

Judgment
16/1964

IN THE PRIVY COUNCIL

NO. 9 of 1964

ON APPEAL FROM

THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

FRANK PARKER

Appellant

- and -

THE QUEEN

Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

78571

CASE FOR THE RESPONDENT

Record

- 10 1. This is an Appeal by Special Leave against a Judgment of the Supreme Court of New South Wales, sitting as the Court of Criminal Appeal, given on the twentyfourth day of November, 1961, dismissing an appeal by the abovenamed Appellant against his conviction for murder in the Supreme Court, sitting at Narrandera in the said State. p. 154
- 20 2. The Appellant was indicted on a charge that he, on the 16th day of October, 1960, near Jerilderie in the State aforesaid, did feloniously and maliciously murder Daniel Christopher Bingham known as Daniel Kelly. p. 1
- 30 3. The statutory provisions relating to murder relevant to this case are contained in the Crimes Act, 1900, sections 18, 19, 23 and 24 and read as follow:-
 - "18. (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life.

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(b) Every other punishable homicide shall be taken to be manslaughter.

(2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence.

19. Whosoever commits the crime of murder shall be liable to penal servitude for life. 10

The provisions of section four hundred and forty-two of this Act shall not be in force with respect to the sentence to be passed under this section.

23. (1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow. 20

(2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly:

Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find - 30

(a) That such provocation was not intentionally caused by any word or act on the part of the accused;

(b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and,

(c) That the act causing death was done suddenly, in the heat of passion caused by such provocation without intent to take life. 40

24. Whosoever commits the crime of manslaughter shall be liable to penal servitude for life, or for any term not less than three years, or to imprisonment for any term not exceeding three years :

10 Provided that, in any case, if the Judge is of opinion that, having regard to all the circumstances, a nominal punishment would be sufficient, he may discharge the jury from giving any verdict, and such discharge shall operate as an acquittal.

4. The case for the Crown was in substance as set out in this and the following paragraphs down to and including paragraph 11. About six weeks prior to 16th October, 1960, the Appellant and his wife Joan (a woman of Maori extraction) and their six children came to live at an out-station of a property at Jerilderie in the south-west of New South Wales, with a Mr. Noel Craig, a brother-in-law of the Appellant, and his family. Some months previously the deceased, known as Dan Kelly, had come to the property and was living in the shearers' quarters some distance away. The Appellant and his family were introduced to Kelly about one week before the occasion charged and Kelly then became a frequent visitor to the Craig home. The Appellant commented to Craig on the attention he noticed Kelly was paying to his wife. On the following Sunday, shortly after 1 p.m., a group, including the deceased and the Appellant's wife, were going to a dam about 300 yards away for a swim. The Appellant whistled to his wife and called out something in Maori and she stopped. He drove over to her and spoke for a quarter of an hour, then came back to Craig and asked whether he didn't think there was something going on between his wife Joan and Dan. Craig replied "It appears so".

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5. After being at the dam about an hour, deceased returned and spoke to Craig and went to the house. About 15 minutes later Craig walked up and heard Appellant say "Why can't you find a single girl, have you no principles", and deceased replied "I lost my principles years ago". Appellant asked his wife to go outside as he wanted to talk to her, and they had some conversation. After about 20 minutes Craig went out and a few minutes later Appellant called him over to his car and said "She is leaving with Dan, and if she does I will get him. There are a lot of dark nights and one of

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p. 18 these dark nights I will be waiting for him".
Again, a few minutes later, Appellant called Craig over to his car where he and his wife and their children were and spoke to his wife, saying he had got a job at Albury he was to go to the following week, and he said to the children, "Wouldn't you like to go to Albury?". They all answered "Yes". His wife replied "It's no good, Frank", and walked away. The Appellant stayed with the car and asked Craig would he tell deceased to go. Craig said he would, and he did. Deceased left a little later on but just before he went Appellant got out of his car and said to him "You had better get going before I do something" or "While your luck is in". Appellant appeared emotional at this stage and Craig thought he (Appellant) might strike the deceased. 10

p. 26, 9 The Appellant tried to start his car. It would not start and he got out and punched the car window.

p. 18 Deceased got on his bicycle and rode off after Appellant told him that if his wife was going with him he had best go up to the gate and wait and he would escort her up to him later on. This was said very loudly and more or less in temper. 20

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pp. 18-19 6. The Appellant then pulled a brake rod from an old car, being a round piece of iron rod about 3 feet in length, and cut the end off and commenced to cut a sharp edge, making it spear shaped. After a few minutes Craig took this rod from him and told him to pull himself together, that he had gone off the deep end. Appellant said "I won't be here to look after the kids - Joan will and that other bastard won't be either". He also said "It would be no good of me fighting him" - or - "having a go at him"....."he would beat me by hand, he is too big - he fights too well. I will still get him (or kill him)". The word may have been "stop" him. He seemed to quieten down a little, so Craig went back to his work. 30

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p. 19 7. Appellant's wife then left in the direction of the road with her bags, being assisted by a niece and nephew. Her children were weeping and wailing loudly. Appellant went off again and was away 15 to 20 minutes. He returned and tried to start his car, asked Craig to give him a push and drove off saying to Craig's daughter, "Thanks, goodbye". Prior to Appellant's departure his wife left the property sitting on the top bar of the bicycle ridden by deceased. Shortly afterwards Appellant was seen to follow them in his car. As near as can be calculated this last occurrence was about 3 p.m. 40

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8. At about 3.50 p.m. a Police Officer at Jerilderie received a telephone message from Appellant saying "I have just killed a boy, will you come out and bring a Doctor, I do not want my wife to die". Accompanied by a Doctor the Police Officer drove some twentyfive miles to the scene. There he saw the body of the deceased and an injured woman lying on the side of the roadway, and numerous articles scattered about in the vicinity. pp. 38-39
- 10 9. On examination there were found on deceased numerous wounds to the face, throat and chest, some consistent with being caused by a knuckle-duster (Exhibit D) and some by the knife (Exhibit H). Both of his legs were broken below the knees. pp. 1-6
- 20 10. In the meantime Appellant had hailed a Mr. Jukes in his car and asked him not to leave him alone as he had just run over a man and thought he had killed him and had rung the Police. He said that he had run over him on purpose and thought he had killed him outright and, further, that he got out and bashed him up and then stabbed him and if he had thought of it he would have cut his head off, but he forgot. pp. 45-46
- 30 11. Later that day Appellant was interviewed by Police Officers and gave his account of the events leading up to the killing. When interviewed by Detective Sheather and asked what had happened, amongst other statements he said (after being cautioned) "Yes. I understand that. I set out to kill him I will tell you what you want to know. I know I have done the wrong thing. I will tell you the truth". Then in detail he related his conduct leading up to and during the attacks on the deceased. Subsequently, in the presence of Detective Ellis he said "I meant to kill him but I did not want to hurt my wife. Thank God she is alright. The bastard was trying to break up our marriage and I meant to kill him. I am not sorry that I did it. He was trying to take my wife away from me and the kiddies". And later, after returning a negative answer to the question whether he had ever suffered from or had been treated for any mental illness:- "I knew what I was doing as well as I know what I am doing now. I set out to kill him and I meant to kill him and am not sorry at all that I did it". The substance of what the Appellant had said was repeated as part of a lengthy statement which Appellant made to the Police the same evening - Exhibit J. pp. 72-73
- 40 p. 167
12. The case for the accused consisted of a statement p. 76

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p. 79 . from the dock by the accused followed by his evidence from the witness box and cross-examination thereon.

p. 91 13. The Trial Judge after argument refused to leave the issue of provocation to the jury.

14. On the 9th day of August, 1962, the High Court of Australia (by majority) refused an application on behalf of the Appellant for Special Leave to Appeal to that Court.

p. 154 15. Special Leave to Appeal to Her Majesty in Council was granted by Order in Council dated the 23rd day of October, 1963. 10

16. The Respondent humbly submits to such determination as the Privy Council thinks proper in this matter and for the purposes of the appeal will advance the following among other

S U B M I S S I O N S

1. In all cases in New South Wales where provocation is raised, the crime may only be reduced from murder to manslaughter if the jury finds - 20

(a) That such provocation was not intentionally caused by any word or act on the part of the accused;

(b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did, in fact, deprive the accused of such power; and

(c) That the act causing death was done suddenly in the heat of passion caused by such provocation, without intent to take life. (New South Wales Crimes Act, Section 23 (2)). 30

2. These questions should be left to the jury, if there is some evidence which could support a finding in the accused's favour on each.

3. Under paragraph (b) of this Section, the act or acts done by the accused causing death, must be found to have been beyond his power to control, and such as might reasonably 40

have been beyond the power of control of an ordinary person in similar circumstances.

4. The words of Section 23 (2) "the act causing death was done.....without intent to take life" require that the act causing death be not accompanied by any conscious intention or purpose to take life.
5. Alternatively, such words require that the act causing death be not accompanied by any conscious intention or purpose to take life, otherwise than arising from deprivation of loss of control.
6. Section 23 of the New South Wales Crimes Act, in its present form, places the onus of proof of the matters enumerated upon the accused when provocation is raised.
7. The question for determination is whether or not there was some evidence fit to be left to a jury in respect of each of the matters referred to in paragraphs (a), (b) and (c) above.

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H.A. SNELLING.

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