07/77

HIGH COURT OF AUSTRALIA

La FONTAINE v R

Barwick CJ, Gibbs, Stephen, Mason and Jacobs JJ

21 May 1976, 8 October 1976

[1976] HCA 52; (1976) 136 CLR 62; 51 ALJR 145; 11 ALR 507 (Noted 4 Mon LR 1; 2 Crim LJ 255)

CRIMINAL LAW – MURDER – MALICE AFORETHOUGHT – RECKLESSNESS – KNOWLEDGE THAT DEATH OR GRIEVOUS BODILY HARM WILL PROBABLY RESULT FROM ACT – DIRECTION AS TO MURDER BY RECKLESSNESS – WHETHER APPROPRIATE – WHETHER SUFFICIENT – LIKELIHOOD OF DEATH OR GRIEVOUS BODILY HARM ENSUING – PROBABILITY – POSSIBILITY – STANDARD OF PROOF – GUILT BEYOND REASONABLE DOUBT.

L shot his brother in the family lounge room saying at the time "I'm going to bloody put a hole in you"; and later in his record of interview stating that he only intended to shoot near him and scare him.

HELD: Murder is committed when a person does a voluntary act which causes the death of another. At the time he does that act he may either intend to kill the other, (the deceased) or to intend to do serious bodily injury to the other (the deceased). If the jury "accepted" the fact that the applicant fired in the direction of the deceased intending that the bullet would not hit him, could they find him guilty of murder? They could only do so on a basis that it was sufficient in law that the applicant foresaw that the possible as distinct from probable consequence of the act was that the bullet would hit the deceased and was recklessly indifferent whether or not it thus caused his death or serious bodily injury. That, however, is not sufficient to constitute murder. It could be said that he was reckless in the sense that appreciating the risk he decided to take that risk. But it is not murder to do an act which is risky to the life of another simply because the risk, the possibility of causing death or serious bodily injury of the other, is known to be probable. There must be indifference to known probable, not merely possible, consequences, and that indifference must be reckless. It is not appropriate to introduce into this use of the words "possibility" and "probability" connotations appropriate to the determination of questions in other fields of law such as satisfaction of a burden of proof or of adducing evidence.

The judgment most relevant as to the law on this point is that of:
JACOBS J: ... 8. The question which arises and will require consideration is whether, if the jury "accepted" the statement of the applicant that his actual intent was to shoot near the deceased, understanding those words to mean that the applicant intended the bullet should not hit the body of the deceased, and to scare him they could nevertheless find him guilty of murder.

9. The ascertainment of intent thus required a choice between alternatives which included shooting intending to hit the deceased and shooting intending not to hit, that is to say, intending that the bullet should pass near his body but not into his body. These alternatives did not particularly require attention to a possible view of the facts, that the applicant fired at the deceased knowing that the bullet would probably hit the deceased but recklessly indifferent whether the deceased was killed or seriously injured. On the other hand, if there could be murder where the applicant knew that it was possible that the bullet might hit the deceased and kill or seriously injure the deceased, and where the applicant knowing that possibility was recklessly indifferent whether or not the bullet did hit the deceased, then a direction on reckless indifference would not appear to be inappropriate.

10. Recklessness in relation to malice aforethought is used as a compendious word to describe actual knowledge of the consequence of an act – I do not at this stage say whether the consequence must be probable or whether it is sufficient that it is possible – and positive indifference whether that consequence follows or not. Such a state of mind may amount to malice aforethought but recklessness in this sense is not failure to take care, even a failure to take care where at the time of his act the actor adverts to the possible consequences of his act. In other words, it is not a quality

of the conduct. The recklessness is the necessary quality of the indifference to the consequences of the intended act – a positive indifference reckless of known consequences. It is a state of mind which rarely needs to be considered on a charge of murder. There is little on reckless indifference in its relation to murder in English legal decisions but the relationship was recognized in *Hyam v Director of Public Prosecutions* [1974] UKHL 2; (1975) AC 55; [1974] 2 All ER 41 and was possibly applied by Stephen J in his charge to the jury in *R v Serne* (1887) 16 Cox CC 311. An aspect was stated in his *Digest of the Criminal Law* by Stephen whose enunciation has been repeated in *Archbold's Criminal Pleading Evidence and Practice*. See now 38th ed. (1973), par. 2485.

> "Express malice. Express malice has been defined by Stephen in his *Digest of Criminal Law*, 9th ed., pp211-213, as including either of the following states of mind preceding or co-existing with the act or omission by which death is caused and it may exist where that act is unpremeditated: -
> (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."

I shall refer presently to the cases decided in those places in Australia where the law of murder is still the common law.

11. It is to be observed that Stephen expressed the principle to include knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person. In my opinion this expression of the principle is correct. The need for a direction on this form of malice would arise for example in cases where the accused said or suggested that though it be found that he knew that his act of shooting at the victim would probably kill or seriously injure the victim his only actual intent was to get away or to prove to himself that he was brave enough in his own mind to do the act, or, it must be added, to frighten the victim, and that, that being the only intent actually in his mind, there was not an intent to kill or seriously injure. The law then says that there may nevertheless be malice in the absence of the actual intent to kill or seriously injure in such circumstances if there was a reckless indifference to what he knew to be the probable consequences of his act. Intent to kill or seriously injure, although it may be inferred as a fact from the doing of an act with knowledge of its probable consequence of death or serious bodily injury to the victim, is not the same as knowledge of the consequences of the doing of such an act.

On the one hand intent may exist even though the knowledge of the actor is that the death of the victim is improbable. If a man were to fire a pistol into a dark place intending to kill another he would be guilty of murder even though he believed that the odds were greatly against him killing that other. It is the actual present intent which is sufficient. The actual present intent need not be the only intent. If in the examples which I have given in the earlier part of this paragraph there was, in addition to the intent to get away or to prove himself, an actual present intent to kill or seriously injure then the act is murder. On the other hand if the intent is not actually present, there is no intent in law. To say that there is in law an intent in such circumstances is to apply a legal presumption that a man intends those consequences which he knows to be probable but there is no such presumption. The question is one of fact. However, there may still be malice in the special circumstances of knowledge of probable consequence and reckless indifference to that consequence.

12. I recognize that an alternative classification is to make no distinction between doing an act intending that a consequence will follow and doing an act expecting, but not certain, that a consequence will probably follow. See, for instance, the classification by Mr TW Smith as Law Reform Commissioner in Victoria in his *Report on the Law of Murder*, p3. So long as the expectation is of the probable consequence, the difference in classification does not appear to me to matter. However, if the relevant expectation was of a merely possible consequence, the word "intend" would be inappropriate. No man can be described as intending what he does not expect to happen unless he actually intends it to happen.

13. I come now to the position if the jury "accepted" the fact that the applicant fired in the direction

of the deceased intending that the bullet would not hit him. Could they find him guilty of murder? It appears to me that they could only do so on a basis that it was sufficient in law that the applicant foresaw that the possible as distinct from probable consequence of the act was that the bullet would hit the deceased and was recklessly indifferent whether or not it thus caused his death or serious bodily injury. That, however, is not in my opinion sufficient to constitute murder. It could be said that he was reckless in the sense that appreciating the risk he decided to take that risk. But it is not murder to do an act which is risky to the life of another simply because the risk, the possibility of causing death or serious bodily injury of the other, is known to be probable. There must be indifference to known probable, not merely possible, consequences, and that indifference must be reckless. It is not appropriate to introduce into this use of the words "possibility" and "probability" connotations appropriate to the determination of questions in other fields of law such as satisfaction of a burden of proof or of adducing evidence.

In the present context we are dealing with the state of a man's mind, with that state of mind which the word "malice" connotes. To say that a man knows in his mind that a consequence of his act is probable is to say that he believes that the consequence will happen or that he expects that it will happen even though he would be prepared to concede that it is not certain that it will happen. To say that a man knows in his mind that a consequence of his act is possible though not probable is to say that he believes that the consequence will not happen or that he expects that it will not happen even though he would be prepared to concede that it may happen. There is a great difference in moral and social content between the first state of mind and the second just as there is between the first state of mind and that of a man who knows that a consequence is possible but who has formed no opinion at all as to the degree of possibility. The difference between the first state of mind and the other two states of mind should be preserved in the law of murder. The words "malice aforethought" can be misunderstood if each of them is given a meaning different from the meaning which they bear in the law of murder. "Malice", it is well accepted, does not refer to the emotive state of the actor and "aforethought" does not mean "existing at a distinctly prior time". Nevertheless, a dislike of the possible confusion that the words may cause must not be allowed to obscure the fact that for a crime to be murder there must be a particular state of mind more wicked than an intention to take a risk with an appreciation that the risk is of death or serious bodily injury to another, an intention which may or may not be able to be described in pejorative terms depending upon the social usefulness of the intended action.

14. Now that the death penalty has been abolished, or virtually abolished, there is not the same importance in physical consequence in distinguishing between murder and the more serious kinds of manslaughter. In the same way it could be said that there is no longer an importance in distinguishing the case of reckless indifference with knowledge of the probable consequence from the intentional taking of a risk or indifference to the risk when the actor positively adverts to the possible consequences in death or serious bodily injury to another of his taking that risk. This kind of consideration has led some to the view that all unlawful killings should be one offence with the variations of circumstances being reflected in sentence: (e.g. Lord Kilbrandon in *Hyam v Director of Public Prosecutions* [1974] UKHL 2; (1975) AC 55 at p98; [1974] 2 All ER 41). Though both murder and manslaughter can be very serious crimes I believe that society still places on the word "murder" a connotation of dreadfulness which is an important social sanction and that the sanction is watered down if anything (apart from the instances of constructive malice and certain Code provisions which have other social purposes) is added to the category of murder which does not involve an intent to kill or do serious bodily injury or what is practically the equivalent thereof.

15. I have attempted to avoid any use of the words "desire", "purpose", "motive", "wish" or "object". Once any word other than "intent" is used I believe that further precise definition is required in order to distinguish the exact sense in which the word is being used. If the use is synonymous with intent, there is no need to use it. If it is different then it introduces a concept different from intent and therefore not relevant as an ingredient of the kind of malice which involves actual intent.

16. The mental element in the crime of murder is not a simple matter at all. It has been the subject of much writing over the last 150 years, ever since the utilitarianism of the Benthamist school and the legal positivism of that time sought an expression of the law in terms free from moralistic concept. Since *DPP v Smith* (1961) AC 290; [1960] 3 All ER 161; [1960] 3 WLR 546 and now since *Hyam v DPP* [1974] UKHL 2; (1975) AC 55; [1974] 2 All ER 41 there has been a fresh surge of writing. (See e.g. Glanville Williams, *The Mental Element in Crime*; R Cross, "The Mental

Element in Crime", Law Quarterly Review, vol 83 (1967), p215; JC Smith, "Intention in Criminal Law", Current Legal Problems, vol. 27 (1974) p93; R Buxton, "Malice Aforethought", Modern Law Review, vol. 37 (1974) p676; and M Sornarajah, "Reckless Murder in Commonwealth Law", International and Comparative Law Quarterly, vol. 24 (1975) p846)

17. The difficulty in holding that anything less than an intent to kill may constitute the mental element for murder, an intent which can be condemned in absolute terms, is that then it is difficult, if not impossible, to leave out of account the baseness or goodness in moral or social terms of any aim, purpose of motive which accompanies the actual intent. The objection which can be made to the introduction of notions of moral turpitude through examination of aim, purpose and motive is that it may largely reintroduce into the legal concept of malice popular indeterminate connotations of that word. One way in which the objection has been met is by regarding reckless indifference to known consequences as a wanton lack of any morally or socially acceptable aim, purpose or motive. I find this acceptable in relation to murder only if the reckless indifference is to a consequence which is known to be probable, which is expected to occur. Reckless indifference to a consequence of death or serious bodily injury which is not expected to occur, but which it is appreciated may possibly occur, is in my opinion properly treated as manslaughter. If ultimate analysis should eventually make it necessary to recognize through examination of aim, purpose and motive the element of moral culpability (the "aim" explored by Lord Hailsham in *Hyam v DPP* [1974] UKHL 2; (1975) AC 55; [1974] 2 All ER 41) or the "wicked, depraved, and malignant heart" of *Blackstone's Commentaries* 15th ed. (1809), vol 4, p198, then I have found no better expression of the elements than that by Traynor J in *People v Thomas* (1953) 261 P 2d 1, at p7 who referred to "a base, anti-social motive ... with wanton disregard for human life".

18. I find nothing in *R v Jakac* [1961] VicRp 62; (1961) VR 367 or in *R v Sergi* [1974] VicRp 1; (1974) VR 1 to the contrary of the principles which I have expressed above. Indeed in the latter case the trial judge charged the jury as follows (1974) VR at p7 :

> "If you find that Sergi intended to miss Condo and merely to frighten him, again you ask yourselves, 'Are we satisfied that was not done in self-defence?' If you are not satisfied that it was not self-defence, the verdict is not guilty of murder and of manslaughter. If you are satisfied that it was not self-defence, the verdict will be not guilty of murder, but you will have to consider whether you will find Sergi guilty of manslaughter ..."

This was in my opinion a perfectly correct direction. I would refer also to the passage in the judgment of the Court of Criminal Appeal (1974) VR at p10 :

> "It is necessary to guard against the danger that the jury, because words such as 'likely' and 'probable' are used loosely in common speech, may understand a charge which uses those words as meaning that malice aforethought is established if the accused realized or believed no more than that he was creating a substantial risk of death or grievous bodily harm. This misunderstanding may also arise from references to 'recklessness' if it is not made clear to the jury what is the particular kind of recklessness that is requisite. It needs to be made quite plain to the jury that in order to bring the case within the principle, the Crown has to establish that when the accused did the act which caused the death he realized or believed that it was more likely than not that death or grievous bodily harm would be the result, or, in other words, that he realized or believed that the odds were against the deceased escaping without at least suffering grievous bodily harm."

In substance I agree with what is there said but I would avoid the test of "more likely than not" or "odds against". What needs to be made clear in any exceptional case where the direction is needed is that the accused must have in his mind, must expect, that the victim will suffer death or serious bodily injury even though his mind is less than certain that this will be so. I think that this is conveyed by a direction that the accused knew that his act would probably cause death or serious bodily injury.

19. In *R v Hallett* (1969) SASR 141 the South Australian Supreme Court considered whether the test was "probable" or "possible" consequence and concluded that the former was the correct test. There are passages in the reasons of Barwick CJ in *Pemble v R* [1971] HCA 20; (1971) 124 CLR 107; [1971] ALR 762; (1971) 45 ALJR 333 which would support the view that foresight of possible consequences coupled with indifference to such possible consequences is sufficient to support a verdict of murder (1971) 124 CLR, at pp118-119, 121. McTiernan J and Menzies J took the view that knowledge of the probable consequence was necessary. Windeyer J and Owen J

did not express an opinion on this question. I do not think that the decision in *Pemble v R* [1971] HCA 20; (1971) 124 CLR 107; [1971] ALR 762; (1971) 45 ALJR 333 indicates a conclusion on the question presently being considered.

20. In Kenny's *Outlines of Criminal Law*, 19th ed (1966) the editor at par 116a, pp164 *et seq*. refers on a number of occasions to foresight in an accused of the possibility or risk of death but it is important to note that those references occur in a paragraph dealing with the nature of the bodily harm which is the necessary ingredient in this kind of malice aforethought.

21. Two further points require notice before I turn to the trial judge's charge. First, the presence in the room of the other two brothers though important in the factual situation was not significant on the question whether the acts and state of mind of the accused could in law constitute murder. This was not a case where the jury could find an intent to kill or seriously injure or, to use an abbreviated reference, a reckless indifference in respect of, a number of persons or any one of a number of persons without particular regard to the identity of any of them. In other words it was not a case of general or universal malice. Nor was it a case where the jury could find an intent to kill or seriously injure or, to use an abbreviated reference, a reckless indifference in respect of, a particular person other than the deceased. In other words it was not a case of transferred malice. Secondly, it was not suggested that shooting near the deceased with an intent to scare him was a felony so the possibility of constructive malice on the applicant's own version of the facts was not canvassed.

22. The first direction in the charge on malice was as follows:

> "We reach, then, the question of what is murder. Murder is committed when a person does a voluntary act which causes the death of another. At the time he does that act he may either intend to kill the other, (the deceased) or to intend to do serious bodily injury to the other (the deceased) or in this third class, which I shall relate to an event which included a rifle being discharged. If he discharges a firearm at another person knowing that the shot will probably or more than likely cause the death of or a serious bodily injury to that other, and that at the time he was indifferent whether death or serious bodily injury would be caused to the other or even if he wished that it might not be caused."

This direction is both precise and correct. ...
