HIGH COURT OF AUSTRALIA

Gibbs C.J., Wilson, Brennan, Deane and Dawson JJ.

THE QUEEN v. DOUGLAS JOHN EDWIN CRABBE
(1985) 156 CLR 464
26 March 1985

Criminal Law

Criminal Law—Murder—Malice aforethought—Recklessness—Knowledge that death or grievous bodily harm will probably result from act—Likelihood of death or grievous bodily harm ensuing—Appreciation of likelihood—Wilful blindness—Direction to jury.

Decision

GIBBS C.J., WILSON, BRENNAN, DEANE and DAWSON JJ. This is an application by the Crown for special leave to appeal from a decision of the Full Court of the Federal Court which, by a majority, quashed the conviction of the respondent on five counts of murder and ordered a new trial.

2. The alleged offences occurred in the early hours of the morning of 18 August 1983 in a motel near Ayers Rock. The respondent had driven a road train, consisting of a prime mover and three trailers, to Ayers Rock on 17 August. He there uncoupled one trailer and went about his work of delivering, loading and unloading. Later during the evening, after he had consumed a substantial amount of alcohol, he visited the Inland Motel and drank in a crowded bar. His behaviour in the bar caused nuisance and annoyance and he was physically ejected from the bar. In the early hours of the morning following this incident he returned to the motel at the controls of his prime mover, to which one trailer was now attached. He drove the vehicle through the wall and into the bar; as a result five persons died and many were injured. The respondent did nothing to assist the injured but left the motel. He was apprehended on the following day.

3. The respondent was tried by the learned Chief Justice of the Northern Territory and a jury. After a summing up to which no objection was or could have been taken, the jury retired but shortly afterwards was recalled by the learned Chief Justice who, at the request of the Crown Prosecutor, gave a short redirection which included the following passage:

> "It is this, I said to you, you will recall, that you had to be satisfied beyond reasonable doubt, on the question of recklessness, that he knew that there would be people in the bar.
>
> It is also a matter of law, of which I have

been reminded, that if he thought there might have been, but chose to blind himself, chose not to avail himself of any opportunity of finding out. In other words, if he swept round the corner and his state of mind then was that there might be people in there, but he just went straight ahead blinding himself, not giving himself the opportunity of finding out if there were going to be any people in there. So that he cannot - if he deliberately stops himself being able to see whether or not there were people in there, as a deliberate choice. If he says, 'Well, I'm going to go ahead anyway. I think there might be people in there, but I'm not going to have a look, so no-one can say I know, because I didn't look.'

Is that clear to you, that if he blinds

himself to the possibility, so to speak, well, then he cannot hide behind that. He cannot say that hiding behind his lack of actual knowledge."

4. The jury again retired, but about two and a half hours later returned seeking a "full definition" of murder and manslaughter. The learned Chief Justice then gave them a second redirection. Amongst other things, he said:

"A man commits murder if he kills somebody,

having at the time that he did the action which caused the death, an intention to kill, or an intention to do really serious bodily injury; or, if when he kills someone, his state of mind is such that he knows what he's about to do is likely to kill someone, but nevertheless goes ahead and does that act with reckless indifference to the consequences; or, and this is the final alternative, if, when he does an act, he foresees the possibility that what he does might cause death, or really serious bodily injury, nevertheless takes no reasonable available step to ascertain whether or not it will.

Now, I'll apply those things that I've told

you to the case in hand. There appears, as I said to you earlier, to be no dispute that Crabbe killed these people, in the sense that he drove the prime mover and semi-trailer into the bar of this motel at Ayers Rock, and that thereby he caused the deaths of these 5 people, so that, when you're considering whether or not he is guilty of murder, you have to consider the state of his mind at the time that he did it. If you're satisfied beyond reasonable doubt that when he drove the truck into the motel, he intended to cause death or really serious bodily harm to whoever might be in there, then he's guilty of murder. If you're satisfied beyond reasonable doubt that his state of mind was that he knew that it was likely that if he drove the truck into the motel bar, that he would cause death or really serious bodily injury, then he is guilty of murder. He's further guilty of murder if you're satisfied beyond reasonable doubt that he foresaw the possibility that there might be some people in the bar, but didn't take any step that might have been available to him to find out whether there were any people there or not, before he went ahead and drove the vehicle in."

5. The majority of the Full Court held that the jury was misdirected by these passages. Assuming that the doctrine of "wilful blindness", to which the learned Chief Justice alluded in his first redirection, is applicable to a case such as the present, their Honours considered that it was erroneous to refer to foresight of a possibility, rather than of a probability, that people might be in the bar and that death or grievous bodily harm might result from the actions of the respondent. Further, the second redirection fails to mention any element of deliberation - it suggests that a person should be treated as having knowledge of facts if he neglects to take reasonable steps (or perhaps any available steps) to find out the truth, even though he does not deliberately refrain from taking such steps because he prefers to remain in ignorance.

6. The Criminal Code Act 1983 (N.T.) had not been passed at the times material to this case and the rules of

the common law governed the question what mental element is necessary to constitute the crime of murder, or, to use the traditional terminology, what is meant by malice aforethought. That question was answered in Stephen's Digest of Criminal Law, 1st ed. (1877), in art.223 which, so far as is relevant, is as follows:

> "... Murder is unlawful homicide with malice aforethought. Malice aforethought means ... (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused ..."

7. There has been in this Court some difference of opinion as to whether the knowledge which an accused person must possess in order to render him guilty of murder when he lacks an actual intent to kill or to do grievous bodily harm must be a knowledge of the probability that his acts will cause death or grievous bodily harm (as Stephen's Digest of Criminal Law holds) or whether knowledge of a possibility is enough. In Pemble v. The Queen (1971) 124 CLR 107 Barwick C.J. thought it sufficient that death or grievous bodily harm should be foreseen as possible (see at pp.118-121) but McTiernan and Menzies JJ. were of the opinion that it was necessary that the accused should have foreseen or known (the words are used without any apparent distinction) that death or grievous bodily harm would be a probable or likely (both expressions are used) consequence of the act: see at pp.127, 135. The matter was considered again in La Fontaine v. The Queen (1976) 136 CLR 62. In that case Stephen J. agreed (at pp 85-86) with the opinion expressed by Barwick C.J. in Pemble v. The Queen that it was enough that the accused foresaw the possible consequences of his acts but Barwick C.J. himself appeared now to think that it is an open question whether it is sufficient if the accused appreciated a possibility rather than the probability of serious harm: see at p.69. Gibbs and Jacobs JJ. held that in a case of this kind an accused would not be guilty of murder unless he foresaw that death or grievous bodily harm was a probable consequence of his behaviour (see at pp.75-77 and 94-100) and although Mason J. left the question open he noted, at p.91, that the suggestion made by Barwick C.J. in Pemble v. The Queen was not a view shared by McTiernan and Menzies JJ. in that case and that it was at odds with the speeches of the members of the House of Lords in Reg. v. Hyam (1975) AC 55. Clearly the balance of opinion on this Court has been in favour of the view that the mental state necessary to constitute murder in a case of this kind is knowledge by the accused that his acts will probably cause death or grievous bodily harm. The view that knowledge of a possibility is not enough has been accepted by the Full Court of the Supreme Court of Victoria (Reg. v. Jakac (1961) VR 367; Reg. v. Sergi (1974) VR 1; Nydam v. The Queen (1977) VR 430; Reg. v. Windsor (1982) VR 89) and by the Full Court of the Supreme Court of South Australia (Reg. v. Hallett (1969) SASR 141).

8. The conclusion that a person is guilty of murder if he commits a fatal act knowing that it will probably cause death or grievous bodily harm but (absent an intention to kill or do grievous bodily harm) is not guilty of murder if he knew only that his act might possibly cause death or grievous bodily harm is not only supported by a preponderance of authority but is sound in principle. The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm. Indeed, on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur. That view was expressed in Reg. v. Hyam by Viscount Dilhorne (at p 82), Lord Diplock (at p 86) and possibly by Lord Cross of Chelsea (at p 96), although Lord Hailsham of St. Marylebone L.C. denied its correctness (at pp.74-75). There is other authority in favour of the view, including some of the cases mentioned in Archbold's Criminal Pleading, Evidence and Practice 41st ed. (1982), at pp.995-1001 and the passage from Kenny, Outlines of Criminal Law cited by Dixon C.J. in Vallance v. The Queen (1961) 108 CLR 56, at p 59. It is however unnecessary to enter upon that controversy. If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word "probable" means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence, and where he knows that it is a likely result. The former is not a case of murder even if death ensues, unless death or grievous bodily harm is intended (or, perhaps - and

it is unnecessary to consider this proposition - unless the act is done with the intention and for the sole purpose of creating a risk of death or grievous bodily harm).

9. It should now be regarded as settled law in Australia, if no statutory provision affects the position, that a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results. It is not enough that he does the act knowing that it is possible but not likely that death or grievous bodily harm might result.

10. A person who does an act causing death knowing that it is probable that the act will cause death or grievous bodily harm is, as Stephen's Digest states, guilty of murder although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or even by a wish that death or grievous bodily harm might not be caused. That does not mean that reckless indifference is an element of the mental state necessary to constitute the crime of murder. It is not the offender's indifference to the consequences of his act but his knowledge that those consequences will probably occur that is the relevant element. Of course, not every fatal act done with the knowledge that death or grievous bodily harm will probably result is murder. The act may be lawful, that is, justified or excused by law. A surgeon who competently performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw that his death was probable. Academic writers have pointed out that in deciding whether an act is justifiable its social purpose or social utility is important: see, for example, Howard, Criminal Law, 4th ed. (1982), at pp.54-55 and 357-359. That question need not be discussed in the present case where there was no possible justification or excuse for the actions of the applicant. It should however be made clear that lack of social purpose is not an element of the mental state with which we are here concerned, though it may bear on the question whether the act is justifiable.

11. It was submitted on behalf of the Crown that a distinction can be drawn between foresight of the consequences of an act - i.e. what harm it would do if persons were in a position to be affected by it when it occurred - and a foresight of circumstances - i.e. of the fact that persons were in a position to be affected. There is no justification in logic or principle for drawing a distinction of this kind. The test simply is whether the accused person knew that his actions would probably cause death or grievous bodily harm.

12. Finally, there is the question whether the jury should have been directed on the question of wilful blindness. When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring. According to Professor Glanville Williams, Criminal Law: The General Part, 2nd ed. (1961), at p.159:

> "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice."

Again, in his Textbook of Criminal Law (1978), at p.79, Professor Glanville Williams said, in a passage cited by Lord Edmund-Davies in Reg. v. Caldwell (1982) AC 341, at p 358:

> "A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter".

13. These statements support the view that it cannot be said that an accused was wilfully blind to the consequences of his acts unless he knew that those consequences were probable; if that is so, the doctrine has no part to play in cases of murder.

14. Professor Howard, on the other hand, considers that an accused may be convicted of murder even though he foresaw only the bare possibility that someone might be killed if, having foreseen that possibility, he

deliberately took no steps to ascertain the magnitude of the risk: op.cit., p.54. However, it seems to us that to state the proposition in that manner is likely to mislead. The question is whether the accused knew or foresaw that his actions would probably cause death or grievous bodily harm and actual knowledge or foresight is necessary; imputed knowledge is not enough. Deliberate abstention from inquiry might, of course, be evidence of the actual knowledge or foresight of the accused.

15. In the present case, there was no evidence that the respondent deliberately refrained from finding out whether there was anyone in the bar and it was unnecessary to advert to the matter. Moreover, it was misleading to speak in terms which suggest that the respondent may have foreseen the possibility that there may have been some people in the bar. This passage, which is contained in the trial judge's second redirection, was likely to confuse in the jury's mind the mental state which the respondent was required to have had before he could be found guilty of murder. It amounts to a material misdirection.

16. For these reasons the majority of the Full Court of the Federal Court was correct in setting aside the conviction and ordering a new trial. Having regard to the importance of the matter, special leave to appeal will be granted but the appeal must be dismissed.

Orders

Application for special leave to appeal allowed.

Appeal dismissed with costs.