury likely to cause death', the argument being that those words, taken by themselves, might suggest an objective test of likelihood. It must be noted, however, that they were immediately followed by 'and that really requires you to find a specific intention to cause

bodily injury to a vital region'. In that context, and the context of the repeated stress in the summing up and the answer to the jury's question and the typed material given to them on the need for the Crown to prove knowledge by the accused of the likelihood of causing death, we are satisfied that there could have been no misunderstanding about that need.

The fact remains that in the single sentence in which he defined recklessness the Judge included the words about giving no thought to the possibility of risk, words obviously taken from Lord Diplock's speech in R. v. Caldwell [1982] A.C. 341, 354. Lord Diplock's approach has been applied and followed, not without controversy, in subsequent English cases which need not be listed here. Mr Atkins argues that failure to give thought to serious risks is not classified as recklessness in the law of New Zealand generally. In the alternative counsel submits the narrower proposition that at least it is not so classified for the purposes of s.167(b) of the Crimes Act.

The general proposition does not call for a ruling in this case and probably in any event does not admit of an unqualified answer. The statutory context may affect the meaning to be given to 'recklessly'. Compare R. v. Howe [1982] 1 N.Z.L.R. 618, 623-4, although the actual decision in that case is now obsolete, because the considerations which led this Court to apply the Caldwell approach there have since led Parliament to replace s.90 of the Crimes Act

with a wider and simpler section (Crimes Amendment Act 1987, s.4). Subject to the requirements of particular contexts, however, we incline to the view that 'recklessly' has usually been understood in New Zealand to have the meaning given in pre-Caldwell textbooks such as 11 Halsbury's Laws of England, 4th ed. para. 14, and Adams on Criminal Law in New Zealand, 2nd ed. para. 1430. That is to say, foresight of dangerous consequences that could well happen, together with an intention to continue the course of conduct regardless of the risk.

In an unreported Auckland High Court ruling under s.198(2) of the Crimes Act, R. v. Stephens (T91/83; ruling 8 December 1983), Chilwell J expressed the view that the less harsh approach (a description easily understood when one considers such a case as Elliott v. C. [1983] 1 W.L.R. 939) had been traditionally applied in New Zealand. Construing the phrase 'with reckless disregard for the safety of others', he held that one who is reckless about safety is aware of the likelihood or possibility that safety may be imperilled even though he may hope that it will not. This Court does not doubt the correctness of that ruling.

Further general discussion is unnecessary because we are satisfied that the narrower proposition advanced by Mr Atkins is right. There is no doubt that the first limb of s.167(b) requires proof of the accused's actual appreciation of the risk at the material time, so it seems most unlikely that the legislature would have meant the second limb to

cover mere inadvertence. It is of some importance to remember that, when paragraph (b) was originally enacted, the companion paragraph (d) included the words 'or ought to have known'. These were discarded in the 1961 Crimes Act to ensure that, as it was put in Garrow and Willis on Criminal Law, 5th ed. (1968), 'a man cannot be convicted of murder for being stupid'. The decision of the House of Lords in Director of Public Prosecutions v. Smith [1961] A.C. 290 had caused difficulty.

Some such words as were in the original (d) might be expected to have been included in (b) if the test thereunder was meant to be partly objective. Moreover, there is a line of cases in this Court in which it has been said or suggested that, normally at least, the requirement of recklessness in (b) adds nothing significant to the requirement of knowledge: R. v. Dixon [1979] 1 N.Z.L.R. 641, 647; R. v. Gush (C.A. 220/79; judgment 5 September 1980, unreported on this point but reported on the meaning of 'likely' and 'probable' in [1980] 2 N.Z.L.R. 92); R. v. McKeown [1984] 1 N.Z.L.R. 630, 635; R. v. Hamilton [1985] 2 N.Z.L.R. 245, 250.

Running through that line of cases is the theme that this definition of murder is concerned with what was called in Dixon 'a particular kind of deliberate risk-taking'. In the four cases the fullest statement on the point is a passage in Gush which regrettably has not been reported.

Delivering the judgment of the Court, Richmond P. said:

> As to (b). In Dixon (supra) we voiced our doubts as to whether the words "... and is reckless whether death ensues or not" added anything to the words which preceded them. However, we pointed out that recklessness in the context of s.167(b) involved the notion of the accused person being willing to run the risk of causing death. In the present case the Judge used language at times which was not altogether felicitious. For example (at page 74) he said:
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> > "You must be satisfied that his mind adverted to the possibility that death could ensue and rejected it."
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> Unfortunately, too, counsel referred the Judge at this stage to the discussion of the case of Andrews [1937] A.C. 576 which is to be found in Adams Criminal Law and Practice, 2nd ed. para. 1430. That was a case dealing with the very high degree of negligence required by English law for the crime of manslaughter and is confusing in relation to the definition of murder in s.167(b). Nevertheless the Judge made certain comments regarding the case of Andrews which in our view would have left the jury in no doubt that for their purposes the concept of recklessness involved the deliberate taking of the risk that death would be a likely consequence of the injury. We add that as the jury were told very clearly that they could not convict under s.167(b) unless satisfied that King had a conscious appreciation of the likelihood of causing death it inevitably followed that a verdict of murder under s.167(b) carried with it a finding of deliberate risk-taking. That is why, in Dixon (supra), we expressed doubt as to whether the words "... and is reckless whether death ensued or not" add anything to the words which precede them.

The concept and history of murder by deliberate risk-taking has been further discussed in this Court in R. v. Piri (C.A. 126/86; judgment 13 March 1987), a case regrettably unreported up to the present time. The judgments there include a full reproduction of the relevant passage in the Report of the English Royal Commission on Indictable Offences 1879. A rather less complete

reproduction will be found in Garrow on Criminal Law, 3rd ed. (1950) 113-115. The Commission did not expressly say what they meant by 'reckless' in their Draft Code, but a reading of the whole passage suggests that they used it in the sense which it bears in the judgment of Blackburn J. in R. v. Pembliton (1874) L.R.2 C.C.R. 119, 122. Lord Blackburn was the senior member of the 1879 Royal Commission. The sense is identical with that adopted in a different context by Chilwell J. in his unreported judgment in R. v. Stephens, as already mentioned.

The tenor of the passage also helps to explain why the reference to recklessness was added. In Dixon at 647 this Court suggested that the purpose may have been to emphasise that what is required in the way of knowledge on the part of the offender is a conscious appreciation of the likelihood of causing death rather than a degree of knowledge on his part in some lesser or vaguer sense, such as possession of the necessary general knowledge to have appreciated the risk if he had paused to think about it. That may well be so, but the added words also point the contrast between paragraphs (a) and (b). The one is aimed at deliberate killing, the other at deliberately taking the risk of killing.

It follows that the few words challenged in the summing up in the present case were incorrect and should be avoided in summing up to a jury under s.167(b). 'Reckless'

there means that there must be a conscious taking of the risk of causing death.

In some cases an error on the point might necessitate a new trial, but in the instant case we think that the Crown is right in submitting that, in the summing up as a whole and in the way in which he dealt with the jury's question, the Judge cured the effect of the error and made it immaterial. As Mr Rea put it, there was a 'massive' emphasis by the Judge on the need to inquire into the accused's actual state of mind, to show that in stabbing as he did he intended to inflict bodily injury which he knew to be likely to cause death. Part of this was the emphasis on whether the accused intended to cause injury to a vital region (the stomach) as distinct from the leg (which the Judge, perhaps generously to the defence, invited the jury to regard as not satisfying the murderous intent required).

Moreover the Judge, speaking in this respect in full conformity with the line of cases to which we have referred, went on to say to the jury, almost immediately after the few words complained of:

> The primary inquiry in the second definition of murder is whether the Crown have satisfied you that Harney intended to cause Irvine a bodily injury that was known to Harney to be likely to cause death. If you are so satisfied then the recklessness element really follows. If you are not so satisfied then you do not have to consider the reckless element.

That amounted to a recognition that on the particular facts recklessness was not an important issue. If the Crown

proved knowledge of the likelihood, recklessness really followed; if the Crown failed to do so, recklessness did not arise for consideration.

Nothing turns in this case on what the jury understood by likelihood. The Judge left that to them, refraining from the direction which he could properly have given and which would not have helped the accused that it was enough for the Crown to prove that the accused must have known of a real or substantial risk of death.

This case is another illustration of how in practice the ingredient of recklessness in s.167(b) usually adds nothing. Despite his careful argument, Mr Atkins was not able in our view to identify any plausible possibility that the jury could have found that the accused knew at the time that the stabbing was likely to cause death but still was not reckless. The argument raised on the appeal is a technical legal one, correct as far as it goes, but not enough to overcome the crucial point driven home to the jury by the Judge: that the inquiry must be as to the accused's 'specific intent', his 'actual state of mind'. What the Judge said could not have failed to make it plain to them that they must not find the accused guilty of murder unless satisfied that he stabbed knowing of the likelihood of killing. On the evidence it was open to them to find that proved. Indeed, understandably, the contrary was not contended for on behalf of the accused in this Court.

The drawing and use of a lethal knife changed the complexion of this tragic incident. It all happened fairly quickly and perhaps there was room, as quite often there is in this kind of case, for the jury to take the view that the stabbing may have been an instinctive, unthinking reaction in the heat of the moment. On the other hand there was evidence that the two men had backed off before the accused produced the knife and that both the deceased and his friend told him to put it away. The jury were entitled to think that the accused made a conscious decision to use it in any further fighting, and did use it, well knowing the risk. The accused was justifiably convicted after a summing up which put the crucial issue fairly and clearly before them. The appeal must fail.

R B Cooke P.

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