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Judgment
16, 1964

Appellate
No 9 of 1964

In The Privy Council

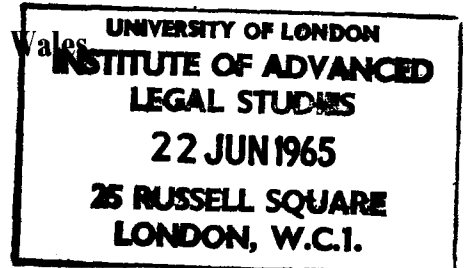
No. 9 of 1964.

ON APPEAL from the Supreme Court of the State of New South Wales
Commonwealth of Australia

BETWEEN
FRANK PARKER

AND

THE QUEEN



Appellant

78570

Respondent

CASE FOR THE APPELLANT

RECORD:

1. This is an appeal by special leave of the Judicial Committee given on the 21st October 1963 from an order of the Court of Criminal Appeal of the Supreme Court of the State of New South Wales, Commonwealth of Australia dated the 24th November 1961 which dismissed an appeal from the conviction of the appellant in the Criminal Court of the Supreme Court of New South Wales at Narrandera in the said State whereby the appellant was convicted of murder and sentenced to imprisonment for life.

2. The questions raised by this appeal are whether the learned trial Judge Mr. Justice Hardie erred in taking from the jury the defence of 10 provocation relied on by the appellant and whether a grave and substantial miscarriage of justice has occurred as a result of the learned trial Judge taking from the jury the defence of provocation relied upon by the appellant. pp. 96-97.

3. The relevant statutory provisions are contained in the Crimes Act 1900 (as amended) as follows:

“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

RECORD:

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.

(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.

“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.

(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 by reason of provocation, unless the jury find: —

- (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.”

4. The appellant was tried on the charge that he on the 16th day of October 1960 near Jerilderie in the State of New South Wales did feloniously and maliciously murder Daniel Christopher Bingham known as Daniel Kelly.

p. 1.

5. The trial of the appellant commenced on the 5th day of April 1961 and lasted for three days. At the trial, evidence was given both by witnesses for the respondent and the appellant himself. The evidence before the jury included the following:

- RECORD:
pp. 1-6.
- (a) The deceased died partly as a result of shock arising from multiple injuries inflicted upon the deceased by the appellant and partly from blood loss associated with wounds inflicted by the appellant.
- 10 (b) The appellant, his wife and six children had come in the early part of September 1960 to a small two-roomed dwelling occupied by a station-hand, Noel Craig, and his family and situated on a grazing property near Jerilderie in the State of New South Wales. On the same property but some distance away there were shearers' quarters in which the deceased was living as a station-hand in the same employ as Craig. The appellant and his wife had been married for about twelve years and had come to Jerilderie and thence to Craig who was the appellant's brother-in-law, so that the appellant could seek work in that district. pp. 13-14.
- 20 (c) Shortly after their arrival, the appellant and his wife went with Craig to the shearers' quarters on the property and there for the first time met the deceased. During the following week the deceased visited Craig's dwelling almost every day and every evening. On one occasion during this week the deceased stayed the night at the dwelling. On Friday of this week the deceased came to the dwelling during working hours and the appellant remarked to Craig that the deceased was "hanging around Joan", that is, the appellant's wife. On the Saturday afternoon, the deceased came again to the dwelling and stayed overnight. pp. 14-15.
- 30 (d) On the Sunday morning, the 16th October 1960, at about ten thirty, the appellant and Craig left the dwelling to obtain some tools from a neighbouring property. The deceased was asked to accompany them but declined to do so and remained at the dwelling. The appellant spoke to his wife and told her to go inside the dwelling and work there so that the deceased would refrain from "hanging around her". The appellant and Craig were absent until shortly after one o'clock in the afternoon and upon their return they found the deceased, the appellant's wife and a number of children proceeding to a nearby dam upon the property in order to swim therein. About an hour later she returned with the others. The appellant spoke to her and asked her whether she had noticed that the deceased was "hanging around her". She informed him that she had noticed it and upon being asked what she thought about it she told the appellant to speak to the deceased. pp. 15-16.
- 40 (e) The appellant spoke to the deceased about the deceased's conduct and the deceased informed him that he, the deceased, was in love with the appellant's wife and after further discussion p. 80.

- RECORD: informed the appellant that he, the deceased, had no moral principles.
- p. 80. (f) During a further discussion, the deceased, who was a heavily built, powerful man, taunted the appellant, who was a small, slightly built man, with the claim that the deceased would take the appellant's wife with one hand and beat the appellant with the other hand. In further discussion and on being informed that the appellant's wife was part Maori, the deceased stated that he "had never had a quarter caste Maori before" and that "they ought to be pretty good". 10
- pp. 80-81. (g) The appellant gave evidence and there was other evidence before the Court that during this conversation and subsequently he was in a state of great emotional shock at the prospect of his wife leaving him and their children. He stated that he was more or less in a trance and did not know what to do or think. He entreated his wife to remain with him and the children and reminded her of a job which had just become available to him on a grazing property in the Albury district. A highly emotional scene took place between the appellant, his wife and children. During this scene the appellant could see the deceased looking 20 on, grinning and obviously enjoying the situation.
- p. 81. (h) The appellant pleaded with his wife to stay for their children's sake, but she refused, stating that she loved him no longer as she had decided three days before to run away with the deceased and to live with him. The appellant told Craig to ask the deceased to leave the dwelling and Craig asked the deceased to go. However, the deceased did not go and the appellant asked the deceased himself to leave the property. Evidence was given that the appellant punched in a small window of his car and was otherwise in a very disturbed state of mind. 30
- p. 18.
- p. 26.
- pp. 18-19. (i) The deceased went some distance away, out of sight of the dwelling, to a gate which led onto the roadway and at which he had left his bicycle. A short while later, the appellant's wife joined him there and the deceased and the appellant's wife sitting on the main frame of the bicycle set off for the deceased's quarters. Meanwhile the appellant was acting in a distraught manner back near the dwelling, wandering around, weeping and sobbing. Craig told him to pull himself together and "to stop going off the deep end". The appellant then entered his motor car and set off in the direction of the gate which led onto the roadway. He gave evidence that he set out to bring his wife back to their children or to fight the deceased with his fists. 40
- p. 22.
- p. 82.
- p. 83. (j) The appellant drove down the roadway towards the deceased's quarters and came up to the deceased and the appellant's wife

who were still riding together on the bicycle. As the appellant approached them in his car they dismounted from the bicycle and stood at the side of the roadway. The appellant swerved his car at the last moment in the direction of the deceased and struck him with the near side front of the motor car. The motor car ran for some distance at the side of the road and then swerved across the road and came to rest still upon the roadway at right angles to it. RECORD:

- 10 (k) The appellant had with him in the motor car a knuckle duster p. 83. which had been given him as a souvenir in Sydney. He also wore at his belt a small single-bladed knife which was used for skinning rabbits. He left the car and went back to where the deceased was lying and looked for his wife. He saw his wife lying face down in the drain and thought he had killed her. He stated that he "done his block" and lost his temper and went to the place where the deceased was lying and struck him in the face a number of times with the knuckle duster. He heard his p. 84. wife moan and struggle in the water in the drain. He pulled his wife from the water and it appears that he then stabbed the p. 175. deceased in the throat.
- 20
- (l) He then ran about two miles to a locked dwelling, broke in and p. 84. telephoned the police and requested them to come to the scene. After some time he was picked up on the roadway by a motorist who drove him to the place where the deceased was lying. The appellant's wife had meanwhile been found by a driver of a motor lorry some distance from this place and had been taken to hospital. The appellant then went on his own accord with the man who had picked him up to the police station at Jerilderie. He was then in a highly emotional state and remained so at the police station where he was interrogated and made a statement.
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6. At the conclusion of the evidence, the learned trial Judge, Mr. Justice Hardie, indicated to Counsel for the Defence that Counsel should make submissions to him as to the availability of the defence of provocation to the appellant. After having heard Counsel's submissions, the learned trial Judge directed Counsel that in his opinion the defence of provocation was not available to the appellant and the learned trial Judge subsequently in the course of his summing up to the jury directed the jury that there was no defence of provocation available to the appellant. On the 7th day of 40 April 1961 the jury found the appellant guilty of the charge and the jury added a strong recommendation for mercy. The appellant was duly sentenced to imprisonment for life by the learned trial Judge, Mr. Justice Hardie, on the 7th day of April 1961.

RECORD: 7. The appellant appealed to the Court of Criminal Appeal of the State of New South Wales. The said appeal was heard by the Court on the 22nd and 29th days of September and the 6th day of October 1961. The said Court reserved its decision and on the 24th day of November 1961 found that the learned trial Judge, Mr. Justice Hardie, had not erred in taking from the jury the defence of provocation raised by the appellant at his trial and dismissed the appellant's appeal to the said Court from his conviction for murder. From the order and judgment of the Court of Criminal Appeal the appellant made application to the High Court of Australia for special leave to appeal. The said application came before the High Court of Australia on the 24th and 27th days of August 1962. The said Court reserved its decision on the said application and on the 24th day of May 1963 a majority of the Justices of the High Court refused the appellant's application for special leave to appeal.

p. 91. 8. On the 21st October 1963 the appellant petitioned the Judicial Committee of the Privy Council for special leave to appeal to Her Majesty in Council against the order and judgment of the Court of Criminal Appeal of the State of New South Wales, Commonwealth of Australia. The Judicial Committee granted the appellant's petition for special leave on the 21st October 1963.

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9. It is respectfully submitted that the learned trial Judge, Mr. Justice Hardie, and the Court of Criminal Appeal of the Supreme Court of New South Wales erred in that—

- (a) on a proper and correct interpretation and construction of section 23 of the Crimes Act, 1900 (as amended) of the State of New South Wales, the defence of provocation was available to the appellant;
- (b) under section 23 of the Crimes Act, 1900 (as amended) of the State of New South Wales the onus of proving that the appellant was acting under provocation offered him by the deceased did not lie upon the appellant;
- (c) on a proper and full consideration of all the evidence material to the defence of provocation that defence was available to the appellant;
- (d) the defence of provocation was available to the appellant;
- (e) there was evidence of provocation by the deceased and the taking of the defence of provocation away from the appellant occasioned a grave and substantial miscarriage of justice to the appellant.

10. The appellant respectfully submits that this appeal should be allowed and the costs and his conviction be quashed and a new trial be ordered or alternatively that a conviction for manslaughter be recorded in lieu of the conviction for murder for the following amongst other reasons.

REASONS

There was evidence before the jury of provocation of the appellant by the deceased and the defence of provocation was available to the appellant and the taking of this defence away from the appellant occasioned a grave and substantial miscarriage of justice to the appellant.

ADRIAN COOK,
Counsel for the Appellant.

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BETWEEN

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Appellant

AND

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Case for the Appellant

**GALBRAITH & BEST,
SOLICITORS,
1, ESSEX COURT,
LONDON, E.C.4.**