IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

T.19/84

1279

BETWEEN GAVIN BRIAN WATHNE
Applicant

AND THE CROWN
Respondent

Hearing: 3, 4 and 5 October 1984

Counsel: R.A. Houston Q.C. for Applicant
C.Q.M. Almao for Respondent

Hearing and Judgment: 5 October 1984

ORAL JUDGMENT OF GALLEN J.

Gavin Brian Wathne has been committed for trial on a charge of murder alleging that on 25 January 1984 he murdered one, Basil Ormond Thomas. He was committed for trial after a preliminary hearing before a District Court Judge. A substantial number of witnesses were called and there is voluminous evidence on the depositions requiring consideration. Mr Houston has moved under the provisions of s.347 of the Crimes Act 1961, seeking a discharge without the accused being required to stand his trial.

This is a difficult matter. It involves the consideration of a large amount of evidence. Argument has taken place over 3 days and counsel have raised a number of difficult

legal points in relation to this matter. I am grateful to them for the trouble to which they have gone, with the detailed analysis which I have had on the factual material and for the references to the law. In view of the seriousness of the matter and the material which has been raised and argued before me, I should have preferred to prepare my decision over a longer period. There are however, considerations of time which make it desirable that there should be a conclusion in this matter as soon as possible. For that reason, I propose to give an oral decision at this stage.

I approach the matter on the basis of the observations of Wilson J. contained in R. v. Myers 1963 N.Z.L.R. 321. I note the submission of Mr Almao that that case does not set out the correct approach. It has however, been followed on a number of occasions and for the purposes of this application I propose to proceed in accordance with the observations contained in it. There is an emphasis on the discretion in the section, but essentially the learned Judge indicated that the approach to applications under that section should proceed on the basis of whether or not the Judge is satisfied that it is unlikely that any jury, property directed, would convict; or that it would be wrong for a jury to convict the accused. I note that in that decision, the learned Judge made reference to the fact that the matter would already have been considered by the committing Court, which had the advantage of seeing and hearing the witnesses. Whether that is a proper consideration or not, I propose to regard the matter as though it came before me abinitio because apart from

anything else, the Crown have taken the opportunity to produce additional evidence which was not before the learned District Court Judge who heard the committal proceedings.

In this case it is necessary to make some reference to the facts, but I propose to do so in no great detail because I think it is undesirable that I should express any concluded opinion on certain aspects. The Crown is able to establish that the deceased died as a result of a stab wound. The pathology evidence is sparse; it has been expanded by additional material produced to me which was not before the learned District Court Judge. The pathologist is unable to indicate the time of death, but he does say that it is likely that death would have ensued between 3-30 minutes after the infliction of the wound which caused the death. He also says that it is possible that the deceased would have been able to walk around during that period. In addition, he says that there is no indication that the deceased had suffered bleeding from his nose and the pathological evidence suggests that the bleeding which did occur, was as a result of the fatal wound. The evidence for the Crown includes a statement to the effect that at some time much earlier on 25 January than the time when the accused was at a band concert at the Miranda Hot Pools, he was observed to be in possession of a knife. The evidence is then to the effect that on the night in question the accused with a large number of other people, were present at a band concert at the Miranda Hot Pools. It is clear that there was a certain amount of drinking taking place at the concert

and some of those involved in giving evidence, had taken liquor beforehand. In particular, there is evidence that the deceased had been drinking in the hotel; that he subsequently went to the concert at the hot pools with friends and that while there, he was drinking tequila and was smoking marijuana.

Mr Houston was good enough to indicate that the evidence did not suggest that the deceased had a very high blood alcohol level, but certainly it would have been at a level which would not have permitted him to drive.

Evidence was given that the deceased with two other persons, had been involved in a cannabis growing enterprise with a considerable number of plants concealed in an area in the district. Parts of these plants had been removed by persons, of whom the deceased seems to have believed the accused may have been one. Whether that is true or not, evidence was given that at the concert there was some altercation regarding this and a claim which the deceased and others are supposed to have made against the accused and other persons said to have been associated with him. This is significant because it is put forward by the Crown as a motive for what it is alleged followed.

There is some doubt on the evidence as to what time the band ceased playing, but it seems certain to have been some time after 11 p.m.. There is evidence from a number of witnesses that at some time either just before the band ceased the concert or just after, the accused and the deceased became involved in some sort of altercation and the evidence is clear

that the deceased was the aggressor. This altercation appears to have developed into a physical confrontation and there is evidence that at one stage during the course of it, the accused was pushed against a table in a barbecue area at the Miranda Hot Pools complex. One witness described the accused as having his back arched against the table. It seems clear that from the descriptions involved at this point, the participants must have been at right angles to the spectators who having become aware that a fight was in progress, had come to watch.

I should mention at this point, because it is important to the applicant's submissions, that there were some eight people who gave eye-witness accounts of the fight and another four who were able to testify to it having occurred but who did not actually fully observe it. The area where the fight took place was an area of cubicles set aside for barbecue purposes. There is some conflict as to the lighting which was available, but it does seem clear that while there may have been no light in the actual cubicle where the fight took place, there was lighting in the area on both sides and sufficient lighting for a number of witnesses to describe in some detail what they saw. At the same time, it is also important to note that some witnesses refer to the darkness and to some difficulty in observing.

Following that point at which the accused was held against the table by the deceased, the accused seems to have been able to cause the deceased to fall to the ground. The descriptions of this event vary, but all the witnesses agreed

that the deceased was on the ground with the accused astride him holding him down. At this point, the head of the deceased would have been pointing into the cubicles with the back of the accused towards the semi-circle of observers.

It is not wholly clear exactly where the participants were in relation to the grassed area or the cubicles at this stage. One witness suggests that when the reversal of positions took place, the parties moved further out towards the grass, but it is not particularly clear from the deposition what he meant by that statement.

There is evidence from a number of witnesses that at various times during the course of the fight the accused made comments to the deceased suggesting that the fight should cease or that the deceased should desist - comments of that kind. There is evidence that when the deceased was on the ground with the accused astride him, the accused struck a blow to the head of the deceased. This is described by more than one witness as a punch. The evidence is then to the effect that the accused got off the deceased and ran or jogged to the carpark.

The evidence of those watching varies as to what the deceased then did, but there is a coincidence of suggestions that he appears to have got up slowly. There is evidence that he put his head between his knees at some stage; there is a suggestion that he used the table to assist him to move. One witness suggests that he began to walk away, but in each case the witnesses appear to have moved away at this stage and there

is no satisfactory evidence as to what the deceased eventually did or where he went. I note however that one witness, the witness Arthur, said he went to the deceased and asked if he was alright. The deceased apparently did not reply other than by moaning or groaning. The witness then left the deceased and was so little concerned with what he observed that he purchased a pie and went home. It is important that another witness, Miss McCullum who did not know the deceased, at some stage - and it is not clear from her deposition when - came back past the barbecue area and observed what she referred to as a "body", but I do not think in using that term she intended by its use that what she saw was necessarily a deceased person in a cubicle. From the description which she gave, it is clear that the person she saw was the deceased. It is important that she was able to describe the 'T' shirt he was wearing as a white 'T' shirt with blue bars and when specifically questioned, she stated that she had not observed any blood.

The accused was observed to leave in a car not driven by him, but it is said that the car was driven at some speed. The accused went home where his parents expressed some concern at what seems to have been a possible intention to return to continue the dispute with the deceased and his friends. Some expressions of concern that the deceased and his friends might take reprisals seems to have been made.

The deceased did not come on his own. He came with other persons who looked for him at the end of the concert, but on

being unable to find him, assumed he had made other arrangements and left without him. It is perhaps important to note that one of those witnesses referred to having been in the vicinity of the barbecue area but having seen nothing there.

The following day the accused is said to have made an observation which suggested a concern that the deceased may have been hurt or dead. This observation was made at a time when the death of the deceased cannot have been generally known. Subsequently the Police investigation established that there was blood on a coat belonging to the accused. This blood was consistent with blood from the deceased and not consistent with blood from the accused. It is said to have been smeared on the coat.

I accept of course that in the present state of knowledge, it is impossible for scientific evidence to establish that the blood came from a particular person, but in this case there is the unusual situation that the deceased had an exceedingly unusual blood group. The Crown relies on this as being a significant part of its case and I think at least at this stage it must be regarded as important.

The Crown also rely upon a statement said to have been made by the accused when in custody under circumstances which may form no doubt the subject of an application in respect of that statement, but at this stage I am bound to accept it as being material before me. In that statement, the accused is said to

have indicated that he had picked up some unidentified object and struck at the deceased with it. He was not aware whether or not he had connected with the deceased; he did not know what the object was; it had not been retained and it was immediately after that that he left the scene.

Under those circumstances, Mr Houston in detailed and forceful submissions, has suggested a number of reasons why I should exercise my discretion under the provisions of s.347. Without going into the detail of the submissions, Mr Houston placed a considerable reliance on the fact that a substantial number of persons who were directly interested enough to watch the fight, gave no evidence at all of any stabbing incident. I think that Mr Almao is right in saying that this of itself is a matter for a jury to consider.

There is some difference of opinion as to the state of the lighting. There are some witnesses who considered that it was such as to impede their observation. There is some difference as to the placement of the incidents. Clearly this will form an important part of any approach which the defence may make on a trial, but I do not think that that of itself would be sufficient. I am much more concerned over the evidence of Mr Arthur who approached the deceased after the incidents and the evidence of Miss McCullum. Mr Arthur was not asked whether he observed any blood. It is not clear whether or not he was concerned over the lack of response of the deceased.

As far as Miss McCullum is concerned, she did express some reservation over her ability to see blood from the position in which she observed the deceased.

With some hesitation, I conclude that neither of those reservations are sufficient to exercise jurisdiction under the provisions of s.347. Indeed it seems to me that on the purely factual material which the Crown have so far adduced, there is material which could properly go to a jury as distinct from its weight. Mr Houston however, drew attention to two particular aspects which are important. The first related to the significance of circumstantial evidence and the approach which a jury would have to be told to adopt towards it. This is a case where the Crown is to some extent relying on circumstantial evidence, although as Mr Almao observed, it is a combination of direct and circumstantial evidence. The direction which is normally given to a jury following the decision in R. v. Hodge (1838) 2 Lew CC 227, is that a jury is entitled to infer guilt where that is the only rational conclusion on the facts proved.

While I have some concern over this aspect of the matter, I do not think that in the combination of circumstantial and direct evidence which the Crown put forward in this case, it would be proper to tell a jury that the contention for the Crown was not the only rational conclusion on the facts proved and in my view this contention too is not sufficient.

That leaves a major argument put forward by Mr Houston which is based on the provisions of s.167 of the Crimes Act and

which effectively involves the responsibility of the Crown to prove intention. Mr Houston says that on the basis of the statement which the Crown has put forward as a matter on which it relies, there is direct evidence that the accused did not have the necessary intention since he refers only to having picked up some unidentified object; that he did not know whether or not he connected with the deceased, although he struck at him with it.

"Intention" for the purposes of s.167, can be inferred under certain circumstances and perhaps the extreme example of that is the case cited by counsel of Black 1956 N.Z.L.R. 204, where the necessary intention was inferred from actions where the accused struck deliberately at the deceased with a knife. In this case, the Crown case is that the deceased was murdered by the deliberate infliction of a sharp instrument. If there is sufficient evidence to indicate that that occurred and that the accused must have been the person responsible, then I think that the circumstances of the incident itself would be sufficient to allow the question of intention to go to a jury, bearing in mind of course the responsibility of the Crown.

In the end, an application under the provisions of s.347 is one of overall impression. I accept that this is an unusual case; that it is one where the circumstances give rise to concern, but I also find it impossible to get past a situation where the Crown have proved on the depositions, a

direct involvement of the accused and where there is circumstantial evidence which takes the matter beyond mere suspicion.

Under those circumstances, the application will be declined.

R. S. Hall

Solicitor for Respondent: Crown Solicitor, Hamilton