GJ4.92

28/1963

IN THE PRIVY COUNCIL No. 18 of 1963

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
19 JUN 1964
25 RUSSELL SQUARE
LONDON, W.C.1.

74162

ON APPEAL

FROM THE CRIMINAL COURT OF MALTA

BETWEEN :-

MALCOLM STEWART BROADHURST ... Appellant

- and -

THE QUEEN ... ... Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal in forma pauperis by special leave of the Judicial Committee granted on the 15th May 1963, from a decision of the Criminal Court of Malta (Mamo C.J. Gauci and Harding JJ. and a jury of nine) dated the 28th October 1961, whereby the Appellant was acquitted of murdering his wife, Jean Peggy Broadhurst (hereinafter called "the deceased") but was found guilty of causing grievous bodily harm from which the death of the deceased ensued, by a majority of the jury of six to three, and was sentenced to fifteen years imprisonment with hard labour. [10: pp.283-284] [p.9, 1.10] [20: p.10, 1.10]

2. The principal grounds of appeal raised by the Appellant are :-

a) The jury were misdirected upon the onus of proof in respect of drunkenness displacing the intent to commit the crime of which the Appellant was found guilty.

b) The jury were misdirected upon the question

of the deceased dying by accident.

c) The jury were misdirected upon the law relating to involuntary homicide.

d) The jury were misdirected upon the law relating to causing grievous bodily harm followed by death.

e) The Appellant was not afforded a proper trial in that the judges intervened excessively in the proceedings, the jury were not told by the learned Chief Justice that they need not accept any comments by him in the summing up upon the evidence, the learned Chief Justice repeatedly commented upon the evidence inaccurately and against the interest of the Appellant and the Appellant's version of the facts was not put fairly or accurately in the summing up. 10

3. The relevant statutory provisions of the criminal law of Malta are :- 20

CRIMINAL CODE

35 (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

.....

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. 30

225 (1) Whosoever shall be guilty of wilful homicide shall be punished by death.

(2) A person shall be guilty of wilful homicide if, maliciously with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person. 40

.....

228. Whosoever, without intent to kill or to put the life of any person in manifest jeopardy shall cause harm to the body or health of another person, ... shall be guilty of bodily harm.

229. A bodily harm may be either grievous or slight.

230(1) A bodily harm is deemed to be grievous....

10 a) if it can give rise to danger of

(i) loss of life; or

(ii) any permanent debility of the health or permanent functional debility of any organ of the body; or

(iii) any permanent defect in any part of the physical structure of the body;....

234. Whosoever shall be guilty of a grievous
20 bodily harm from which death shall ensue solely as a result of the nature or the natural consequences of the harm and not of any supervening accidental cause, shall be liable -

a) to hard labour or imprisonment for a term from six to twenty years, if death shall ensue within forty days.....

235(1) A bodily harm which does not produce
30 any of the effects referred to in the preceding sections of this sub-title, shall be deemed to be slight....

239. Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction be liable to imprisonment for a term not exceeding two years or to a fine not
40 exceeding one hundred pounds.

Record

479. For every verdict of the jury, whether in favour of or against the accused, there shall be necessary the concurrence of at least six votes.

pp.11-12

4. The Appellant was indicted for the wilful homicide of the deceased on the night of the 22nd and 23rd of July 1961 at 49 St. Andrew Street, Birzebbugia, Malta. The trial took place between the 24th and 28th October 1961 before Mamo C.J., Gauci and Harding JJ. and a jury of nine. 10

5. The principal evidence among the 32 witnesses called for the prosecution was:-

pp.14-28

a) Surgeon Lieutenant Clements R.N. had found the deceased lying on her bed in her flat at about 1.30 a.m. after being called by a rating named McKinnell; she was removed to hospital; he had seen the Appellant at the hospital about 2.15 a.m. and had examined him for signs of drunkenness: his conclusion was that the Appellant had been under the influence of alcohol but was sobering up at the time: in cross-examination he said that the Appellant seemed to have had "a skin-ful". 20

pp.29-33

b) Surgeon-Commander Watt R.N. had operated upon the deceased: there had been a fracture of the right parietal bone under a laceration of the scalp and contusion and laceration of the brain: the deceased had not recovered after the operation and had died from the injuries to her head. 30

pp.34-37

c) Doctor V. Camilleri read a joint post mortem report which gave the cause of death as laceration and contusion of the brain, subdural haemorrhage and fracture of the vault of the skull. Injuries on the body were a bruise 1 x 1½" on the chest, a series of abrasions down the back and a bruise on the right ankle: there were also abrasions to the head as well as the injury to the skull and the brain damage: all the injuries together could not have 40

been caused by a fall onto a flat surface from a standing position: the abrasions on the back could have been caused in one of three ways, either by the body grazing sideways along the railing, or being passed forcibly over these railings, or by the body rubbing over the edge of a step or steps: the post mortem found that there was "nothing incompatible with the possibility of the victim having been thrown down the stairs". In answer to the Court the witness said he had not got the means to establish that the deceased had been forcibly thrown down: the injuries were consistent with the body falling down the stairs: in cross-examination the witness said it was most unlikely that the body had been thrown down across the railings because in that event the head injuries would be higher up: on further questioning by the Court the witness agreed that the head injuries could not all have been caused at once, but said that the doctors considered the deceased must have fallen backwards on the top of the stairs, grazed her back on the bannister, and suffered the head injuries at different stages of her fall to the half landing and then to the next floor.

p.38, 1.30

d) Superintendant Scicluna had interviewed the Appellant at 3.30 p.m. on the 23rd July and cautioned him: the Appellant had replied that he could not say anything: he had been to a dance and had had beer and whisky, his wife had left at 11.30 p.m. or midnight and he had stayed until the end when he was more or less drunk: when he had come out he had a black out and could not remember how he got home: he only remembered crossing Birzebugga Square and then had a black out and the next thing he remembered was finding himself standing near his wife who was laying on the steps at his flat with her head downwards in a pool of blood: he picked her up and put her in bed and remembered calling his neighbours but did not remember saying anything to them: after he had seen the sickbay attendant he had another blackout until he woke up in the guardroom. This story had later been repeated by the Appellant to Superintendant Lanzon: the Appellant had said that he had blackouts on

pp.53-62

two previous occasions: he also said that he had had differences with his wife but no arguments, she was rather possessive and did not like him staying on the terrace or sleeping in the afternoons. He might have had an argument the previous day as he had two bites on his arm which he offered to show.

pp.79-101 131-133

e) Mrs. Brenda McKinnel said that she lived in the next door flat to the Appellant: she and her husband went to bed before midnight, and between 1 a.m. and 2 a.m. they were woken up by noises on the stairs and a lot of running about on the roof: she heard the Appellant say "That's the end of that" somewhere near the stairs at her door: ten minutes later there was a ring at her door and the Appellant was standing there, in his trousers and slippers with blood upon him, and he said "Please go and see Jean because I have thrown her down the stairs": she took him in and he said "I am not drunk, I am not drunk, I am not drunk", and "I do not know why I have done it because Jean did not do anything to me": when the doctor came the Appellant was crying: he was taken away and returned at 3 a.m. when he had a cup of tea and said that the deceased had fractured her skull: the witness said that she had heard some quarrels between the Appellant and the deceased mostly over his sleeping in the afternoon: her husband had told her that the Appellant used to look through bedroom windows.

p.80, 1.20

p.80, 1.30

p.80, 1.30

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In cross-examination the witness said that there were packing cases on the landing outside the flats: some had had to be moved to get the body out: the Appellant and the deceased were a normal couple who got on well together, who occasionally quarrelled. She said that she heard the noises on the roof on the night in question, she awoke her husband; they had heard a noise like packing cases rolling down the stairs: there were two doors and her sitting room between her bedroom and the landing: she did not think the Appellant was drunk when he came to her flat, she had pulled him in and put

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him in a chair but in answer to a question by the Court, she said she had done this because he was distressed, not drunk. She further said that the Appellant and the deceased would kiss and cuddle each other affectionately and openly: when the witness was asked whether her husband had said in her presence that he would like to see the Appellant hang, she broke down and her cross-examination was interrupted: on resumption she agreed that he had said so to other people.

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f) Thomas John McKinnel, a naval rating, said that he was under close arrest because of victimisation through evidence he had given in the Court below: he had been tried and sentenced for being in contempt of an officer. The Court then held an enquiry, and the jury was told that this evidence was not justified. The witness went on to say that he lived in the next flat to the Appellant, and on the night in question he was awakened by running on the roof and banging noises in the stairway: soon after there was a ring on the bell, the Appellant appeared and said "I have thrown Jean down the stairs; I do not know why I have done it": the Appellant was in a hysterical state: later the Appellant had returned and said that he could not remember anything after breaking his toy pistol on the way home from the dance. The deceased had objected to the Appellant going on the roof at night: the witness knew of the Appellant's reputation as a peeping tom from sone one else.

pp.102-104
110-130
228-229

pp.105-109

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p.110, 1.30

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In cross-examination the witness said that the Appellant and the deceased frequently kissed each other in his presence: they would skylark about and bite each other in play, both on the roof and in their flat: when the Appellant came into his flat, he was crying and sobbing, and speaking unintelligibly: when the witness went out, he saw blood all down the stairs. The Appellant had not warned him that he could be seen from the roof if he was in his flat naked: the Court disallowed further questions on this point.

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g) Mary Gafa, had been baby sitting for the deceased, who had returned on the night in question at 12.30 a.m.: she had left the flat

pp.144-146

at 1 a.m. She agreed in cross-examination that the Appellant and the deceased got on well together; when the deceased returned from the dance, she was very happy.

pp.149-159

h) Petty Officer Raymond Jackson had been called to the flat: he found the Appellant perspiring profusely, shaking and sobbing: at the hospital the Appellant had said he could not remember anything after part of his journey home from the dance: on his way to the Police Station the Appellant had staggered: he was sobbing and was in great mental anguish. 10

6. The evidence for the defence included:

pp.178-195
197-204
206-220

a) The Appellant, who elected to give evidence, said that in October 1961 he was preparing to go home to England with the deceased and their small child: the deceased had had one argument with him over the child, she was rather shy and did not like going out: they had been very happy together, and would skylark about, and sometimes she would bite him on the shoulder in fun: their friends would sometimes join in the skylarking. On the 22nd July they had been on a picnic in the afternoon, and he had drunk five bottles of beer: in the evening they went to the fancy-dress dance at 7.45 p.m.: about midnight the deceased said she wanted to go home and he gave her the keys: he remained at the dance until the end: during the evening he had drunk about twelve bottles of beer and six whiskies: when he came out of the dance, the cold made him feel worse: he remembered coming to the square where his toy pistol broke: the next thing he remembered was finding his wife on the stairs in a pool of blood: he had carried her to his flat and then went and rang the bell of the McKinnel's flat: the next thing he remembered was McKinnel slapping his face: then he found himself in the guard-room at Lyster Barracks, and was told that his wife had a fractured skull: he had then been interviewed by the police. The Appellant said that on two previous occasions he had had black outs from drinking too much when he could not remember what had happened: he had been told he had been violent and abusive. He also said that he had warned McKinnel

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that he and his wife could be seen naked in their flat from the roof, and that this was the explanation of the peeping tom story.

He was cross-examined as to what he remembered of the evening of 22nd July and after various questions in cross-examination, he was questioned by the Court at length upon his evidence that he could not remember what had happened.

b) Michael Shepherd had been on the picnic on 22nd July and had seen the Appellant drink about five beers. pp.233-236

c) Leonard Henry Collecott spoke of an incident in August 1959 when the Appellant had too much to drink and became violent: he had had to be restrained and there was difficulty in getting him back to his ship. pp.237-239

d) Geoffrey Foster spoke of an incident at Christmas 1960, when the Appellant had been drunk and unconscious. pp.242-245

e) Donald Barker said that, after the Appellant's arrest, McKinnell had said to him on several occasions "I hope he hangs", which his wife had repeated, "I am going to do all I can to see that he hangs" and "If they cannot find anyone to hang him I will hang him myself". He had known the Appellant who was always very affectionate to the deceased. In answer to a number of questions by the Court, the witness said these words were spoken and the only reason he could think of was jealousy for the Broadhursts. pp.247-256; p.247, 1.30

f) Sub-Lieutenant Gerald Edward Loxton, the Divisional Officer of Rating McKinnell said that he had known Mrs. McKinnell since 1960 and that she was not a reliable person for speaking the truth: these were mainly occasions of matrimonial disputes. The witness was then asked by the Court if he always spoke the truth, even in his own private matters, to which he replied that he should have the habit to do so but that he had told a lie on occasions. To the Court, he said that this was not the sort of thing he was saying about the McKinnells: on occasions they had both lied to him on domestic matters. pp.257-259

7. The summing up to the jury was delivered by the Chief Justice. He began by telling the jury pp.260-282

they must decide the case upon the evidence and without bias or prejudice: the prosecution had to drive the charge home against the accused beyond reasonable doubt: if the prosecution failed to discharge this burden they should acquit the accused, but if the charge was honoured, they should convict regardless of any consequence. To find the accused guilty of wilful homicide, they had to be satisfied of four ingredients, the fact of death, that it was caused by the accused, that he did so maliciously, and that he had the necessary intent. It was common ground that the deceased had been found dead with various injuries: the learned Chief Justice outlined her movements during the evening, and went on: 10

p.262, 1.40

"I think this is a convenient place to mention a circumstance, which, you may think, may have very considerable importance in the assessment of the evidence, especially that given by the accused, although he does not say so in so many words, yet the implication of the version given by the accused is clear: that he found his wife lying on the staircase when he returned home. Now you know from the evidence that at the dance the accused was wearing fancy costume which consisted of jeans, black shoes, a black shirt and a straw hat. 20

p.263, 1.10

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Yesterday you asked to see the fancy shirt, and you observed yourselves and were told by Doctor Pullicino that there were no traces of blood at all on that shirt. He (Dr. Pullicino) had already seen that shirt when the first enquiries were being made and he had then satisfied himself that there was nothing of importance on it. As against this shirt, you have seen the jeans which the accused was wearing that evening, and you observed that they were soaked with blood, or had been, anyway: so were also, the black shoes which the accused was wearing. Now if the version of the accused is true, that he found his wife lying on the staircase when he first came into the building, and that he carried her to the bedroom and put her on the bed, you would expect the shirt to be also stained with blood. You may well

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ask yourselves why it is not. Since it is not, does that show that this part of the version given by the accused is not true and that he had already taken off his shirt before he picked up the body of his wife to carry her to her bed? That is all I want to tell you about this particular circumstance."

10 The learned Judge then referred to the medical evidence, and said there was no suggestion that the injuries were self inflicted: there had been a suggestion that they were accidentally caused, but the jury would remember the medical evidence that the injuries were not inconsistent with the possibility of the deceased having been thrown down the stairs. To prove that the deceased had been killed by the act of the Appellant the prosecution relied mainly upon the
20 evidence of the McKinnells: the learned Judge then reviewed their evidence and the grounds of criticism which had been made by the defence.

The third question for the jury was premeditation, and the learned Judge directed them upon this question: the theory of the prosecution was that there had been an argument over his being a peeping tom, which led to a fight: the Appellant had had two
30 bites on his arm which had been suggested by the defence as caused while skylarking with his wife: the learned Judge went on :-

p.273, l.30

"The object of this evidence of skylarking is, as I understand it, to suggest to you that the events of that night were merely an incident of this fun without any malice whatsoever. Counsel suggested to you, or asked you to imagine, that the wife could have fallen
40 down the stairs as the accused was chasing her in fun and, therefore, this was a case of pure accident. I do not know, but I do not think you will find very great difficulty in disposing of that suggestion. The circumstances appear to be hardly consistent with that explanation. To accept it would be to reject the whole of the evidence of the McKinnells and to disregard also the

nature of the injuries, while it is a mere conjecture on the part of the accused if, as he says, he does not remember".

p.274, l.10

The learned Chief Justice then said that the real defence lay in the statement "I do not remember". The jury were only concerned with the Appellant's state of mind at the time of the incident, and the plea put forward by defence counsel was that the Appellant was so drunk that he could form no criminal intent: there was no doubt the Appellant had had a number of drinks on the 22nd July. Drunkenness was of itself no defence, but it could be taken into account in determining the criminal intent of the accused. The learned Judge said:

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p.277, l.10

"All that the law means is simply this: that intoxication, if it exists, is a circumstance to be taken into consideration together with all the circumstances of the case for the purpose of determining whether the accused had, in doing the act, in perpetrating the deed, the requisite guilty mind. If it appears that he was so drunk that he was incapable of forming the intent required, then of course he cannot be convicted of the crime which is only committed when the intent is proved. But again this does not mean that drunkenness in itself is an excuse for the crime. It means only that the state of drunkenness may be incompatible with the intent and therefore the actual crime charged is excluded or negatived by the presence of this incapacity. I am sorry I am taking so long about this explanation, but it is vital in this case and I would ask you to bear with me if I emphasise what the legal position really is. Therefore evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely showing that his mind was affected by drink so that the accused more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts.

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l.30

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Now, having stated as fully as I can - I hope correctly - what the law says on

intoxication, does the evidence show that the accused was so incapable?"

He continued by describing the evidence relating to the drunkenness of the Appellant: the evidence of affection towards the deceased, he said, did not necessarily displace malice. If the jury found that the intent to kill or put the deceased's life in manifest danger existed they should convict:
10 but if they were not satisfied as to the formation of such itent, they would have to consider whether he was guilty of grievous bodily harm followed by death: for this crime the specific intent of wilful homicide was not required: it is sufficient if the person causing the grievous bodily harm had the generic intent to do some harm to the victim. Drunkenness might permit a person to have this generic intent, even if he was
20 disabled from having the specific intent required in wilful homicide. If the jury considered that the injuries from which the deceased died were inflicted by the Appellant, and if when he did so he had the intent to hurt her in any degree, then they could find him guilty of the lesser crime.

The learned Judge then said :-

"I have about finished, Gentlemen of the Jury, but simply because learned Counsel for p.281, 1.30
30 the Defence has also made reference to another kind of crime which conceivably, in his view, might be considered as fitting the circumstances of the case, I am going to just mention it to you. He suggested that at the utmost what you could find the accused guilty of was involuntary homicide, and he said that you should consider this if, as he hoped, you accepted the submission that the accused was, on account of
40 drunkenness, incapable of forming any intent at all. The crime of involuntary homicide, unlike wilful homicide and also unlike wilful bodily harm from which death ensues, does not require any intent, it is committed by mere negligence on the part of the accused. I do not know precisely what 1.40 learned Counsel meant by negligence in the present context whether he makes it consist p.282, 1.10 in the skylarking as he called it, or in the

> very act of the taking of the drinks. Well, there it is: but as I said, you need not trouble yourself with this third hypothesis unless you have first excluded not only the crime of wilful homicide but also that of bodily harm."

p.9, 1.10

8. That the jury unanimously found the Appellant not guilty of wilful homicide, but by a majority of six to three found him guilty of causing grievous bodily harm from which death ensued. The Appellant was sentenced to fifteen years imprisonment with hard labour. 10

p.283

9. Special leave to appeal in forma pauperis against this verdict was granted by the Judicial Committee on the 15th May 1963.

10. It is respectfully submitted that the summing up of the learned Chief Justice contained misdirections to the jury, whereby they arrived at a wrong verdict. In particular it is submitted that the direction upon the 20 question of drunkenness negativing intent was wrong: the learned Judge failed to tell the jury that where drunkenness was properly raised, they had to be satisfied beyond reasonable doubt by the prosecution that any criminal intent was not rebutted by drunkenness: the direction given was contrary to the law stated in Beard v. D.P.P.; (1920) A.C. 479 explained in A-G for Northern Ireland v. Bratty (1961) 3 W.L.R. 965, and exemplified 30 in R. v. Clark (Court of Criminal Appeal, 6th March 1963). The learned Judge further failed to direct the jury upon this topic in regard to the generic intent required for the crime of which the Appellant was found guilty, and thus failed to carry out the principle exemplified in Woolmington v. D.P.P. (1935) A.C. 462.

It is submitted that there was a misdirection of the jury upon the question of 40 the accidental death of the deceased, in that the learned Chief Justice said that in order to reach such a conclusion, the jury would have to disregard the nature of the injuries suffered by the deceased. This, it is submitted, was contrary to the medical evidence, and implied that a verdict of not guilty on

the ground of accident was not open to the jury. The learned Chief Justice failed to direct the jury upon the question of onus of proof in regard to accidental death.

11. It is respectfully submitted that the jury were wholly misdirected upon the possible verdict of involuntary homicide. This verdict was a reasonable one upon the evidence, and it is submitted that the direction of the learned
10 Judge had the effect of withdrawing this verdict from the jury, by indicating that there was no merit in the submissions made on behalf of the Appellant.

It is respectfully submitted that the summing up did not fairly and properly put the Appellant's defence before the jury. In particular the learned Chief Justice failed to summarise the effect of the medical evidence, which was not hostile to the Appellant, he
20 stressed unduly the unsupported prosecution theory for the Appellant's responsibility, and he attempted to persuade the jury that the Appellant was not under the influence of drink at the relevant time. It is submitted especially that the learned Judge seriously misunderstood the evidence as to the Appellant's blackouts, and wrongly suggested as a "circumstance of very considerable importance" that the Appellant was lying as
30 to the amount of recollection he had of the events of the morning of 23rd July.

It is further submitted that the jury were not properly or fully directed as to the ingredients of the offence of which they found the Appellant guilty by the minimum required by law, in that they were not instructed as to what was necessary in law to constitute grievous bodily harm, and were directed that if they found the Appellant had committed any
40 bodily harm, they could find him guilty.

12. The Appellant respectfully submits that this appeal be allowed and that his conviction and sentence be set aside for the following, amongst other

R E A S O N S

1. BECAUSE the jury were misdirected upon the question of drunkenness.

2. BECAUSE the jury were misdirected upon the question of the deceased dying by accident.

3. BECAUSE the jury were misdirected upon the law relating to involuntary homicide.

4. BECAUSE the jury were misdirected upon the law relating to causing grievous bodily harm followed by death. 10

5. BECAUSE the Appellant did not have a fair trial.

6. BECAUSE the summing-up did not put the defence of the Appellant fully or fairly.

7. BECAUSE the Court intervened in the trial excessively and to the prejudice of the Appellant.

8. BECAUSE the Court in the summing up commented excessively and erroneously upon the evidence to the prejudice of the Appellant. 20

9. BECAUSE the Appellant has suffered a miscarriage of justice.

MERVYN HEALD.

IN FORMA PAUPERIS

No. 18 of 1963

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE CRIMINAL COURT OF MALTA

B E T W E E N :-

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- and -

THE QUEEN ... ... Respondent

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