

IN THE SUPREME COURT }  
OF WESTERN AUSTRALIA }

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10 AUG 1971  
Heard: 25 June 1971;  
2 July 1971;  
2 August 1971.

Delivered: 9 August 1971.

COURT OF CRIMINAL APPEAL

CORAM: JACKSON C.J., BURT J., WICKHAM J.

JAMES ALEXANDER TILBURY

Applicant

v.

THE QUEEN

Respondent

Mr. E. M. Franklyn (instructed by E. M. Franklyn & Co.)  
appeared for the applicant.

Mr. R. D. Wilson, Q.C., Mr. M. J. Murray and Mr. G. M.  
Overman (instructed by the State Crown Solicitor)  
appeared for the respondent.

Cases cited by the applicant -

Bullard v. R. (1957) A.C. 635 at p.642  
Mancini v. Director of Public Prosecutions  
(1941) 3 A.E.R. 272  
R. v. Longley (1962) V.R. 137  
R. v. Porritt (1961) 3 A.E.R. 463  
R. v. Bond (1906) 2 K.B. 389 at pp. 400-401, 402, 403  
R. v. Tsingopoulos (1964) V.R. 676 at pp. 680, 681, 684  
R. v. Wilson (1970) V.R. 693 at pp. 695-696, 697  
R. v. Barber (1938) Supreme Court Reports, Canada, p.465

Cases cited by the respondent -

R. v. Scott (1909) 11 W.A.L.R. 52 at pp. 60-61  
R. v. Jumakhan (1949) Q.W.N. 37 at pp. 54-55  
Lee Chun-Chuen v. R. (1963) A.C. 220, at pp. 231, 233  
R. v. Shersmith (1967) Q.R. 576, 582  
R. v. Barber (1938) Supreme Court Reports, Canada, p.465  
R. v. Wilson (1970) V.R. 693  
R. v. Wilson (1970) 44 A.L.J.R. 221  
R. v. Iuliano (1971) V.R. 412  
R. v. Vassiliev (1967) 68 S.R. N.S.W. 74

JACKSON C.J.

The applicant seeks leave to appeal from his conviction after trial of the crime of wilful murder. The grounds of the application are, firstly, that the learned trial Judge failed to direct the jury on provocation when that question was open on the evidence; secondly, that the Crown introduced prejudicial evidence through a witness named Roberts without notice to counsel for the applicant that such evidence would be led; and thirdly that this evidence was inadmissible, or at least should have been excluded as a matter of discretion.

The charge against the applicant arose out of the death of a young married woman, Mrs. Robeson, at Serpentine on the morning of Monday the 8th February this year. She died from asphyxiation caused by strangulation which occurred when the applicant wound a stocking three times tightly round her throat and knotted it. The applicant had known Mrs. Robeson for several weeks and had been living with her for just over a week. On Saturday night 6th February they went together to the Boomerang Hotel, where Mrs. Robeson's brother, Neville Roberts, was also present. During that evening Mrs. Robeson refused to dance with the applicant but danced with other men and invited one of them to her home, and this led to arguments between the applicant and Mrs. Robeson on the way home. On Sunday, they more or less ignored each other, and the applicant spent most of the day drinking bottled beer. On Monday morning they continued arguing, partly about Mrs. Robeson saying she was going to her mother's place instead of delivering some pamphlets with the applicant, as had been previously arranged, but mainly, the applicant said in evidence, "it was about myself - past things I'd done". His evidence in chief continued:

"You gave her a backhander did you; or several backhanders?---Yes.

Why did you give her those backhanders?---It was more or less to keep her quiet and make her see reason sort of thing.

"What was her situation at this time? What was she doing?—She was in the bedroom getting dressed to go to her mother's place.

Yes - but why did you give her the backhanders?—Well, she was yelling out and I wasn't sure whether the neighbours could hear or not, and - - -

How loud was she yelling?—Well, I was in the lounge room and I could hear her quite plainly.

And what happened then?—Then I went into the bedroom and that is when I gave her a couple of backhanders and told her to wake up to herself, and I asked her if she was going mad or something. That was when she told me that on her way to her mother's she was going to go to the police and tell them about other crimes which I had committed - and, I don't know. I just lost my block and we started arguing more and more, then I grabbed her around the throat and we over-balanced and she fell - or both of us fell - on to the bed and she just still kept going, and she was getting me - - -

What do you mean by 'she kept going'? What was she doing?—Just kept saying that she was going to the police and this type of thing, and I just done my block and - I don't know what came over me but the result is that she is now dead."

And a little later:

"—I was sitting in the lounge room drinking beer and Lynne just started to more or less say - - I asked her if we were going to deliver these pamphlets for which we had made arrangements previously and she said 'No', she was going to her mother's. I asked her why we weren't going out to do the pamphlets - which was my income at the time - and she just said she'd changed her mind and then that she was going to go to the police and tell them these things about me; and I don't know. I just didn't think it was right and we started arguing there and then and it ended up that I got up and I walked into the bedroom. I gave her a couple of backhanders around the mouth and that didn't seem to quieten her at all and she got worse and was yelling louder - - -

Yelling louder? How loud?—Reasonably loud. She woke the baby up, who was on the front verandah at the time.

What happened then?—Then I just done my block and grabbed her around the throat and kept on telling her to shut up and wake up to herself and then we were on the bed. She was still going and I more or less just seen the stocking out of the corner of my eye and I thought, 'Well, if I can't shut you up something's going to try and shut you up' - and I put the stocking around her neck. Then all of a sudden I realise that 'something's happened that shouldn't have happened' and I panicked and just grabbed my 'port' and shot through.

Did you realise that she was dead, or did you know whether she was dead or not when you left the home?—No. I think she was still breathing. "

He also admitted that he picked up a baby's nappy from the dressing table and "put it over her mouth and tried to put it down her mouth". He then took his suitcase and drove in her station wagon intending to go to the Eastern States; but that night when a police constable spoke to him in Kalgoorlie, the applicant suddenly said "I want to tell you I committed a murder in Perth this morning about 10 o'clock". He told the constable Mrs. Robeson's name, and when asked how he killed her, he answered "I strangled her"; and when asked "what was your motive for killing her?", he replied: "She knew too much about me".

On the first ground, it was submitted that Mrs. Robeson's alleged threat to make a report to the police about offences committed by the applicant was evidence of provocation which could, under s.281 of the Criminal Code, reduce wilful murder to manslaughter. The learned trial Judge decided, after the matter had been discussed with counsel in the absence of the jury, that there was no evidence fit to be left to the jury on this issue, and accordingly he did not give any direction upon it. Counsel who appeared for the applicant at the trial expressly told His Honour that provocation was not the defence, and did not himself mention the subject to the jury. If the common law rule relating to provocation applied in this State, as it has been held to apply in Queensland under the same Code provisions, it is plain that Mrs. Robeson's threats to go to the police could not amount to provocation, because at common law words alone do not suffice "save in circumstances of a most extreme and exceptional character" - Holmes v. D.P.P., 1946 A.C. 588 at p.600. In this State it has been generally accepted that the definition of provocation in s.245 of the Code applies to the defence of provocation under s.281 - R. v. Scott (1909) 11 W.A.L.R. 52, Dunstan v. The Crown (1931) 33 W.A.L.R. 118, Mehemet Ali v. The Queen (1957) 59 W.A.L.R. 28. By that definition provocation means and includes any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive him of the power of self control and induce him to assault the person by whom the act or insult is done or offered.



For Mrs. Robeson to make a report to the police about offences committed by the applicant could not be a wrongful act, unless it were a wilfully false report, which was not suggested. Still less could a threat to make a report be a wrongful act, nor could it be an insult, if he had committed offences; and if he had not, while such a threat might conceivably insult an ordinary person, it could not reasonably deprive him of his power of self-control. Accordingly His Honour was in my view correct in deciding not to direct the jury on this issue.

The second and third grounds of this application arise out of a short piece of evidence given by Mrs. Robeson's brother Roberts, which we are told by counsel representing the Crown occurred unexpectedly. Roberts had given formal evidence at the committal proceedings that he had, after her death, identified his sister's body at a mortuary, and then stated that he had last seen her alive and in good health on the 6th February at the Boomerang Hotel in the company of the applicant. Roberts' name was included in those of the Crown witnesses on the back of the indictment. When called, he gave the same formal evidence as he had given previously but was then asked further questions by counsel for the prosecution, and these and his answers were as follows :

"And at that time what was the relationship between them?—As far as I know — — — I had only met him once and that was the week before. From what I can gather he was boarding at her place at Serpentine.

Was the relationship between them on the evening of the 6th (the Saturday evening) friendly?—Well, Lynne was dancing with someone up on the floor and Tilbury must have been getting jealous or something because he said to me 'I'll fix her and fix her properly', and I said 'You'll have to fix me or get me first' or something like that. I can't quite remember, but those were the words he used.

It seems that the relationship was not very good?  
—That is correct. "

It is conceded that counsel for the applicant was not informed that further evidence would be adduced from Roberts. The witness was not cross-examined. He gave his evidence at about 12.15 p.m. The applicant was called to testify on his own behalf after the lunch adjournment, but Roberts' evidence was not put to him by his own

counsel and he was not questioned about it by the prosecution. No application was made on behalf of the applicant for an adjournment to obtain instructions, but counsel would of course have had an opportunity of consulting the applicant during the lunch adjournment.

The second ground for leave to appeal is in the following terms :

- " (a) The Crown Prosecutor introduced highly prejudicial evidence touching on the issue of intent through the witness Neville Dennis Roberts, which evidence had not been led in the preliminary hearing and no notice of intention to lead the same having been given to me or my counsel prior to or at trial.
- (b) Such lack of notice prohibited my counsel from any investigation as to the truth or otherwise of such evidence and hampered him in his cross-examination of the said Neville Dennis Roberts and his examination in chief of me as a result whereof I was unfairly prejudiced in my trial. "

I am quite unable to accept the argument that the absence of notice of intention to lead this evidence can in the circumstances of this case be taken on appeal as a ground for setting aside the verdict. It is the proper and, I believe, the invariable practice in this State for the prosecution to give notice to an accused person of an intention to call further witnesses in addition to those called at the committal proceedings or named on the back of the indictment, and this practice should be and usually is adopted where it is intended to adduce from a named witness evidence beyond that which he gave at the preliminary hearing. But if there is a failure to observe this rule, and an accused person is taken by surprise, his remedy is to seek an adjournment which would normally be granted if the evidence were material. The practice on this subject is referred to in Archbold, 37th ed., par. 1375. If an accused person is unrepresented, no doubt the trial judge would take some appropriate action if new evidence is introduced without notice; but where counsel appears, the judge is entitled to rely on him to apply for an adjournment if thought advisable. We cannot enquire why no adjournment was sought in this case, although there could be obvious reasons for the course which was adopted. The conduct of the defence was in counsel's hands, and he neither asked

for an adjournment nor led evidence from the applicant touching what he said to Roberts. It has not been shown that the applicant was prejudiced as alleged.

The third ground for leave to appeal relates to the same evidence of Roberts as to what was said to him by the applicant at the hotel on the Saturday night. It was submitted that this was irrelevant and hence inadmissible, or in the alternative that it should have been excluded by the trial Judge in his discretion as being of little relevance and highly prejudicial to the applicant. No exception to its admission was taken at the trial. In my opinion, this evidence was relevant and admissible. It formed part of the narrative of the events which led up to the death of Mrs. Robeson. The narrative commenced with the visit to the hotel on the Saturday night, when her conduct annoyed the applicant and led to resentment on his part and ill-feelings between them on the way home, which continued throughout Sunday, and progressed to a flare-up of serious arguments on the Monday morning. The applicant himself both in his statement to the police and in his evidence at the trial related these events and plainly regarded them as material. The whole of this evidence was also relevant as disclosing the relationship between the applicant and Mrs. Robeson during this period immediately preceding her death. The relations between the parties at a material time "so far as they may reasonably be treated as explanatory of the conduct of the accused .... are properly admitted to proof as integral parts of the alleged crime ...." - per Kennedy J. in R. v. Bond, (1906) 2 K.B. 389 at p.400 - a passage cited with approval by both Barwick C.J. and Menzies J. in Wilson v. The Queen, 44 A.L.J.R. 221 at pp. 222-224. Menzies J. added - "To shut the jury off from any event throwing light upon the relationship between (the parties) would be to require them to decide the issue as if it happened in a vacuum ....".

Thus what was said to Roberts by the applicant on Saturday night tending to show his jealousy of and annoyance with Mrs. Robeson was clearly relevant. But it was not suggested at the trial that it disclosed a present intention to kill her on the following Monday. The Crown Prosecutor in his address to the jury put it that the evidence might show the applicant who was already thinking in terms of violence and was prepared to use violence to Mrs. Robeson. But His Honour put the evidence in its proper context in his summing up when he commented: "There was apparently therefore some degree of ill-feeling at that stage and that is, I think, as high as it can reasonably be put". There is nothing to indicate that the trial Judge erred in not excluding this evidence.

For these reasons, leave to appeal should, in my opinion, be refused.