LOUIS WILLIAM BALDWIN FISHER ..APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1961

*Apr. 25, 26
May 15

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Drunkenness—Capacity to form intent—Admission of doctor's evidence—Instructions to jury—Criminal Code, 1953-54 (Can.), c. 51, s. 201(a)(i) and (ii).

The accused was convicted of murder. He did not deny the killing, and he gave to the police a statement the admissibility of which was affirmed in the Courts below and is now unchallenged. After drinking heavily in a hotel until closing time, the accused met a woman who asked him to take her out in his car. While in the car she made sexual advances to him. After driving through various streets, he drove into a service station parking area. He then stabbed her with a knife, some fifteen times, pushed her out of the car and drove off.

A psychiatrist was called by the Crown to give expert evidence on hypothetical questions in which were substantially included the material facts related in the accused's statement. He expressed the opinion that any one, able to do what the accused was alleged to have done, would have the capacity to form the intent to murder. The defence was accused's lack of capacity, on account of drunkenness, to form the intent to commit murder either under s. 201(*a*)(i) or s. 201(*a*)(ii) of the Code.

The conviction was affirmed by a majority judgment of the Court of Appeal, the dissent being in respect of the admissibility of the psychiatrist's evidence. The accused appealed to this Court (1) on questions of law as to which there was a dissent in the Court below and (2) on other questions of law by leave of this Court granted under s. 597(1)(*b*) of the Code.

Held: The appeal should be dismissed.

The evidence of the psychiatrist had been properly admitted.

The instructions given by the trial judge to the jury as to the intent required under s. 201(*a*)(ii) of the Code and those he gave in answer to the questions put to him by a juror were in both respects according to law.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the accused's conviction on a charge of murder. Appeal dismissed.

J. B. Pomerant, for the appellant.

W. C. Bowman, Q.C., for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1961] O.W.N. 94, 34 C.R. 320.

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The judgment of the Court was delivered by

FAUTEUX J.:—At the conclusion of a jury trial presided over by Thomson J., at Toronto, the appellant was convicted of the murder of one Margaret "Peggy" Bennett, on or about the 10th of June, 1960, at the municipality of Metropolitan Toronto.

His appeal from this conviction was dismissed by a majority decision of the Court of Appeal for Ontario[1].

Appellant then appealed to this Court (i) on questions of law as to which there was a dissent in the Court below, as provided under s. 597(1)(*a*), and (ii) on other questions of law by leave of this Court granted under s. 597(1)(*b*).

The circumstances surrounding the commission of the offence are described mainly in a statement made to the police by appellant some ten days after the fatal occurrence. The admissibility of this statement in evidence was affirmed in the two Courts below and is now unchallenged.

For the purposes of this appeal, this summary of the facts is sufficient. At about 9 o'clock in the evening of the 9th of June, 1960, appellant, his wife, Douglas Zachariah and Hubert Vincent Baker went to the Wembley Hotel on Danforth Avenue, in Toronto. Shortly after they arrived, Mrs. Fisher returned home and the men, who had consumed beer in her company in the Ladies' Beverage Room, moved to the Men's Beverage Room where they drank beer and remained up to closing time, shortly after midnight. The material events that took place thereafter are related with minute details in appellant's statement. Upon leaving the hotel, he met Peggy Bennett, whom he knew by sight as a patron of the hotel beverage room, and was asked if he had his car. He told her to wait while he went home to get it. He came back with the car and, upon her suggestion that they go to a restaurant to have some coffee, declared that he did not have any money. As they drove away, she asked him for a cigarette and he stopped at a restaurant where he knew he could get some and pay the next day. He thus obtained a package of Black Cat filter tips. They sat in the car outside the restaurant, smoking, and she commenced "fondling" him. He drove off again and she continued the fondling. He then indicated the various streets on which he travelled, with particulars as to traffic lights and signs.

[1] [1961] O.W.N. 94, 34 C.R. 320.

Finally, he told her that if she wanted to get it, she was going to get it, and wheeled into a service station parking area. There, with a knife, which he carried in his car, he stabbed her—some fifteen times, according to the evidence of the pathologist who performed the autopsy—pushed her out of the car and drove off. On his way home, he threw away one of her shoes and part of the contents of her purse.

Towards the end of his statement, he said, with respect to the actual time of the fatal stabbing:

> I really went off my rocker, I guess, or I must have been drunk, or a combination of both.

At trial, both Zachariah and Baker gave evidence as part of the case for the Crown and were then cross-examined by defence counsel as to the quantity of beer consumed by appellant at the hotel. According to Zachariah, appellant had four glasses of beer with him, but in the course of the evening visited other tables where, he assumes, appellant also drank. Baker declared that appellant had, that night, a "considerable quantity" of beer.

Before closing the case for the prosecution, the Crown called Dr. Norman Lewis Easton, Director of Psychiatry at the Ontario Hospital, New Toronto, and a practitioner of long standing in that particular branch of medical treatment. Having read appellant's statement and being asked an hypothetical question, in which were substantially included the material facts related in the statement, he expressed the opinion that any one, able to do what appellant was alleged to have done, would have the capacity to form the intent to murder, even if he had consumed twenty-five glasses of beer or more. Appellant, testifying subsequently in his own defence, swore that he had drunk, on that occasion, about twenty-five glasses of beer and that he had no recollection of what took place after he left the hotel.

That appellant killed Mrs. Bennett by the infliction, with a knife, of numerous kinds of wounds, including the perforation of the aorta, is not in issue. The defence was appellant's lack of capacity, on account of drunkenness, to form the intent to commit murder either under s. 201(*a*)(i) or s. 201(*a*)(ii).

The dissent in the Court of Appeal is with respect to the admissibility of the evidence given by Dr. Easton. In the view of the minority, that evidence was inadmissible on

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grounds related to the qualifications of Dr. Easton, the nature of the opinion he gave, the form of the questions put to him to elicit that opinion, the facts he took into consideration to form it and the manner in which he expressed it. It is particularly emphasized that by giving that opinion, which, it is said, required no scientific knowledge or training and which any layman was in as good a position to form, Dr. Easton usurped the function of the jury. If admissible at all, it is added, it was at least inadmissible as part of the case for the prosecution when, at that stage of the trial, the issue of drunkenness as affecting the capacity to form an intent, had not been raised. The Judges of the majority considered that the Crown had to prove beyond doubt, as an essential element of its case, the intent required to constitute the offence of murder; that the issue of drunkenness had been raised in the cross-examination of Zachariah and Baker by counsel for the defence and in the appellant's statment; that Dr. Easton was qualified and in a better position than a layman to form an opinion in the matter and that there was no fault in the manner in which this opinion was elicited by the Crown or formed and expressed by the expert. They concluded that the evidence had been properly admitted.

With deference to the views of the learned Judges who dissented in the Court below, we are all in substantial agreement with the reasons expressed by Aylesworth J.A., who spoke for the majority, and concur in the conclusion which he reached.

The grounds upon which leave to appeal was granted are related (i) to the directions given by the trial Judge as to the intent required under s. 201(*a*)(ii) and to those he gave in answer to the questions put to him by a juror. After carefully considering the submissions made at the hearing by counsel for appellant, in his full and able argument, we are all satisfied that the instructions given, in both respects, were according to law.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: J. B. Pomerant, Toronto.

Solicitor for the respondent: The Attorney-General of Ontario.