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IN THE HIGH COURT OF NEW ZEALAND T. 114/84

AUCKLAND REGISTRY

Special Consideration

/441

R E G I N A

v.

C PILBROW

Hearing: 20 November 1984

Counsel: S.B.W. Grieve for Crown
R.L. Maclaren for Pilbrow

ORAL RULING OF HILLYER J.

This is an application by Mr Maclaren for a ruling as to admissibility of evidence he wishes to call from a psychiatrist, Dr Culpan, whose qualifications are well known to those who practice at the criminal bar in Auckland, and even to those whose experience is not as great in that regard. He has given a report to Mr Maclaren and that report sets out the basis of the evidence which Mr Culpan would give.

The accused is charged with attempted murder and with wounding with intent to cause grievous bodily harm. Evidence has been led on behalf of the Crown to the effect that the accused attended a party in Takapuna; that he had something to drink, but was only socially intoxicated. An argument developed between himself and a Mr M There was a fight between them. The accused, it is said, was grasped by the throat, fell down and was said to have banged his head. Following that the allegation is that he took a knife and chased Mr M and in the course of a struggle, Mr M suffered severe cuts to his hands from the knife.

Dr Culpan, after setting out the accused's

history from the time he was a child and his home circumstances, goes on to consider the events of the evening in question. I make it clear that nowhere in Dr Culpan's report is there any suggestion that the accused was in any way abnormal physically or mentally. He said:-

> "I was unable to detect any aberrations in the quality of his thinking suggestive of any form of mental illness. His emotional reactions appeared appropriate to his situation."

He then goes on to set out on the basis only, of course, of the depositions, an analysis of the facts as he understands them to have occurred on that particular evening, and draws certain conclusions as to the ability of the accused to remember. He says:-

> "It would seem that the major inconsistencies between his own account of the incident and the version given by witnesses is evidence that his capacity for precise memory was impaired at the time and that his own subsequent description of a series of unconnected still pictures represents the true situation."

Dr Culpan goes on to say:-

> "It appears that conclusions may be drawn from the available evidence that Mr Pilbrow was partially throttled with a considerable degree of force by Mr M and, during the next minute or so, his awareness of events, and his capacity for subsequent recollection, were substantially impaired. During this period of impairment it seems that he took a large knife from a kitchen drawer and sought to attack Mr M with it."

On that basis Dr Culpan gives his opinion that there would be a real doubt as to whether the accused was capable of forming a specific intent to kill Mr M or even to wound him grievously. He puts this on the basis of what he calls "his altered state of consciousness following the throttling experience". I do not understand that

expression to be anything more than the expression of an opinion that the accused was not entirely normal after he had been involved in this fight and had been throttled, but indeed, one would hardly expect any person in those circumstances to be completely normal.

What the doctor is not saying there is that as a result of the experience the accused suffered any complete blackout or disease of the mind. Any person who has been involved in a fight will be affected by it.

On the basis then of a number of authorities, Mr Maclaren has suggested that the evidence is admissible, and he has analysed the case of R. v. Majewski (1976) 2 WLR 623. That was a case in which two doctors were called without objection, to state that accused had a particular personality disorder and as to the effect that alcohol and barbiturates would have upon a person with such a particular disorder.

Equally, he referred me to the case of Toohey v. Metropolitan Police Commissioner (1965) AC 595. In that case again, a witness whose evidence was to be commented on by a doctor, was said to be normally prone to hysteria. The evidence was as to whether such a person was able to give reliable evidence. The hysteria shown might be a product of his mental condition not of fear produced by the assault. Equally, his having illness or abnormality of the mind would be relevant to demonstrate that his capacity to give reliable evidence was impaired.

Of much greater assistance has been the case of R. v. Moore (1982) 1 NZLR 242, to which Mr Maclaren also referred. This case was also relied on by Mr Grieve for the Crown. This was a decision of the Court of Appeal in New Zealand, and at p. 245 Cooke J. said:-

"Medical evidence may be admissible to show that a

witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence.... In recent years the Courts have been somewhat readier to allow pyschiatric opinion evidence to be called, even in cases where insanity or automatism is not in issue, in order to avoid unfairness.... An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a Judge or jury...Drawing a line will not always be easy. We are clear, however, that the present case fell on the wrong side of the line from the defence point of view. In essence the jury had to decide whether the defendant's claim that he acted only to frighten, and did not intend death or know that it was likely to result, were reasonable possibilities; and in arriving at a conclusion they had to weigh the possibility that such readiness as he displayed in answering the questions of the police or Crown counsel - and we interpolate that it was not unqualified - may have been due to unusual susceptibility to suggestions.

That some persons are more open to suggestion or less stubborn than others is a matter of everyday experience. We think that the Judge was well entitled to take the view that these were issues on which expert evidence of the kind proposed, not being evidence of any disorder, was not admissible."

I also had drawn to my attention the case of Peter John Chard decision of the Court of Appeal Criminal Division (1971) 56 CAR 268. The headnote in that case reads:-

"Where no issue of insanity, diminished responsibility or mental illness has arisen, and it is conceded on the medical evidence that the defendant is entirely normal, it is not permissible to call a medical witness to state how, in his opinion, the defendant's mind operated at the time of the alleged crime with regard to the question of intent."

Mr Maclaren's distinction that in the case before me the accused had suffered some trauma which may have affected the way in which he thinks; does not in my view, take the case outside those principles.

We have in our Courts a system whereby an accused person is tried by 12 citizens with the wisdom and knowledge of the world that the years have brought them. They, in my view, are well capable of appreciating a situation that could be created by the forces that were brought to bear on the accused on this particular evening. It would not be proper to admit the evidence of a psychiatrist to give evidence as to his opinion on the very question the jury is to determine, whether there is a reasonable doubt that the accused had the intent necessary to make him guilty of the offences with which he is charged.

For completeness sake I should say that I have also considered the case of Turner (1974) 60 CAR, another decision of the Court of Appeal United Kingdom and of Maisaria, a ruling of Vautier J. in the Supreme Court of New Zealand, Auckland Registry T. 187/79, given on 8th November 1979.

For those reasons I rule that the evidence of Dr Culpan is not admissible.

P.G. Millyer J.