

1914
Sept. 25.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* LESBINI.

Criminal Law—Murder—Provocation necessary to constitute Manslaughter—Prisoner sane, but hot-tempered and sensitive, with Defective Control and Want of Mental Balance.

The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (e.g., a person afflicted with defective control and want of mental balance) of his self-control.

APPLICATION by the prisoner for leave to appeal against his conviction for murder. The application was by the practice of the Court treated as a final appeal.

The facts (so far as material) were as follows :—

On August 12, 1914, a few minutes before 4 in the afternoon, the prisoner went into a hall in Tottenham Court Road called "Fairylane," in which was a rifle and revolver range. A girl named Alice Storey was in charge of the range, and said, in the prisoner's hearing, "Iky wants some shots." The prisoner said, "Don't you talk to me like that." She replied, "Oh, it is only my way of talking to my customers ; I am only joking." The prisoner then said, "Well, don't let it occur again." He stood by the range, and for a short time nothing further was said. Alice Storey then asked the prisoner whether he wanted any shooting. He replied, "Yes, I want some shooting." She then asked whether he wished to shoot with a revolver or a rifle, and he said that he wanted a revolver, and pointed at the one he wanted, which, with others, was in a glass case. Alice Storey went to unlock the case, and as she was doing so she dropped the keys on the floor, which the prisoner picked up for her. She then said, "It just shews what sort of temper he has, it is soon over," or something to that effect, and then unlocked the case and took out the revolver, which she loaded for the prisoner and laid on a counter for him

ready to fire. The prisoner picked up the revolver and held it towards the target. He then brought the revolver down to his side, and turned round to Alice Storey and went in front of her, saying, "Now I have got you," levelling the revolver at her. She screamed out, "Oh, please don't, don't," and ran away. The prisoner followed her, still pointing the revolver at her, and discharged it, inflicting a wound from which she shortly afterwards died.

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At the trial which took place before Atkin J. at the Central Criminal Court on September 9, 1914, medical evidence was given to the effect that the prisoner was perfectly rational both in conduct and conversation, and that there was no evidence of any delusions or condition of epilepsy or hallucination or other evidence of insanity on the part of the prisoner, but that he was hot-tempered and sensitive, with defective control and want of mental balance.

The defences set up at the trial were that the occurrence was an accident, and alternatively that the prisoner was insane.

The jury returned a verdict of guilty.

The prisoner appealed.

E. J. Purchase, for the prisoner. The grounds in the notice of appeal which was prepared by the prisoner himself are merely a repetition of the defence and are not now relied on. It was impossible to set up at the trial that the case was one of manslaughter, for the authorities that words of the kind used by the deceased girl would not justify the judge in leaving a defence of manslaughter to the jury are too strong for a judge of first instance to disregard. But it is open to this Court to rule as a point of law, where, as in the present case, the mens rea of the prisoner is in question, that the proposition laid down in *Reg. v. Welsh* (1)—"The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion"—is not exhaustive, but that where, as in the present case, the prisoner is of defective control and there is a want of mental balance—

(1) (1869) 11 Cox, 336, at p. 338.

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| 1914 <hr style="width: 100px; margin: 0;"/> REX v. LESBINI. | what is medically called a "border line case"—the absolute suddenness of the provocation may be taken into consideration, and although that provocation would not be sufficient in the case of a normal man to reduce the killing to manslaughter, it may be sufficient in the case of a person who, although not insane, is, like the prisoner, afflicted with defective control and want of mental balance. It must be admitted that no general proposition can be laid down having regard to the judgment of Darling J. in <i>Rex v. Alexander</i> (1), but in that case two hours elapsed between the provocation and the murder, and it is therefore distinguishable. In the present case the provocation and the killing took place momentarily, and under an impulse the result of the provocation acting upon the mind of a person of defective mental balance. |
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[AVORY J. It would seem to follow from your proposition that a bad-tempered man would be entitled to a verdict of manslaughter where a good-tempered one would be liable to be convicted of murder.]

It is open to this Court to place a restriction upon the rule laid down in *Reg. v. Welsh* (2) that the provocation must in all cases be such as to deprive a reasonable man of self-control. If the provocation is sufficient in the case of a person of defective mental balance to deprive him of his self-control, the jury will be justified in returning a verdict of manslaughter.

R. D. Muir and *E. C. P. Boyd*, for the prosecution, were not called upon.

The judgment of the COURT (Lord Reading C.J., Avory and Lush JJ.) was delivered by

LORD READING C.J. This is an application by the prisoner, who was tried before Atkin J. and convicted of the murder of a girl named Alice Storey, for leave to appeal from the verdict and the sentence which was imposed upon him. According to the practice of this Court the application comes before us as if it were an appeal. On behalf of the prisoner Mr. Purchase, as he was bound to do, admitted that he could make no complaint with

(1) (1913) 9 Cr. App. Rep. 139.

(2) 11 Cox, 338.

regard to the summing-up of Atkin J. We have read and considered the summing-up, and in our view it was a most careful one. Every point was put before the jury, and there was ample evidence upon which the jury could come to the conclusion at which they arrived with respect to the two defences submitted to them at the trial. The short story so far as it is necessary to state it is that the prisoner entered the shooting gallery at which the deceased was one of the attendants. She used some language which was perhaps provocative, but which we think was intended to be merely jocular. The expression she used was, however, understood by the prisoner to involve an offensive reference to himself or his race. It appears from the evidence that shortly afterwards she dropped her keys and the prisoner picked them up and returned them to her. She remarked that his temper was soon over. She thereupon handed the revolver to him for the purpose of shooting at the target. He seems to have pointed it at her and to have followed her armed with the revolver and eventually to have discharged it at her, with the result that she died shortly afterwards. At the trial two defences were raised. One defence was that it was an accident. The prisoner said that he had his finger on the trigger and that only a light pull was necessary to cause the trigger to fall and discharge the revolver, and that he had merely followed her with the revolver and had no intention of shooting her, but that he pulled the trigger involuntarily and by accident caused her death. The jury came to the conclusion that that was not so and negatived it, and upon the evidence it is quite clear that the jury could come to the conclusion that it was not an accident. I only refer to that in some detail because I think it is in reference to that contention that the argument addressed to us would find its proper place, namely, that the prisoner had so little self-control that he might impulsively pull the trigger by reason of the slight provocation which had been given to him. We think that that would be evidence to be taken into account as bearing upon the defence of accident. He was not of good mental balance, though not insane in the proper legal sense of the term. Atkin J. told the jury that they ought to take those circumstances into account in judging whether the occurrence was an accident. The other defence was that the

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prisoner was insane. There was no real evidence of insanity and the jury negatived it.

It is now said before us that we as a Court of Appeal might come to the conclusion that the tests laid down in the well-known authorities as to the provocation necessary to constitute a defence of manslaughter are too narrow and that we could extend it, and if we come to the conclusion that it ought to be extended we could enter a verdict of manslaughter and alter the sentence. It is sufficient to say that we see no reason to dissent from what was said by Darling J. in giving judgment in *Rex v. Alexander*. (1) A similar argument was placed before the Court in that case. It substantially amounts to this, that the Court ought to take into account different degrees of mental ability in the prisoners who come before it, and if one man's mental ability is less than another's it ought to be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self-control, although it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We agree with the judgment of Darling J. in *Rex v. Alexander* (1) and with the principles enunciated in *Reg. v. Welsh* (2), where it is said that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." We see no reason, therefore, to dissent in any way from the principle of law on which this case was tried. On the contrary we think it is perfectly right. This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts.

Appeal dismissed.

Solicitor for the prosecution: *Director of Public Prosecutions.*

Solicitor for the prisoner: *Registrar of Court of Criminal Appeal.*

(1) 9 Cr. App. Rep. 139.

(2) 11 Cox, 338.