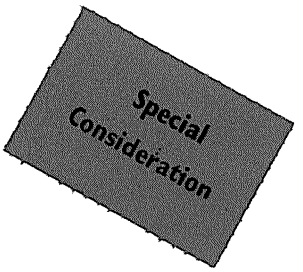
5/3 N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

T. No. 15/83

134.



reported 1 CRNZ 185

REGINA

v.

L O'CALLAGHAN

(Attempted murder (1);
Injuring by unlawful act (1))

Hearing: 13 February 1984

Counsel: C.J. Walshaw for Crown
L.H. Atkins and R.S. Simes for accused

Ruling: 13 February 1984

RULING OF QUILLIAM J

The accused is charged upon an indictment containing two counts which are laid in the alternative. The first is that she did attempt to murder her infant child and the second is that she injured that child in such circumstances that if death had been caused she would have been guilty of manslaughter.

On behalf of the accused, Mr Atkins has indicated in advance his intention, if permitted to do so, to raise on the first count the defence of insanity. He wishes to take advantage of the provisions of s 178 (3) of the Crimes Act 1961. That subsection provides:

> " Where upon the trial of a woman for infanticide, or for the murder or manslaughter of any child of hers under the age of 10 years, the jury are of opinion that at the time of the alleged offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she was insane, the jury shall return a special verdict of acquittal on account of insanity caused by childbirth. "

The question which arises is whether that subsection can apply in the case of attempted murder or whether it is confined strictly to the three crimes specified.

On behalf of the Crown it is argued that the subsection is so confined and that this result is arrived at by a consideration of the introduction into the statute of the crime of infanticide and of the implications of that. In support of that argument reference was made to the provisions of subss (1) and (2) of the section. Subsection (1) enables a jury, in appropriate circumstances, to reduce the crime of murder or manslaughter to one of infanticide and subs (2) makes special provision for the returning of an appropriate verdict in such circumstances.

I do not think that the terms of subss (1) and (2) can be permitted to be determinative of the interpretation which must be given to subs (3). This is primarily because the argument which is now advanced could not in any circumstances be made to apply to subss (1) and (2) in any event. The question of a reduction in the verdict to one of infanticide can only be logically applicable if there has been a killing. That does not need to be the case in respect of subs (3).

There may, of course, be different implications between the crimes of murder and attempted murder. In particular, in the case of attempted murder there must be shown to have been an attempt to kill and those other situations referred to in the Act which can amount to murder do not apply. However, I am satisfied that s 178 (3) must be regarded as applicable to a charge of attempted murder.

It is necessary to observe the plain purpose for which s 178 (3) was passed. It was a recognition of the special circumstances of the effects which can follow upon childbirth and which can affect the relationship between mother and child. That being the case it seems to me clear that the general proposition of the greater including the less must be regarded as applying. If that were not so then the result could be that a woman had the special insanity defence available to her when her

intention was successful but not when it failed. Plainly that proposition cannot be extended so as to apply to other forms of assault which in themselves constitute separate offences, but I believe that it does extend to attempted murder.

It is necessary then to determine the effect of holding that s 178 (3) may apply. All that the subsection says is that the defence of insanity is available. Although it does not say so I have no doubt that the intention of the legislature is that the defence available is that of insanity as defined in s 23 of the Act. What s 178 (3) has done is to recognise that the effects of childbirth, as set out in the subsection, may amount to or be equivalent to a disease of the mind for the purposes of s 23 when otherwise that might not be regarded as a logical or acceptable medical concept. The other distinction which is achieved by s 178 (3) is to make special provisions available in the event of a finding of insanity.

I accordingly conclude that the defence is available to the accused on the charge of attempted murder although not, of course, on the alternative count, and that if it is raised the defence will need to proceed upon the basis of s 23 and with the onus on the accused. As to the alternative count it is still, of course, open to the accused to offer an ordinary defence of insanity under s 23 but in that event the special provisions as to disease of the mind and as to the consequences could not apply and there will accordingly need to be a careful direction to the jury in that respect.

Solicitors: Crown Solicitor, PALMERSTON NORTH, for Crown
Purnell, Creighton, McGowan & Co., CHRISTCHURCH, for accused