55/76

SUPREME COURT OF VICTORIA

R v EVANS & GARDINER

Lush J

23 October 1975

[1976] VicRp 52; [1976] VR 517; aff'd [1976] VicRp 53; [1976] VR 523

CRIMINAL LAW – MURDER – CAUSE OF DEATH – CAUSATION – WHETHER CAUSED BY ACCUSED OR MEDICAL INTERVENTION.

Accused were charged with murder. During the course of a ruling on duress, Lush J made some comments as to causation involved in cause of death.

RULING:

1. A fact which the jury will have to consider is whether the medical handling of Jahn's case at Beechworth was reasonable and proper in the circumstances. It is only if the second cause is so overwhelming as to make the original wound merely part of the history that it can be said that death does not flow from the wound. An appreciation of whether one cause is overwhelming in relation to another involves a consideration of the circumstances of both. Broadly speaking, the force of the original cause diminishes with the passage of time, and an appreciation of the significance or relative weight of the second cause involves considering the skill and wisdom, or lack of it, displayed in the handling of the first cause.

2. The jury will be told that the question was whether the stabbing was at the date of death an operative and substantial cause, and they will have to consider the question whether by that time the stabbing had merely become part of Jahn's medical history and that in considering the relative significance of the various factors in death it was proper for the jury to take into consideration any departure from proper practice in the medical treatment and the degree of that departure as they see it.

LUSH J: ... The third matter discussed related to the question of causation, and I had already given counsel some indication that I proposed to base the charge on *R v Smith* [1959] 2 QB 35; [1959] 2 All ER 193; [1959] 2 WLR 623. It seems to me appropriate that I should tell the jury that a fact which they will have to consider is whether the medical handling of Jahn's case at Beechworth was reasonable and proper in the circumstances. That seems to me to be necessary for two reasons, perhaps three. The first two are reasons of logic. To use the phrase in *Smith's Case*, it is only if the second cause is so overwhelming as to make the original wound merely part of the history that it can be said that death does not flow from the wound. An appreciation of whether one cause is overwhelming in relation to another involves a consideration of the circumstances of both. Broadly speaking, it is my view that the force of the original cause diminishes with the passage of time, and an appreciation of the significance or relative weight of the second cause involves considering the skill and wisdom, or lack of it, displayed in the handling of the first cause. I do not wish at the moment to bind myself to any form of words to be used in the ultimate charge to the jury. The selection of words may be influenced by what counsel say in the meantime, but I indicate that this will be the general basis of my approach.

Reference in that fashion, to the quality of the medical treatment, was made in *Levy v R* [1949] WALR 29. It underlay, I think, the reasons of the South Australian Full Court in *R v Bristow* [1960] SASR 210. That was a case where the accused woman had poisoned her husband with arsenic but, on admission to hospital, he was treated for alcoholism. There is an old case in which it was said that if an operation is performed *bona fide* by competent practitioners, evidence that different treatment was preferable is inadmissible. That case is *R v Pym* (1846) 1 Cox's CC 339. I think that it is doubtful whether that case, which was a trial at Assizes in which a verdict of not guilty was brought in, would now be regarded as representing the law. In most of the cases that deal with this matter — indeed, I think, in all of them — the defence of intervening cause failed,

but they were all cases in which medical treatment was given very soon after the injury: *Pym's Case*, above; *R v McIntyre* (1847) 2 Cox's CC 379, where the accused man had kicked his wife, and on the administration of brandy to her as a reviver by a doctor, some went to her lungs, and the evidence was that that might have been the factor that killed her. That also was an Assize trial. The verdict was guilty of manslaughter. There was the case of *R v Flynn* (1867) 16 WR 319, where, after a fight in a street outside a public house, the deceased and the accused resumed drinking and finally, for reasons not specified in the report, spent the night in the police station. The deceased then rode home. He died a little while later of a skull fracture. He was examined by a doctor, who failed to perceive the injury. As I remember the report, it was not suggested that this was negligent. Lastly, apart from the recent cases, there was *R v Davis and Wagstaffe* (1883) 15 Cox's CC 174, where the victim has sustained a broken jaw in a street fight and died under the anaesthetic. The Court said (at p179), "The chloroform having been properly administered by a regular general practitioner, the fact that the death primarily resulted from its use cannot affect the criminal responsibility of the accused persons." The indictment in that case was for manslaughter and the verdict "not guilty".

Jordan's Case (1956) 40 Crim App R 152, is a peculiar case in which it is clear that the Court of Criminal Appeal regarded the fact that the medical treatment was inappropriate as relevant to a consideration of cause of death. The same matter was considered in *Smith's Case*, but *Smith's Case* again was one in which such treatment as could be given in the circumstances was given and given on the same night as the man was injured.

I have recorded these cases merely as a means of bringing them together, but in the present case a consideration of them leaves me in the position that I had already outlined that I propose to tell the jury that the question is whether the stabbing was at the date of death an operative and substantial cause, and I shall instruct them to consider the question whether by that time the stabbing had merely become part of Jahn's medical history and advise them that in considering the relative significance of the various factors in death it is proper for them to take into consideration any departure from proper practice in the medical treatment and the degree of that departure as they see it.
