LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 21/2 C.A. 254/91

THE QUEEN

69.

v.

FOREMAN

Coram: Casey J (presiding)
McKay J
Greig J

Hearing: 4 February 1992

Counsel: Lowell Goddard QC for Crown
P J Kaye for Appellant

Judgment: 18 February 1992

JUDGMENT OF THE COURT DELIVERED BY CASEY J

Foreman appeals against his conviction in the High Court at Hamilton on 12 July 1990 on a charge of murdering on 14 October 1989 at Kennedy Bay. The amended grounds advanced in support of the appeal were the Judge's refusal to allow provocation to go to the jury, supported by an application to call fresh evidence from a psychiatrist about the accused's "special characteristics"; the Judge's failure to direct the jury that an alternative verdict of manslaughter was open; and

the admission of unduly prejudicial photographs of the deceased.

She had lived in a small house at Kennedy Bay with the appellant and had a young child and was expecting another. Neighbours described sounds of an argument emanating from the house in the morning of 13 October 1989 (the day before the homicide) and later that day friends noticed that she was injured and upset and she stayed with one until 8pm that evening. A neighbour saw bruises and injuries on her on 14 October and saw the appellant come back from a fishing trip about 2pm in the afternoon. He was last seen at the house with the deceased about 6pm on the Saturday. Another neighbour gave evidence that about 8pm the same night the appellant knocked at her door sweating and shaking and told her that there was a baby over the road to be looked after and he had just killed He added that he was going to Coromandel if they wanted him.

This witness said that immediately prior to that visit she heard some thumping and banging but had put it down to children next door and had not taken much notice. With a relative she went over to the deceased's house and found her lying on the floor, apparently dead. They left with the baby and informed the police. Meanwhile the appellant had made his way to a local party where he was seen at 8.25pm drinking. The police arrived at the deceased's property with a doctor at 9.33pm and then went

to the party where they picked up the appellant and after a brief struggle recovered a large sheath knife worn under his bush shirt. He was interviewed at the police station and was somewhat intoxicated. Some of his answers to questions were confusing and evasive and he made no admission of responsibility for the woman's death.

There were signs of a struggle in the living room/kitchen in which the deceased's body was found lying on the floor on its side, in what was suggested was a "recovery position", with her head on some folded carpet. There was a large quantity of blood surrounding the body, and she had been killed by a single stab wound to the centre of her chest which had penetrated almost to her back, severing major blood vessels. Death would have occurred within a few minutes. Traces of her blood were found on the appellant's knife. A kitchen knife was found on the bench in a position consistent with its use in the preparation of a meal, which appeared to have been interrupted by the events leading to her death. There was no blood on that knife or any other indication that it had been used aggressively. The lower sleeve of the appellant's bush shirt had been torn away at the elbow and was found on the floor close to where the deceased was lying.

During the course of the interview at the police station it was suggested to the appellant that the deceased may have been having an affair with another man. He said he had heard that, but when asked whether that affair had anything to do with her death he replied "No", although he said if it had been true he would not have been very happy about it. At another point during the interview with the detective this exchange took place :

> "IS, I have to know what happened
> HS, 'Ask
> IS, 'You know I can't ask her, I have been to the house, I think you fought with tonight?'
> HS, 'I don't like people who pull knives on me'
> IS, 'Are you saying that pulled the knife on you?'
> HS, 'It is too late, she is dead.'"

The appellant did not give or call evidence at the trial. In the absence of any eye-witness account of what took place and in the light of the obvious signs of struggle before the stabbing, his counsel (Mr Hassall) submitted that it might have been accidental or unintended. Self-defence also went to the jury without opposition from the Crown. However, the Judge refused to allow provocation which Mr Hassall also wanted to raise, relying on the suggestion of the deceased's infidelity raised in the police interview, and the appellant's statement about not liking people who pull knives on him.

In his ruling the Judge accepted that disclosure of infidelity could have amounted to provocation, but

dismissed it as a relevant consideration in view of the appellant's clear assertion that it had nothing to do with the killing. From his recorded comments to the detective it is doubtful whether the appellant believed she had been unfaithful. We agree with the Judge's conclusion on this point.

Counsel also submitted that against the background of domestic disturbances and the evidence of a struggle before the stabbing, the deceased may have used a kitchen knife to threaten the appellant. The Judge accepted that in principle such a threat could amount to provocation, but it could not be inferred simply from those circumstances and the presence of the knife on the bench. But he was prepared to assume that "however oblique", the remark about people who pulled knives was evidence upon which the jury might conclude that the deceased had threatened him with one.

He was not prepared, however, to accept the possibility that the pulling of a knife would have caused him to lose control. Nor did he think the evidence provided any foundation for satisfying the objective test in subsection 169(2)(a), saying "namely that given the characteristics of the accused (and Mr Hassall is unable to suggest any special characteristics of legal reference) the ordinary person would have lost self-control at that sight". These conclusions were criticised by Mr Kaye.

The relevant parts of s169 read :

> **"169. Provocation -** (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
>
> (2) Anything done or said may be provocation if -
>
> (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
> (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.
>
> (3) Whether there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact."

The appellant now seeks to produce evidence from Dr Culpan of the existence of a characteristic in terms of subsection 2(a) and although its admission was opposed by Miss Goddard she indicated she did not wish to cross-examine the doctor on the material to be adduced from him, in the light of answers he gave to specific questions raised in correspondence between counsel. We agreed to accept the doctor's affidavit dated 23 January 1992 stating that he had examined the appellant on two occasions in 1989, the last being on 22 June at Waikeria Prison when he concluded he was suffering from schizophrenia. He thought he was in the throes of an active schizophrenic process at the time of the homicide, expressing the view that he was "medically"

insane at the time, to such an extent as to possess a special characteristic affecting his response to any provocation.

His report to defence counsel of 27 June relating to his examination at Waikeria was made available to us. It runs into 11 pages and is clearly directed at the question of insanity in terms of s23 of the Crimes Act. He concluded that the appellant suffered from a "disease of the mind", but that he could not bring himself within the other criteria of s23; specifically there was no question that the appellant, as an experienced pig-hunter, would not know the nature and quality of his act, nor could it be argued that he did not know it was wrong. At that stage the doctor thought he could satisfy any test of diminished responsibility, had such a defence been open.

Miss Goddard submitted that the material in this report was known to counsel well before the trial (which commenced on 9 July 1990) and it should have been sufficient to alert counsel to its effects on provocation as now spelt out in Dr Culpan's affidavit. Accordingly this could not be regarded as relevantly fresh evidence. We think that submission requires too much of defence counsel. The report was concerned solely with the question of insanity within the definition of s23 and it is understandable that he did not recognise its implications for the plea of provocation he wished to

raise. The present affidavit expressing Dr Culpan's opinion on this aspect should be regarded as fresh evidence.

A trial Judge's approach to the question of allowing provocation to go the jury has been well settled; it is his duty to do so if a credible narrative of events discloses material suggesting that provocation in law is available from all the evidence - see **R v Anderson [1965] NZLR 29.** The difficulty in this case is that even allowing as a relevant characteristic the schizophrenia found by Dr Culpan (and we think it is), the matters raised in support of the plea of provocation go no further than speculation, which the accused's vague reference to people who pull knives on him does nothing to clarify.

The evidence indicates that the kitchen knife was being used at the time for ordinary domestic purposes only. It is fanciful to suggest that the deceased may have picked it up to attack the appellant and then put it back on the bench exactly where it would be for preparing food, especially on the assumption that her action triggered the appellant's loss of control and stabbing, which must have caused her immediate collapse and rapid death. Undoubtedly there was a struggle beforehand, as evidenced by the overturned chairs and torn sleeve, but this is consistent with the deceased simply trying to defend herself with her hands in the course of the

physical contest suggested by the noises which the neighbour heard before the appellant came to her door and announced he had killed her.

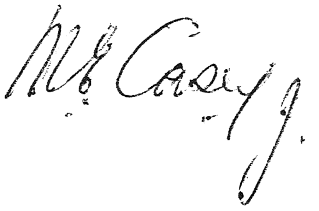
While we accept that provocation is not lightly to be taken away from the jury, we are satisfied that there was simply no rational foundation to support the plea in this case. Any jury asked to resolve it could only have had recourse to guesswork and speculation. The Judge was right in refusing to put it.

The next complaint was over his failure to direct that the alternative verdict of manslaughter was available. It would seem that this was not suggested to the jury by counsel and the Judge was not asked to direct on it. That, of course, would not excuse his failure if manslaughter could have been an appropriate verdict. In spite of Mr Kaye's submissions and his careful review of the evidence, we are satisfied that without provocation as an issue, there was no basis on which a reasonable jury could have found manslaughter, and any verdict to that effect would have to be regarded as perverse. The wound was lethal and its fatal nature must have been obvious to the accused. The fact that he was an experienced pig-hunter would compound his appreciation of its consequences. The jury rejected the possibilities of accidental injury and self-defence - as with provocation, we think those pleas also rested on speculation. There was simply no basis left on which they could have found a

killing without one or other of the states of mind required by ss167(a) and (b) of the Crimes Act.

This brings us to the final matter put forward relating to the production of unduly prejudicial photographs to the jury. Miss Goddard informed us that in preparing for trial she learned that the offending photographs in the booklet exhibited at the trial may have been excluded from the material which went to them. This has now been confirmed by both counsel and Mr Kaye abandons that ground.

The result is that the appeal against conviction must be and is dismissed.



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