RICHARDS v. R.

Court of Appeal
Forbes, P., Bourke and Hogan, J.J.A.

8 May 1978

Crime — murder — provocation — direction to jury
Crime—murder—provocation—meaning of "reasonable man"—Criminal Offences Ordinance, s. 8

The appellant was convicted of murder. On appeal, it was argued that the direction to the jury on the issue of provocation was inadequate.

HELD: (i) It is not enough merely to tell the jury that the prosecution must prove that the acts of the defendant were unprovoked. A fuller direction is desirable, and the substance of the defendant's evidence and contentions should be put to the jury in their proper context.

(ii) The reasonable man referred to in s.8 of the Criminal Offences Ordinance means an ordinary person of the age and sex of the defendant, sharing such of his characteristics as would affect the gravity of the provocation to him.

Cases referred to in the judgment

Woolmington v. *D.P.P.* [1935] A.C. 462
Mancini v. *D.P.P.* 28 Cr. App. R. 65
D.P.P. v. *Camplin* [1978] 2 W.L.R. 679

Appeal

This was an appeal from a conviction of murder passed in the Supreme Court.

Sir Joshua Hassan, Q.C., and A. M. Provasoli for the appellant.

The Attorney General (J. K. Havers, Q.C.) and E. Thistlethwaite for the Crown.

12 May 1978: The following judgment of the court was read—

The appellant, Ian Stuart Richards, a seaman aged 19 years serving on H.M.S. Norfolk, killed a Gibraltarian named Terence Alman. He was convicted of murder and sentenced to life imprisonment.

The deceased was the subject of a most brutal attack. The cause of death was intra-cerebral haemorrhage and fracture of the skull. On the medical evidence the face was badly smashed in with fractures of the bones of the nose, cheeks and jaw: the pathologist, Dr. Cassaglia, gave it as his opinion that these injuries could have been caused by 6 or 7 heavy blows with something blunt such as kicks with a shoe. There were also scratches on the body some of which could have been caused in a rolling fight and others through dragging along the ground.

The same witness found an abrasion on the appellant's thumb, a bite mark on a forearm, a small scratch on the penis and a slight swelling of the right testicle which he thought would have been due not so much to a kick as a grab. There was other medical evidence as to the tenderness of the testicles.

According to the story told by the appellant in the witness box he had drink taken and wished to return to his ship. The deceased accompanied him and took him to a confined space described as an "attic". There the deceased made sexual advances towards him which he resented and had then kicked him in the groin: he said that a fight ensued and they were rolling on the floor. He, the appellant, was getting very frightened, angry and "seeing red". The deceased was biting his arms and then got hold of his testicles and started squeezing, whereupon the appellant started lashing out with his feet: he was then conscious of feeling dazed and trying to pull himself together while he could hear "this horrible breathing in the background". The appellant made his way into a street where he was picked up by police. He was found to be drunk and, according to one witness to be in such a state as to give the impression that he was having a fit. He was taken to hospital and later allowed to return to his ship.

There was also evidence that a bracelet and a ring belonging to the deceased were found in the appellant's locker on the ship. The appellant claimed the former had been given to him by the deceased as part of the enticement. At one time he spoke of assuming he had taken the ring from the deceased's finger but later he said he could not remember.

The grounds of appeal argued before us were three in number. They related solely to the summing up and read as follows: —

> "(1) That the judge did not sufficiently direct the jury that the onus was on the prosecution to rebut the defence of provocation and generally.
> (2) That the judge did not direct the jury to take into consideration the state of the defendant's mind due to drink and drugs when applying the test of provocation.
> (3) That the judge did not sufficiently direct the jury on the defence of provocation."

In support of the first ground, Sir Joshua Hassan, counsel for the appellant, argued that the learned trial judge, having, at the outset of a lengthy summation, given a text book exposition of the law in the abstract, which was itself defective in one respect, entirely failed to relate that law to the issue of provocation arising from the evidence in the case.

Counsel conceded that, in his opening statement, the learned judge correctly directed the jury that the burden of proof was on the prosecution and that if left with a reasonable doubt the jury should acquit but in dealing with provocation the judge merely said: —

> "... it is for the prosecution to show that the acts of the accused were unprovoked: it is for the prosecution to prove that the accused was not taking part in a fight which would reduce the offence to manslaughter."

Counsel maintained that the judge should have gone on to say as Viscount Sankey said in *Woolmington v. D.P.P.* (1),

> "... the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

(1) [1935] A.C. 462, at p. 482.

Where provocation is concerned the word "acquitted" is of course inappropriate. The prisoner's right is to a verdict of manslaughter: see *Mancini v. D.P.P.* (1).

It may be argued that this further direction is implicit in the judge's brief description of the burden on the prosecution but counsel, if we understood him correctly, maintained that, at least in a case like the present where the appellant had come forward with an exculpatory statement, he was entitled to the amplification indicated. To make matters worse, said counsel, facts and circumstances put forward by the appellant to show provocation were never put as such to the jury. Instead in a short passage at the end of a lengthy summation, which dealt in great detail with many less important matters, the learned judge, apart from just saying that the appellant's evidence should be considered, referred merely to the medical evidence of minor injuries to the penis, etc., as if this was the only matter material to the determination of the issue.

No reference of any kind was made at this point to the appellant's account of what had happened in the attic, which was, of course, the primary basis for the argument on provocation. This, counsel claimed, was an entirely inadequate direction on this aspect of the case, and, in addition, the learned judge failed at this point to remind the jury that, if left in doubt on the issue of provocation, the appellant was entitled to the benefit of that doubt.

When a material issue as to provocation is raised we are disposed to think that the more ample direction indicated in *Woolmington* should be given. When, in its absence, the substance of the accused's evidence and contentions on provocation are not put, adequately and in their proper context, to the jury, the direction is inevitably open to criticism. Moreover, in the present case, the judge opened his final direction on provocation with: —

> "I turn now to the question of provocation. The question that you have to ask yourselves is, was the accused provoked?"

In isolation that is not a correct direction. The question should have been "Has the prosecution proved that the accused was not

(1) 28 Cr. App. R. 65, at p. 78.

provoked?" The judge could have achieved the same result by going on to point out what the jury should do if in doubt as to the answer but this was not done.

The question posed by the learned judge could be taken to imply a burden on the accused and, coming where it did in the summation, without further explanation might well have left the jury with the impression that unless they could say "yes" to the judge's question no reliance could be placed on provocation, an impression that might not have been removed by the very brief reference at the end of the summation to the overall burden on the prosecution.

It seems to us, therefore, that, quite apart from the recent decision in the case of *D.P.P. v. Camplin* (1), the direction in the present case was open to objection.

In *Camplin*, a fifteen year old boy, who had split the skull of an alleged assailant and killed him, raised the defence of provocation.

At the trial, the judge refused to direct the jury that they had to consider whether the provocation was sufficient to make a reasonable boy in like circumstances act as the accused had done but followed the more usual course, as did the Chief Justice in the present case, of relating the question to the acts of a reasonable man. The Court of Appeal held that the direction was incorrect and the point was taken to the House of Lords where, in the course of a speech with which all but one of the remaining Law Lords agreed, Lord Diplock said: —

> "In my opinion a proper direction to a jury on the question left to their exclusive determination by section 3 of the Act of 1957 would be on the following lines. The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did."

(1) [1978] 2 W.L.R. 679.

Section 3 of the United Kingdom Homicide Act 1957 is identical with s. 8 of the Gibraltar Criminal Offences Ordinance and it would appear from this statement of the law that the Chief Justice should have referred not to the reasonable man but to a reasonable youth of nineteen years, leaving it to the jury to determine whether this would lead them to apply a standard differing from that of the reasonable man.

In the circumstances we do not think the direction on provocation can be regarded as satisfactory, and, as we are unable to accept the submission by the Attorney General that the jury must, if correctly directed, have reached the same conclusion, the appeal is allowed. We set aside the conviction for murder and substitute a conviction for manslaughter. We find it unnecessary to deal with the remaining grounds of appeal which cannot affect the result.

The sentence of life imprisonment is set aside and a sentence of 10 years imprisonment is imposed on the conviction for manslaughter.