21/75

SUPREME COURT OF VICTORIA — FULL COURT

R v WYNNE

Gowans, McInerney and Nelson JJ

26 February 1975

EVIDENCE – PROOF OF MURDER – CONFESSION MADE BY ACCUSED – WHETHER CROWN WAS REQUIRED TO LEAD EVIDENCE THAT THE DECEASED DIED AS A RESULT OF SELF-INFLICTED INJURIES – WHETHER IT WAS OPEN TO THE JURY TO FIND THE CHARGE OF MURDER PROVED.

The applicant was convicted of murder. He was known to live at the Gill Memorial and from time to time drink in the Flagstaff Gardens. Evidence was given that the applicant who had been drinking, reported the finding of the body in the Old Christy's Motor Auction Rooms in William Street, near the Gill Memorial Home. The deceased had been stabbed in the neck and chest, presumably by a broken bottle found nearby. The applicant's right palm print was on this bottle. The applicant at a later stage confessed to the killing. The accused was found guilty of the charge. Upon appeal—

HELD: Appeal refused.
1. The proof of the fact of the accused having caused the death did not depend only on inference, because there was the evidence that the accused had confessed to his doing the killing. Insofar as the proof relied upon inference on the finding of the bottle neck and the presence of the palm print on the bottle neck, it was open to the jury, having been properly directed on the subject of circumstantial evidence, to be satisfied to draw an inference that it was his act and not the act of the deceased that caused the death.

2. The evidence of the witness Cherry amounted to evidence of a confession by the applicant. According to that evidence, the accused had said he had killed Parker upstairs at Christy's by cutting his throat with a broken wine bottle, and had robbed him, taking $14 out of his pocket, Harris being upstairs at the time. This evidence, if accepted, was sufficient foundation for a conviction. It was open to the jury to accept this evidence as to the making of the confession as credible; and viewed in the light of the evidence as to confessions of the killing, and in the light of the accused's own evidence in the witness box (or at least some of it) as to his having made the confessional statements, it was open to the jury to regard the confessions made as reliable, in the light of the evidence of the existence of the applicant's palm print on the bottle, and in the light of the evidence as to his false denials, at the time of reporting the finding of the body, of his not knowing the deceased, thus indicating a sense of guilt. There was no doubt a question of credibility involved in the confessional evidence, but in the light of the supporting evidence it could not be said that the jury could not reasonably rely upon it.

GOWANS J: ... The next ground is ground 9(a). It reads:
'9. That the Crown did not adduce evidence that which caused death of deceased could not be self-inflicted, result –
(a) the Crown did not prove all the elements to charge of murder.'

This ground goes to matter of proof. It asserts that the Crown did not prove all the elements to sustain the charge of murder because it did not produce evidence that the wound which caused the death of the deceased could not have been self-inflicted. As stated, this ground involves the proposition that the Crown could not prove a base of killing by adducing evidence of a confession by the accused that he killed the deceased if it did not also adduce evidence that the fatal wound was not self-inflicted. That proposition is untenable. At its highest, the ground could only be put as an assertion that where proof of the fact of the deceased causing the death is a matter of inference only, the fact cannot or should not be inferred in the absence of evidence that the fatal wound could not be self-inflicted. But the proof of the fact of the applicant having caused the death did not depend only on inference, because there was the evidence that the applicant had confessed to his doing the killing. Insofar as the proof relied upon inference on the finding of the bottle neck and the presence of the palm print on the bottle neck, it was open to the jury, having been properly directed on the subject of circumstantial evidence, to be satisfied to draw an inference that it was his act and not the act of the deceased that caused the death.

The argument at one stage took the form that the *corpus delicti* had to be proved, that is that there had been a crime, before any question of the identity of the person committing the crime arose and that this involved proof excluding suicide as the explanation. The argument, in our view, is disposed of by the judgments of the High Court in *Plomp v R* [1963] HCA 44; (1963) 110 CLR 234; [1964] ALR 267. At p242 Dixon CJ said this:

> "It is objected that Plomp's motives cannot be taken into account until it is shown by evidence that in some physical way his actions were responsible for his wife's death. There is nothing, it is said, to show that anything he physically did impeded her emerging from the surf or recovering her equilibrium. Until that is shown, evidence of motive cannot be used, so it is said, to prove guilt. There is, in my opinion, no legal doctrine to that effect. All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged."

And at p247 there appears this passage in the judgment of Menzies J:

> "The argument that to prove a person had a motive for doing an act cannot be relied upon to prove that he did the act was also supported by references to persuasive authority – but again I am unpersuaded. The authorities cited were relied upon in the first place to show that the term *corpus delicti* relates at most to the commission of a criminal act by somebody and does not cover the commission by an accused person of the criminal act charged against him – that is, here, that Fay Irene Plomp had not died accidentally but had been killed, but not that the applicant had drowned her. Had the authorities cited not gone beyond this, they would hardly have assisted the applicant's case, but it was sought to attach this limited meaning to the term *corpus delicti* as a step towards establishing that it was not until the *corpus delicti* had been proved that evidence that the applicant had reasons for killing her and had sought to take advantage of her death became material, and some of the authorities cited do give some support to this contention.'

His Honour then referred to authorities which had been cited, and proceeded:

> "Notwithstanding such support as counsel have been able to muster for their submission, I am satisfied that proof of a case cannot be so fragmented. The cause of death, to the exclusion of suicide or accident, is unquestionably part of the *corpus delicti*, yet proof of this is often inseparately involved with proof that the person who is charged with homicide caused the death. In such a case it could not be maintained that proof of identity must wait upon proof of the *corpus delicti*. Furthermore, in such a case any evidence to show that an accused person caused the death would be at once evidence of the *corpus delicti* and an indication of who it was that committed the crime."

In our opinion, this part of ground 9 cannot be sustained.

Ground 2 reads:
'2. That the verdict was unreasonable or cannot be supported having regard to the evidence.'

That ground can now be approached on the basis that the jury had been properly and adequately directed. In a case which depends entirely on circumstantial evidence, the function of a court of Criminal Appeal is as stated in *R v Ratten* [1971] VicRp 10; [1971] VR 87 at p95, echoing what was said by Menzies J in *Plomp v R* at p252. In such a case the question is whether there was sufficient evidence upon which the jury, fulfilling their duty not to convict unless the inference of guilt was the only inference which they considered they could rationally draw from the circumstances, could have convicted the applicant.

It was said that this case was to be treated in the same way and that there were so many explanations consistent with innocence which a jury might have accepted that the inference of guilt could not have appeared to them as the only inference which they could rationally draw from the circumstances. But the evidence in this case was not wholly circumstantial (see *Cross on Evidence* (Australian Edition) p7, and *R v Gordon* (1963) 80 WN (NSW) 957; [1964] NSWR 1024; 63 SR (NSW) 631 at p633).

The evidence of the witness Cherry amounted to evidence of a confession by the applicant. According to that evidence, the applicant had said he had killed Parker upstairs at Christy's by cutting his throat with a broken wine bottle, and had robbed him, taking $14 out of his pocket, Harris being upstairs at the time. This evidence, if accepted, was sufficient foundation for a conviction. It was open to the jury to accept this evidence as to the making of the confession as credible; and viewed in the light of the evidence of Gadd and Scott as to confessions to them of

the killing, and in the light of the applicant's own evidence in the witness box (or at least some of it) as to his having made the confessional statements, it was open to the jury to regard the confessions made as reliable, in the light of the evidence of the existence of the applicant's palm print on the bottle, and in the light of the evidence as to his false denials, at the time of reporting the finding of the body, of his not knowing the deceased, thus indicating a sense of guilt. There was no doubt a question of credibility involved in the confessional evidence, but in the light of the supporting evidence it could not be said that the jury could not reasonably rely upon it.

It was submitted in the alternative that this Court should conclude that on the evidence as a whole it was dangerous for the jury to convict the applicant (see *Plomp v R* per Dixon CJ at p244). There were many questions left unanswered by the evidence, and many of these were emphasised in the argument which has been presented to us. In particular, there was the possibility of Harris being the guilty one; but this issue was fairly and fully put before the jury, and it was rejected by them as an explanation.

After careful consideration of these matters, we have come to the conclusion that we are unable to accept the submission that we ought to reach the decision that the verdict of the jury should be set aside as unsafe. Ground 2, therefore, cannot be upheld.
