

CASES

DETERMINED BY THE

SUPREME COURT OF WESTERN AUSTRALIA

MATAMIN ROSLAND, APPELLANT.

THE KING, RESPONDENT.

1923.

March 2.

Court of Criminal Appeal—Criminal Code Act, 1913 (No. 28 of 1913), section 21—Wilful murder—Conflicting statements by accused—Motive—Intention.

McMillan,
C.J.
Burnside, J.
Draper, J.

Petition against a conviction for wilful murder.

Held, the presence or absence of motive is only one of the circumstances to be considered in drawing a conclusion from the whole of the facts.

Petition referred by the Minister for Justice to the Court of Criminal Appeal under section 21 of the Criminal Code Act, 1913.

On the 15th January, 1923, the appellant was indicted for the wilful murder of one Zareen before the Court of Criminal Sessions at Cue. After a trial lasting three days the jury disagreed. The accused was arraigned a second time on the same charge, and on the 24th January, 1923, was found guilty of wilful murder and sentenced to death.

The petition set out that the appellant was not guilty of the crime of wilful murder, that the verdict of the jury was against the evidence and the weight of evidence, that a reasonable doubt was established by the evidence, and the appellant should have been given the benefit of such doubt by the jury, and that if the evidence disclosed any offence it was that of manslaughter only, and the appellant should not have been convicted of wilful murder.

The appellant was a gardener and resided in a camp at Nullagine. The murdered man, Zareen, was an Afghan camel driver in a prosperous way and resided at Lionel Asbestos, 22 miles from Nullagine. He could not read and could only write his name. A week or ten days before the 27th August, 1922, he

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is known to have had in his possession at least £23. On the 27th August, 1922, he had £10 at least in his possession, and on that day he went to the accused's camp at Nullagine, and was never seen alive again. He possessed a gold ring and also three gold teeth.

In October, 1922, the police made an inspection of the appellant's camp and discovered extensive blood stains on the bed, underneath the head of the bed on the floor, on the cobble stones outside the house leading to the fowl yard, and on the wheelbarrow. The appellant, after arrest, informed the police that Zareen had left his camp on the 27th or 28th August, leading two horses, and that he had not seen him since. He accounted for the blood stains by saying that they were from a fowl he had killed. Subsequently the body of Zareen was discovered in night attire buried in the fowl yard. The gold ring and teeth were missing. The approach to appellant's camp had, up to the end of August, always been through the fowl yard, but since that time, he had barred the approach to the house.

When the body of Zareen was discovered, the appellant sent for a Mr. Angelo, to whom he made a statement which was reduced to writing. He stated that he had killed Zareen by accident. The story put forward was that he had been asleep, and some unknown person had attacked him. The appellant fought with his assailant and hit him on the foot with an iron bar, causing him to fall and hit his head on the iron. The appellant then stated that he went to bed, and that the blood stains on the bed were caused from a wound he himself had received in the scuffle. The appellant further stated that in the morning he was surprised to see Zareen lying dead, and that he thereupon buried him.

At the time of his arrest the appellant was in possession of Zareen's saddle. There was also evidence that the appellant, since the date of Zareen's death, had written letters purporting to come from Zareen, one in particular authorising another Afghan to pay a sum of money to the appellant.

The doctor who examined the body of Zareen stated that the head was fractured by a severe blow, which would have caused death instantaneously if inflicted during life. He was unable to say whether the blow was inflicted before or after death.

At the trial the appellant entered the box and put forward yet another story. He stated that Zareen came to his house at

night time, that they quarrelled about money matters, and that Zareen attacked him furiously. In the scuffle they both fell on the door step and Zareen struck his head and became insensible. The appellant picked up Zareen and put him on the bed, where he died a quarter of an hour later. He was too frightened to tell the police, so dug a hole and put the body in, ramming it down with a heavy piece of wood, thereby fracturing the skull. He went on to say that he saw the gold ring and gold teeth afterwards in the house, but threw them away.

Lavan, Haynes and Coleman, for the appellant. There was no satisfactory evidence as to the exact date of the death of Zareen. It is admitted that the death was caused by appellant but not under circumstances amounting to wilful murder. If he was guilty of any offence it was manslaughter only. The verdict was not a satisfactory one, and the accused should have had the benefit of any doubt. The accused never made any attempt to destroy the blood stains. The doctor admitted that the fracture might have been caused after death in the manner suggested by the accused. The evidence of the Crown was only circumstantial, and the only account of the killing was that given by the accused. There was no evidence of a motive. In order to make unlawful killing wilful murder, evidence of intent must be provided and the onus is on the Crown. There was no evidence of motive, and the friendliness of the parties supports the hypothesis of manslaughter. The more serious the charge, the greater must be the proof.

Counsel also referred to *Jackman v. The King* (a); *Brown v. The King* (b); *Peacock v. The King* (c).

Parker (Crown Prosecutor), and *Roe* in support of the conviction. The accused made different statements each time he was asked about the disappearance of Zareen. He was present at the inquest and knew all the evidence that the Crown witnesses intended to give. (On proceeding to review the facts further they were stopped.)

MCMILLAN, C.J. This is a petition which has been referred to us under section 21 of the Criminal Code by the Minister for Justice. The whole matter has been referred to us, and the case has therefore to be heard and determined by this court as in the case of an appeal by a person convicted. The proper way in which to exercise the jurisdiction of this court was considered

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(a) 16 W.A.L.R., 8.

(b) 17 C.L.R., 570.

(c) 13 C.L.R., 619.

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in the case of *Jackman v. The King* in 1914, and I repeat what I said on that occasion in delivering the judgment of the court, which consisted of Mr. Justice Burnside, Mr. Justice Rooth and myself:—"The first matter to be considered is the principle on which we ought to deal with appeals like this, where we are asked to come to a conclusion on the facts different from that arrived at by the jury. I do not think that the rule which is applicable in civil cases, which only justifies a court of appeal in setting aside a verdict of a jury in cases in which the court is prepared to say the verdict is an unreasonable one, applies. In order to see what our powers are, we must look at the section of the Act in question, section 689, which says, 'The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable.' Now, if the legislature had stopped there, one would have been driven to the conclusion that the intention was that the same rule should be applied in this court as is followed in the civil court. Then the section continues, 'or cannot be supported having regard to the evidence.' We must give effect to these words. In England, judges who have had to consider this point have always asked themselves whether the verdict in question is a satisfactory or an unsatisfactory one."

The case which was put forward by the Crown depended on circumstantial evidence, and that is what one expects to find where the charge is one of wilful murder, but in this case it is supplemented by admissions which have been made by the accused man. If he had said nothing it seems to me that the facts would have shown clearly enough that he killed Zareen, and killed him, I think, on the 27th August. The material sections which deal with unlawful killing are sections 268, 277, 278 and 280. Section 268 says, "It is unlawful to kill any person unless such killing is authorised or justified or excused by law." Section 277 says, "Any person who unlawfully kills another is guilty of a crime which is called wilful murder, murder, or manslaughter, according to the circumstances of the case." Section 278 enacts, "Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder," and section 280 says, "A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter."

In this case, the killing which is admitted by the accused man, was clearly unlawful, not authorised or justified or excused by law. He is, therefore guilty either of wilful murder or of manslaughter. It seems to me that apart from the evidence which was given by the accused man himself (I will leave that for the moment entirely out of consideration) the only possible conclusion which can be drawn from the facts which have been proved in this case is that he was guilty of wilful murder. That is the conclusion which I think is supported by the way in which he disposed of the body, the condition of the body when it was found, the injury to the head, the night clothing with which the body was covered, and it is further supported by the large quantity of blood which was found at the head of the bed in which Zareen slept that night. Then again it is supported by the false stories, two of which were told by the accused man before he came into court, by his attempt to manufacture evidence to show that Zareen was still alive at a time when he been killed and buried, by the order for £4 odd which was forged, and, lastly, one is driven to this conclusion by the fact that he was found in possession of property which belonged to the dead Afghan. He had his pair of boots and his saddle, no money was found on the body, and, according to the evidence, the Afghan had some money. He was in possession of at least £10 on that day, and according to the evidence given by the witnesses they knew that he had at times a large sum of money in his belt.

Now, it is said there is no motive to be found for this murder. In Jackman's case I referred to the language used by the learned Chief Justice of Australia in the case of, the *Mutual Life Insurance Co. of New York v. Moss* (a), where he said, "When, therefore, the question for consideration is whether such an act is intentional or not, it is of the highest importance to consider whether the person in question, in the circumstances in which he was placed, had any inducement to form such an intention. On charges of murder, sometimes the question is whether or not the accused caused the death, and sometimes whether, if he caused it, he did so intentionally or accidentally. The existence of a motive may tend to show either that the person in question did the act *simpliciter* or that he did it intentionally." So the presence or absence of motive is only one of the circumstances to be taken into consideration when saying what the proper conclusion

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is that should be drawn from the whole of the facts. I think that one of the motives the accused had for the killing was to get possession of the property which belonged to the deceased man. There may have been others. It is always difficult to get to the bottom of the mind of a murderer and to know by what motive he was actuated. It is hard to say what were the exact relations between these parties, but there is one fact which can be called a motive, although it may seem to be hopelessly inadequate for the commission of such a crime as this.

But the case does not rest there. The accused man went into the witness box and told a story which, if the jury had believed it, would have reduced the crime from one of wilful murder to manslaughter, and the only question that the jury had to consider was whether that story which was then told was true or not. The case was properly left to the jury by the learned commissioner, and no complaint has been made of the way in which he conducted it. Really there was no room in the case for any judge to go wrong. It was such a simple one, as all that had to be done was to leave it to the jury to say whether they were satisfied with the story of the accused man or not. It was not the first story he had told: there were two before he went into the witness box. In one of them he simply said that the Afghan had gone off with his camels, and the other he told to Mr. Angelo after the body had been discovered, when he would have had plenty of time to think matters over, and when he was not in an unduly excited condition. That story was evidently carefully thought out, because it accounted for the death and the presence of this large quantity of blood on the bed. Obviously it was not true for various reasons. In the first place he said that the blood came from himself, but if he had lost such a large quantity of blood his condition would have shown it afterwards. He also said that blood would be found on the ground near the iron on which he alleged that Zareen had fallen, but no blood was found there. It seems to me unnecessary to go further, because when he went in the witness box he admitted having told lies before, and then he put forward his last version of the affair, the one the jury were asked to accept. I asked Mr. Lavan in the course of the argument whether he knew of a case in which the jury were asked to say whether the story told by the accused man was true or not and in which they had refused to believe the story, in which the Court of Criminal Appeal had come to a different con-

clusion. So much depends on the way in which the evidence is given and the demeanour of the witnesses that naturally we should hesitate very much, even if we have the power, to interfere with the finding of the jury in a case of this kind. But in this case I am not content merely to say that I think the verdict was not an unsatisfactory one, because, in my opinion, it is a verdict that is not only warranted by the facts, but called for by the facts; and if I had been sitting on the jury and heard this story I should have come to the conclusion that it did not account for the way in which the death was caused, and that it failed to account for the large quantity of blood which was found at the head of the bed. It seems to me to be a most improbable story, and I am not surprised to find that the jury refused to accept it.

I think that the verdict of the jury was a right one, and that this appeal should be dismissed.

BURNSIDE, J. I agree.

DRAPER, J. In my opinion the verdict of the jury is supported by the evidence given at the trial, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Lavan and Walsh* and *L. A. Coleman*.

Solicitor for respondent: *Crown Solicitor*.

WILLIAMS, APPELLANT.

ANDREWS, RESPONDENT.

Receiver—Application for removal by person claiming to be creditor.

A. was appointed receiver of the Gosnells Estate Company in a partnership action between himself and another. Subsequently a society was formed, of which he was secretary, for the purpose of acquiring on behalf of his members land from the company. W., a member of the society, became entitled to acquire a block of land, but before he had completed his purchase A., as secretary, refused to accept any further instalments, he, as receiver, having become involved in a dispute with the W.A. Bank. W., thereupon, claiming to be a creditor of the partnership, applied by summons in the partnership action for the removal of A. as receiver on the ground of misconduct. The summons was dismissed on the ground that he had no right to make the application.

Held, on the facts, that no misconduct had been proved.

Held, per McMillan, C.J., that a member of the society had no right to ask for the removal of the receiver in the partnership action.

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