COOPER V. R.

Court of Appeal
Forbes, P., Hogan and Unsworth, J.J.A.,
5 November 1979

Crime — manslaughter — possibility of death by natural causes
Evidence — standard of proof — direction to the jury

The death of the deceased resulted from the rupture of a vascular aneurysm. The appellant was charged with manslaughter. The only real issue at the trial was whether the rupture was caused by a violent assault on the deceased by the appellant or whether it might have been a spontaneous rupture coincidental in time with the assault. The appellant was convicted. On appeal, it was argued that this possibility made the verdict unsafe or unsatisfactory and that the trial judge misdirected the jury on the standard of proof required.

HELD: (i) (Per Forbes, P., and Hogan, J.A.) The possibility that death occurred by spontaneous rupture was so remote that it could properly be ignored.

(ii) (Unsworth, J.A., dissenting) The general burden of the summation and more particularly the closing passage could have left the jury under no misapprehension as to the level of proof required.

Cases referred to in the judgments
Bracewell v. R. (1979) 68 Cr. App. R.44
R. v. Hepworth and Fearnley [1955] 2Q.B. 600
Walters v. The Queen [1969] 2 A.C. 26
Yap Chuan Ching v. R. (1976) 63 Cr. App. R. 7
Miller v. Minister of Pensions [1947] 2 All E.R. 372
Plomp v. The Queen (1963) 110 C.L.R. 234
McGreevy v. D.P.P. [1973] 1 All E.R. 503

Rivett v. R. (1950) 34 Cr. App. R.87
Attfield v. R, (1961) 45 Cr. App. R. 309
Stafford v. R. (1969) 53 Cr. App. R.1

Appeal

This was an appeal against conviction of manslaughter passed in the Supreme Court.

A.M. Provasoli for the appellant
The Attorney General (D. Hull) and C. Finch for the Crown
9 November 1979: The judgment of the majority of their Lordships was delivered by Hogan, J.A.

On 3 April 1979, the appellant was convicted by the Supreme Court of manslaughter and of inflicting grievous bodily harm. He has appealed against the conviction of manslaughter. The grounds of appeal are as follows:

"1. That under all the circumstances of the case the verdict is unsafe or unsatisfactory as, given that the only point in issue was whether the assault on Robert Sheppard caused his death:
(i) the verdict was based only on medical evidence which of itself was inconclusive and
(ii) the evidence adduced at the trial by the expert witness for the prosecution was not sufficiently probative on its own and in particular taking into account the evidence given by the expert witness for the defence.

2 The learned judge misdirected the jury on the standard of proof required on a criminal case."

The relevant evidence was to the effect that suspicion had fallen on the deceased, Sheppard, in the mind of the appellant at least, that Sheppard had stolen money from shipmates during a voyage to Gibraltar; that following a convivial evening in Gibraltar, the appellant and Sheppard were making their way back to their ship, both under the influence of alcohol, Sheppard being assisted by the appellant; that, apparently as a result of something he said, Sheppard was suddenly assaulted by the appellant who gave him a violent kick in the stomach; and that Sheppard collapsed on the ground unconscious and received three more kicks in the face. Sheppard received immediate attention from police and was rushed to hospital. Though technically kept

alive for 48 hours on life support machines, for practical purposes his death occurred within a very short time after the initial assault. The medical evidence was to the effect that death was due to the rupture of a vascular aneurysm at the base of the brain; that this is a development condition of congenital origin; that such an aneurysm is liable to spontaneous rupture at any time; that such a rupture can be precipitated by a rise in blood pressure; that alcohol, though not causing a rise in blood pressure, could increase the risk of rupture by increasing the speed of the flow of blood through the system; that a sudden assault of the nature suffered by Sheppard could be expected to produce a sudden rise in blood pressure; that this could have been responsible for the rupture of the aneurysm; and that there was no question of the rupture being caused directly by the kicks to the head. The pathologists who gave evidence agreed that it was impossible to exclude with absolute certainty the possibility of a spontaneous rupture of the aneurysm coincident with the assault; but while one forensic pathologist, Professor Harland, put the chances of this at one in a thousand, the other Mr Knight, considered the possibility to be greater than this.

It was established that the rupture of the aneurysm must have occurred in a space of time extending from immediately before the assault to some seven minutes following the assault.

The first ground of appeal, which, like the second, was ably and persuasively argued by Mr Provasoli, counsel for the appellant, rested on the contentions that the prosecution case depended on the medical evidence of one expert to show that the appellant killed the deceased and that it was inconclusive or insufficiently probative to justify that conclusion, particularly when weighed against the evidence of the expert called for the defence.

The Attorney General, on the other hand, argued, no less competently, that the prosecution case rested not on the evidence of one specialist alone but on that of four qualified doctors together with the testimony of those who narrated the events leading up to the death, and that it sustained the heavy burden of proof resting on the Crown.

The defence argument centred on the assertion by Mr Knight, a very highly qualified forensic pathologist, that the known facts, disclosed by the post mortem and other evidence did not preclude the possibility that the aneurysm burst spontanously and consequently one could not be certain that the assault on the deceased caused his death.

As against that, Professor Harland, the other forensic pathologist, said it was "Very highly probable" that the rupture of the aneurysm was not spontaneous but related to the assault and one pathologist, Dr Buchanan, said the odds against the rupture being purely spontaneous were "Astronomical". Moreover, said the Attorney, it would be flying in the face of common sense to think that a man, who is apparently alive and well, even if somewhat drunk, immediately before the vicious assault and virtually dead within minutes thereafter because of cardiac failure from a burst aneurysm, had come to his death independently of the assault. But this line of argument had found no favour with Mr Knight who, in addition to evidence of doubtful admissibility about the non-prosecution of other similar cases, said that after 16 to 18,000 autopsies he "ceased to be amazed at anything" and would not agree that a spontaneously burst aneurysm at that particular moment in time should be regarded as a "remarkable coincidence."

In effect, although the bursting of the aneurysm was due to pressure within the artery and the assault would have raised that pressure, Mr Knight was saying, unless you can prove that, in the absence of the assault, the deceased would have gone on living during the brief period between the initial assault and the disappearance of life, you cannot be sure that the assault caused the aneurysm to burst. This is similar to saying that if you throw a man into a shark infested sea where he is promptly devoured you cannot be certain that this caused his death unless you can prove that he did not die from cardiac failure or some other cause after he is thrown and before the sharks got him. Theoretically and scientifically it was no doubt conceivable that, had there been no assault, the deceased might have died contemporaneously from a spontaneous bursting of the aneurysm but, viewed with that practical common sense which one must expect from a jury, it was a possibility so remote and unlikely that, quite apart from any argument based on the presumption of continuity of life, it could properly be ignored. The point is well illustrated by the case of *Bracewell v. R.* (1), to which we will return, where a distinction was drawn between scientific or absolute certainty and the certainty which should be sought by a jury in a criminal case.

Consequently we think the first ground of appeal cannot be sustained.

(1) (1979) 68Cr. App. R. 44, at p.49.

The 2nd ground of appeal claims that there was a misdirection on the standard of proof.

Two passages in the learned Chief Justice's summation call for consideration. In the first he briefly dissents from the approach adopted by Sir Joshua Hassan in addressing the jury on behalf of the appellant. It will be convenient to return to this after consideration of the second passage which reads as follows: —

"Dr Knight, as you will remember, stressed the lack of certainty, the impossibility of certainty, as to the cause of the rupture of the aneurysm and Professor Harland also said that there is no certainty in medicine. But, I must point out to you that the law does not require certainty, as I have said earlier, the law requires proof beyond reasonable doubt, that is a standard less than certainty. If the law required certainty, there would be few if any convictions in the courts. But the law does require a very, very high standard of probability. A standard of probability where, although you admit that there are or there may be other possibilities, you can say to yourselves, while there are these possibilities it would be unreasonable to take them into account. If you can say that to yourself then the standard of proof has been satisfied."

At first sight and isolated from its context, that passage, particularly in its reference to probabilities and something less than certainty, may well seem open to question when regard is paid to the judgments which have been brought to our attention by counsel for the appellant, such as *R. v. Hepworth and Fearnley* (1), *Walters v. The Queen* (2), and *Yap Chuan Ching v. R.* (3).

But it cannot be overlooked that in this case, Mr Knight, who was portrayed as the leading expert, had made it very clear that, before ascribing death to the assault, he would require scientific or absolute certainty that there had not been a contemporaneous and spontaneous bursting of the aneurysm. Moreover Sir Joshua Hassan had made the absence of this level of certainty the main theme of his address to the jury.

The Chief Justice was plainly seeking to correct what he thought to be an exaggerated presentation of the measure of certainty required. He was performing a task very similar to that which fell to the trial judge in *Bracewell v. R.*, where the English Court of Appeal (Criminal Division) had this to say: —

(1) [1955] 2 Q.B. 600.
(2) [1969] 2 A.C. 26.
(3) (1976) 63 Cr. App. R. 7.

> "The learned judge then gave the jury an important direction in the following terms: 'Mr Steer understandably makes great play on his client's behalf of the doctor's expression 'I cannot with certainty rule out' so and so. You must remember this, that a doctor, and you may have thought that Dr Green was a splendid example of fairness, is speaking from a scientific point of view. He was saying 'I cannot as a scientific certainty rule out that which you postulate, namely partial asphyxia, recovery and then a heart attack,' but, he said, 'I incline strongly against that view.' You will remember ladies and gentlemen that your duty is not to judge scientifically or with scientific certainty. You judge so that as sensible people you feel sure and even say that what might not satisfy Dr Green as a scientific certainty, might with propriety, satisfy you so that you felt sure. Do not be misled. There is no such thing as certainty in this life, absolute certainty. You ask yourselves the simple question upon the whole of the evidence do I feel sure? Take account of course of the doctor's evidence. It is the most important evidence on this aspect. He is really the only one qualified to speak here. Take account of his reservation fully.'
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> "That direction, in our judgment, correctly draws the distinction between what might be described as scientific proof on the one hand and legal proof on the other. It is, with respect, an admirably lucid and succinct way of dealing with a problem which often arises in connection with scientific evidence."

The point is well illustrated by a passage from the comment on the case in [1979] Crim. L.R. 111 at p.113, which reads: —

> "the most favoured form of direction to the jury at the present day seems to be to tell them that they "must feel sure" of the prisoner's guilt, or be "satisfied so that they feel sure." "Sure" is a synonym for "certain" so it may be that the formula is too favourable to the defendant. Can one be "sure" or "certain" that something is so, while recognising a possibility, though a very remote one, that it is not so? The traditional formula of "proof beyond reasonable doubt" seems to be the most accurate manner of expressing the law's requirements. See the discussion in Cross, Evidence (4th ed.) 93-96."

Moreover in the instant case the general burden of the summation and more particularly the closing passages could have left the jury under no misapprehension as to the level of proof required to satisfy them. The final direction on this issue was: —

> "What you have to decide is whether the admitted probability that the stress caused by the assault caused the rupture and so the death of Sheppard is so over-whelming that you can dismiss any other possibility as insufficient to raise a reasonable doubt and in deciding this you must weigh, what appears to be an extreme improbability of coincidence, against the opinion of a very highly qualified and very experience pathologist."

Whilst it might well have been desirable to make more explicit the brief reference to dissent from the submission of Sir Joshua, we think that, having regard to the main emphasis reflected in his address and the general burden of the Chief Justice's direction, the jury were not likely to have misunderstood the distinction which the Chief Justice was seeking to make.

In the circumstances we have, after some initial hesitation, come to the conclusion that neither ground of appeal can be sustained and the appeal against conviction is dismissed.

Unsworth, J.A., delivered a dissenting judgment which, after reciting the charge, the verdict and the grounds of appeal and setting out the facts, continued—

There were two post mortems. The first took place on 17 November 1978, at Gibraltar and was carried out by Surgeon Commander Buchanan assisted by Dr Imossi. The cause of death was cardiac failure following a haemorrhage caused by a ruptured aneurysm. The second post mortem took place on 14 March 1979, at Bristol in England after the body had been exhumed. It appears that the sole purpose of the second post mortem was to determine whether there were injuries in the neck around the cervical vertebrae which could have been the direct cause of the haemorrhage. There were no such injuries.

The substantial issue in the manslaughter charge was whether it had been proved that the death of the deceased had been caused by the injuries inflicted by the appellant. There was a considerable amount of medical evidence called on this point.

In addition to the two pathologists who carried out the first post mortem, the Crown called Professor Harland who is the Regius Professor of Forensic Medicine at the University of Glasgow. The defence called Dr Bernard Knight who is a Reader in Forensic Medicine at the University of Wales and a Home Office pathologist. It was not in dispute that the deceased suffered from a congenital condition whereby he was liable at any time to develop a ruptured aneurysm. The opinion of the pathologists who carried out the first post mortem that a ruptured aneurysm may be precipitated by emotional stress and the injuries inflicted by the appellant would probably produce stress of this kind. Professor Harland expressed the opinion that it was very highly probable that there was a relationship between the injuries inflicted by the appellant and the death of the deceased. Dr Knight did not think that there was a possibility that the force of the kick caused the rupture. In his opinion the rupture could have been first a completely spontaneous event which is improbable but possible, second that alcohol was a potent contributory factor and thirdly that the rupture was due to an increase in blood pressure due to stress.

I propose to deal first with the second ground of appeal which raises the question whether the learned Chief Justice properly directed the jury on the standard of proof required in a criminal case.

Mr Provasoli on behalf of the appellant referred to the address of his senior counsel in the court below (Sir Joshua Hassan) in which he had submitted that the jury should not convict unless they felt sure of the guilt of the accused. In his summing up the Chief Justice said this: —

> "As you have been told the burden of proof is on the prosecution. The defendant does not have to prove his innocence and the standard of proof is a very strict one. With respect to Sir Joshua, it is proof beyond all reasonable doubt (I'm thinking of course of McGreevy's case). That needs no explanation. It means what it says".

Later in the summing up after considering the medical evidence the Chief Justice said: —

> "Dr Knight, as you will remember, stressed the lack of certainty, the impossibility of certainty, as to the cause

> of the rupture of the aneurysm and Professor Harland also said that there is no certainty in medicine. But, I must point out to you that the law does not require certainty, as I have said earlier, the law requires proof beyond reasonable doubt, that is a standard less than certainty. If the law required certainty, there would be few if any convictions in the courts. But the law does require a very, very high standard of probability. A standard of probability where, although you admit that there are or there may be other possibilities, you can say to yourselves, while there are these possibilities it would be unreasonable to take them into account. If you can say that to yourselves then the standard of proof has been satisfied."

The Chief Justice no doubt saw a danger that, because of the evidence, the use of the word "sure" or "certain" in this case, without explanation or qualification, might lead to misapprehension by the jury and took steps to guard against this by a direction not unlike that adopted by Boreham, J., in *Bracewell* and subsequently endorsed in the Court of Appeal. From the context it would appear that he was using the word "certainty" in the sense that Mr Knight used it, as meaning absolute or scientific certainty.

A reference to probability in a summation has its dangers and has frequently attracted criticism but that it is not necessarily inappropriate is shown by the judgment of Denning, J. in *Miller v. Minister of Pensions* (1), when he said: —

> ".....for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the absence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

(1) [1947] 2 All E.R. 372.

More authoritative, perhaps, is the citation from the judgment of Dixon C.J., in *Plomp v. The Queen* (1), which featured in the speech of Lord Morris of Borth-y-Gest in *McGreevy v. D.P.P.* (2), where the House of Lords so firmly endorsed the "reasonable doubt" formulation. The citation reads as follows: —

> "In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."

Mr Provasoli submitted that the words "With respect to Sir Joshua" would lead a jury to believe that Sir Joshua was wrong when he submitted to the jury that they should not convict unless they felt sure of the guilt of the defendant. McGreevy's case, he submitted, did not decide that the formula "without reasonable doubt" must be used to the exclusion of other ways of explaining the standard of proof. The case was dealing with a different issue, namely, whether a special direction is required in cases where the only evidence is circumstantial. Mr Provasoli submitted that no particular formula or form of words is required for explaining the standard of proof to a jury but it should be explained first that the onus of proof is always on the prosecution and secondly that they must be made to understand that they must not convict unless they feel sure of the guilt of the accused. The overall effect of the summing up must be considered in deciding whether this has been done in any particular case. In support of this counsel referred to the judgment in *R v. Hepworth and Fearnley; Walters v. The Queen* and *Yap Chuan Ching v. R.*

The learned Attorney General in reply submitted, as I understood him, that the words "With respect to Sir Joshua" would be understood by the jury, in the light of the evidence as a whole, as referring to remarks in Sir Joshua's address which related the standard of proof to the medical evidence rather than to his submission on the standard of proof itself, namely, that they should not convict unless they felt sure of the guilt of the accused. In dealing with this second ground of appeal the Attorney

(1) [1963] 110 C.L.R. 234 at p. 252.
(2) [1973] 1 All E.R. 503 at p. 509.

what mattered and submitted that the directions of the Chief Justice were correct: the burden of proof is on the Crown and the case must be proved beyond reasonable doubt. He referred to the cases of *Rivett v. R.* (1), *Bracewell v. R.* (2), *Attfield v. R.* (3) *and Stafford v. R.* (4) in support of his arguments.

General agreed that the overall effect of the summing up was

It is clear from the authorities that a judge is not required to use any particular formula or form of words in explaining the standard of proof to the jury but the formulas most frequently used are either "You must be sure" or "you must be satisfied beyond reasonable doubt". The practice in this respect has not, in my view, been altered by McGreevy's case where the decision related solely to the issue of whether a special direction is required where the evidence is wholly circumstantial. In deciding whether there has been a proper direction on the standard of proof an appeal court must look at the summing up as a whole and consider its overall effect.

There are a number of points which arise for consideration in deciding this ground of appeal. Was the Chief Justice referring to the defence submission on the standard of proof when he said "With respect to Sir Joshua" and, if so, should he have adopted or explained the submission made by the defence? Was the Chief Justice wrong in saying that the law does not require certainty and in referring to probabilities? Finally there is the question whether the jury were misled as to the standard of proof having regard to the summing up as a whole and its overall effect.

The first point for decision is whether the words "With respect to Sir Joshua" would be understood by the jury as referring to the defence submission on the standard of proof, namely, that the jury must not convict unless they are sure. It seems to me that the jury would clearly understand the words as a reference to the standard of proof. The words are in the paragraph in which the Chief Justice was dealing with the standard of proof and indeed in the very sentence in which he put forward the alternative formula that they must be satisfied beyond reasonable doubt.

(1) (1950) 34 Cr. App. R. 87. (2) (1979) 68 Cr. App. R. 44.
(3) (1961) 45 Cr. App. R. 309.
(4) (1969) 53 Cr. App. R. 1.

The next point for consideration is whether the Chief Justice was wrong in not either adopting or at least explaining the submission on the standard of proof put forward by the defence. I think that the Chief Justice was fully justified in putting forward the alternative formula of reasonable doubt but, in view of the words "With respect to Sir Joshua" I think that he should have explained why he was not following the formula put forward by the defence such as by saying that the two formulas were alternative ways of describing the standard of proof or by saying that they must be sure in the sense that they must be satisfied beyond all reasonable doubt. In the absence of an explanation, the jury would, in my view, be led to believe that the formulas were different and that reasonable doubt was something different from being sure.

I turn now to the question whether the Chief Justice was wrong in directing the jury that the law does not require certainty. It is true that this direction followed immediately after the medical evidence, but in my view, the Chief Justice did not limit his words to medical certainty but was telling the jury that the law did not require certainty and that proof beyond reasonable doubt was the test for them to apply in reaching their decision. This they would have to make after considering the whole of the evidence including the medical opinions. I appreciate that it is difficult to establish facts with absolute certainty but in its ordinary meaning without such qualifications certainty means the same as sure and could lead a jury to believe that they could convict even if they were not sure. In this same context the Chief Justice directed the jury that what the law requires is a very high standard of probability, and I think that it is undesirable to refer to probabilities in a criminal case.

The final point for consideration is whether the matters referred to above would have misled the jury as to the standard of proof having regard to the summing up as a whole and the overall effect. After considering the position in this way, I feel that the apparent rejection of the formula put forward by the defence without explanation, the direction that the law does not require certainty and the reference to probabilities would have led the jury to believe that the standard of proof in a criminal case is not as high as the law in fact requires. I would accordingly find in favour of the appellant on the second ground of appeal. In these circumstances it is unnecessary for me to consider the first ground of appeal.