37/81

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v O'NEILL

Starke ACJ, Crockett and McGarvie JJ

16 June 1981 — [1982] VicRp 13; [1982] VR 150; (1981) 4 A Crim R 404

CRIMINAL LAW – APPEAL AGAINST CONVICTION FOR MURDER IN THAT JUDGE ERRED IN NOT INSTRUCTING THE JURY AS TO PROVOCATION & THE EFFECTS OF SELF INDUCED INTOXICATION – *R v CROFT* COURT OF CRIMINAL APPEAL NSW FOLLOWED – *R v O'CONNOR* DISTINGUISHED.

The general result of a review of the authorities is that the intoxication of the accused is not, and never has been, at common law or under any of the legislation which has modified it in those jurisdictions which have derived the doctrine of provocation from the common law, a matter to be taken into account in the application of the objective test in provocation. It is not a matter to be taken into account in the application of the objective test which is expressed in s23(2) of the *Crimes Act (NSW)*.
***R v Croft* (1981) 1 NSWLR 126; 50 WN (NSW) 56, followed.**

STARKE ACJ: ... Bray CJ, *R v Webb* (1976) 16 SASR 309 at pp313-314 ... I turn then to the actual direction given by the learned Judge at p312 onwards. He said:

> "The elements of the concept of provocation are two. The first is that the acts which are said to constitute the provocation caused the accused man to lose his self-control and the act of killing was done during the period of loss of self-control. The second is that the acts of provocation must have been such as to produce in the same circumstances a possibility that an ordinary man would have reacted in the same way as the accused man did. I will state those again (and he does so)."

His Honour proceeds at the top of page 313:

> "In a case like this it is necessary to say that the ordinary man contemplated there is an ordinary man unaffected by alcohol. Provocation may produce one result in a man who is affected by alcohol but this question is whether it might, not would, might have produced the same result in an ordinary man who wasn't affected by alcohol. Mr Vincent this morning said to you that, and correctly, that this doctrine was a common law doctrine ameliorating the severity of the law of murder, recognising human frailty. I would adopt all of that, but the second rule is an indication that that merciful amelioration of the law will only go so far. There are limits. There must be some kind of proportion between what the provocation was and what was done in response to it. And the measure of that proportion is that what was done must have been something which in the same circumstances an ordinary man might have done. Notice the word 'might'. I have emphasised it before. It is not that the ordinary man would have done the same thing in the circumstances, but he might have done it. It is not outside the bounds, the limits of possible action of an ordinary man.
>
> I do not need to tell you that ordinary men come in all shapes, sizes and temperaments. We are not thinking of some stereotyped creature of unswerving virtue and a cold and detached nature. We are thinking of the whole mass of various kinds of people who go to make up the community. Somewhere we all draw the line between people who can be classed as ordinary people and people who are abnormal. Well, we are looking at the whole class of ordinary people and the question is whether what was done was beyond the range of activities that you might expect as a reaction in the circumstances of an ordinary person."

We have been spared a considerable amount of labour in determining this appeal having been referred to a decision of the Court of Criminal Appeal in New South Wales, *R v Croft* (1981) 1 NSWLR 126; 50 WN (NSW) 56. It was a court constituted by Street CJ, Samuels JA and O'Brien CJ of Cr D. The judgment was written by O'Brien CJ. In a most elaborate and erudite judgment His Honour reviewed all or nearly all of the authorities touching on the problem of the objective test in respect of the doctrine of provocation. I need not and will not refer to these authorities in detail. They are plainly set out in His Honour's judgment. Having, however, considered the judgment and having regard to the fact that there is no decision to which we have been referred to a contrary

effect, I have come to the conclusion that the conclusions of the NSW Court of Criminal Appeal are correct, as are the reasons for those conclusions. The conclusion itself is in a few words and may be found at p48 of the judgment, The learned Judge said:

> "The general result of the foregoing review of the authorities is that the intoxication of the accused is not, and never has been, at common law or under any of the legislation which has modified it in those jurisdictions which have derived the doctrine of provocation from the common law, a matter to be taken into account in the application of the objective test in provocation. In my view for the above reasons it is not a matter to be taken into account in the application of the objective test which is expressed in s23(2) of the *Crimes Act* ..."

That section, so far as is relevant, is in these terms:

> "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—
> (a) ...
>
> (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, ..."

It will be seen that the statutory definition or code in the NSW Act is in for all practical purposes precisely the same terms as it is expressed at common law. Accordingly, in my opinion, the judgment of the Court in this case is directly in point. It is not, of course, a binding authority upon us, but it is a highly persuasive authority and in any event, with great respect, in my view it is correct. It has a good deal I might say to commend itself; firstly, the test is a simple one; and secondly, it is in my view expedient that the various States within Australia should where possible adopt the same rules of common law. If the rules are to be changed generally it is in the interests of justice that this should be done by the High Court.

I pause before leaving this case to deal with an argument that was put in respect of the recent High Court decision of *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1979) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349. In that case the High Court, by a majority of four to three, held that when dealing with the general intent in the definition of murder that it was proper for a jury to consider the question of intoxication of the accused at the time of the alleged offence. It was said as a matter of policy the High Court lay down a general principle which should be applied to the objective test under the rule of provocation. I think there is a very obvious distinction.

In *O'Connor's Case* the Court was dealing with a matter of fact. That matter of fact was whether the accused had the requisite intent at the material time. The courts in this country have for long set their face against fictions or presumptions when it comes to questions of intent and questions of fact, and that was a question of fact. Here, as the learned Judge so aptly expressed it the law as a matter of policy has set up a barrier, as it were, below which the doctrine of provocation will not assist an accused. It may be called if you wish an artificial barrier, but as a matter of policy it sets a limit to the ambit of the doctrine of provocation. That is the way, and in more felicitous words, that the learned Judge expressed it in the passage from the judgment which I have already read.

In my opinion, the learned Judge was correct in the way he charged the jury, and indeed, if I may say with respect to him, it seems to me to be a model charge on the subject. In my view the application should be dismissed.

CROCKETT J: Counsel for the applicant maintained that the point for which he was contending was in principle logically unanswerable and that there was no good cause why that principle should be required to bow to the requirement of public policy. Indeed, there were cogent reasons why it should not. Whether the logic to which counsel made appeal is as he contends or not, it is clear that a number of courts, including appellate courts that have considerable persuasive authority, has ruled otherwise. Also there are plainly reasons of public policy which suggest that counsel's contention should not be adopted.

As long ago as in 1962 the Court of Appeal in New Zealand in considering the matter which is the subject of argument in this application, in *R v McGregor* (1962) NZLR 1069 dealt with the matter in a way adverse to the submission of counsel for the applicant. The relevant passage in these words is to be found at pages 1081-1082:

> "The 'unusually excitable or pugnacious individual' spoken of in *Lesbini* is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor."

The first indication of the acceptance of that concept in England appears in some observations of Lord Simon in *DPP v Camplin* [1978] UKHL 2; [1978] 2 All ER 168; (1978) 67 Cr App R 14; [1978] 2 WLR 679; (1978) AC 705, where at p726 His Lordship said:

> "In my judgment the reference to 'a reasonable man' at the end of the section means 'a man of ordinary self-control'. If this is so the meaning satisfies what I have ventured to suggest as the reason for importing into this branch of the law the concept of the reasonable man – namely, to avoid the injustice of a man being entitled to rely on his exceptional excitability or pugnacity or ill-temper or on his drunkenness."

There is, of course, no distinction to be drawn for present purposes between a test which is expressed as "a reasonable man" as against "an ordinary man". Then in 1980, the Court of Criminal Appeal in England in the case of *R v Newell* (1980) 71 Cr App R 331; (1980) Crim LR 576, adopted as correct for England the statement of law as it is to be found in the New Zealand case.

The same approach has recently been adopted in a number of other Australian States. In *R v Webb* (1977) 16 SASR 309 Bray CJ at p314 said:

> "The hypothetical ordinary man, too, is a hypothetical sober ordinary man, even though ordinary men sometimes get drunk and even if the particular accused was drunk. It was so held in *R v McCarthy* (1954) 2 QB 105 contrary to much earlier authority see, for example *R v Letenock* (1917) 12 Cr App R 221. This does not mean that the accused's intoxication is unimportant. Though it is irrelevant for the purpose of the objective test, it may be important when the subjective test is being considered, because it has an obvious bearing on whether he did in fact lose his self control by reason of the deceased's conduct."

Then in *R v Rose* (1967) Qd R 186, the Court of Appeal in Queensland adopted the same interpretation in relation to the common law test, which is, of course, the test in this State, and may be taken to be the test in other States where basic common law elements are enshrined in statute law whether as a code or not. In a judgment with which the other Judges of the Court agreed Wanstall J said:

> "There remains one further argument for the appellant, that the accused's intoxication is relevant on the question of provocation, This proposition is disposed of by Philp J (Hangar J concurring) in *R v Young* (1957) SR Qd 599 at p602; 52 QJPR 64, 'the hypothetical reasonable man is one who is sober and of ordinary power of self-control.'"

Those authorities, together with others, including many that deal with the development of the defence of provocation, have been elaborately dealt with in the unreported decision of O'Brien J in the NSW Court of Appeal case *R v Croft* to which the Acting Chief Justice has referred. It is unnecessary further to refer to those cases. I add simply that the Court of Appeal itself in *Croft's Case* accepted as correct the observations to which I have just made reference. In consequence, in NSW too, the law is as it has been laid down in the States of Queensland and South Australia. In those circumstances, in my view it would require cogent argument to persuade this Court that an interpretation of the relevant element of the defence should be different in this State from what it is in the United Kingdom, New Zealand and other States of the Commonwealth. For my part, I have not been so persuaded, and if some change in the law is to take place, it appears to me, having regard to the weight of existing authority, that it is appropriate that that change should be effected not by this Court, but by the High Court. Accordingly I, too, am of the view that the application should fail.

McGARVIE J: I agree. I add that both *R v Croft* and this case are concerned only with self-induced intoxication. I agree with the order proposed by the Acting Chief Justice.