SC 445A

IN THE HIGH COURT)
)
OF AUSTRALIA)

NICKOLA KRISTEFF
Applicant

v.

THE QUEEN
Respondent

APPLICATION FOR LEAVE TO APPEAL

J U D G M E N T

1968

August 23 and
26, September
5.

Sydney

Barwick, C.J.
Menzies, J.
Owen, J.

On 15th September 1967 the applicant was indicted on a charge of having wilfully murdered one Pipilua Kewa on 28th May 1967. He pleaded not guilty and the trial, which lasted for many days, took place before Frost J., a judge of the Supreme Court of the Territory of Papua and New Guinea, sitting without a jury. On 29th September 1967 the learned judge, being of opinion that the Crown had failed to establish the necessary intent to kill or cause grievous bodily harm, found the applicant guilty of manslaughter and sentenced him to imprisonment with hard labour for five years. The notice of motion for 2nd August 1968 for leave to appeal is dated 13th May 1968. Thus not only was there considerable delay in giving the notice but opportunity was not sought to have it heard in Brisbane during May 1968. The lapse of time from the date of conviction to 13th May is explained by the time required "to investigate this case without full notes of evidence and to satisfy the requirements before legal aid to appeal could be granted". Conscious as we are of the difficulties which must attend such matters in the Territory, it is to be hoped that ways and means will be found in the future to accelerate these processes and avoid such a consequence as will ensue in this case in which the applicant will have served a substantial part of his sentence before this Court is enabled to deal with the matter.

It was not disputed at any stage of the trial that the deceased man, a native of the Territory, was killed as the result of a number of shots fired by the applicant from a shotgun. The applicant, a Bulgarian, kept a trade store about ten miles from Port Moresby. His wife, who comes from Yugoslavia, and their young son lived there with him and it was in the portion of the store set

1968

Nickola Kristeff

v.

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apart for the sale of goods that the shooting took place. The evidence was that the space between the top of the counter and the ceiling was guarded by cyclone wire netting in which, at the level of the counter, was a hinged wire gate, about twenty inches square, with a wooden frame through which the customer would hand his money and receive his purchases. The shots which killed the deceased were fired by the applicant from behind the counter through the wire netting and hit the deceased who was standing on the other side of the counter. The general outline of the case for the Crown was that the deceased and some other natives had gone into the store to buy some food and soft drinks. A heated argument had then developed between the deceased and the applicant, arising from the fact that the applicant refused to supply the deceased's order unless the money to pay for it was first handed over. Evidence was given that in the course of the argument the applicant produced a knife and threatened the deceased with it and that the deceased and the applicant were pushing and pulling at the wire gate. While this was going on the applicant's wife handed the applicant a shotgun which was kept in the store and from it he fired the shots which killed the deceased.

Evidence for the defence was given by the applicant and by his wife. It was to the effect that the deceased and a number of other natives with him were in the store in an excited and angry state, threatening to rape the applicant's wife and to kill her, the applicant and their child. The deceased pushed the wire gate open and put his arms through it in an endeavour to get through the door to the space behind the counter. In these circumstances the applicant, believing that he and his family were in danger of being killed or grievously injured, fired the gun to protect them and himself.

On two occasions during the course of the trial the learned judge, at the request and in the presence of counsel for the Crown and counsel for the defence, viewed the locus, and one of the grounds of appeal is that his Honour, in reaching the conclusions that he did, went beyond the limits for which a view may properly be used.

It is for the purpose of considering this ground of appeal that we have given an outline of the evidence in very general terms and it will be seen from it that the determination of the issues which the learned judge was called upon to try depended in large measure upon the views that he formed as to the credibility or otherwise of the various witnesses. That question was, as his Honour said, one of great difficulty and was made no less difficult by the fact that the evidence of the native witnesses called by the Crown had to be given through an interpreter, as had the evidence of the applicant and his wife who had little command of the English language.

In the course of the reasons which his Honour gave for finding the applicant guilty of manslaughter and after setting out the evidence in considerable detail, he said:

> "In the first place I must assess the witnesses as best I can from their demeanour in the witness box and decide upon which witnesses I can rely."

He went on to say that he was satisfied that the evidence of the Crown witnesses was substantially true and that he was unable to accept the evidence given by the applicant and by his wife. He added that he considered that the account of the events given by witnesses called by the Crown was more probably true than that given by the applicant and his wife and that he thought that the applicant's case was so improbable that he was not able to accept it. He went on:

> "I was not impressed with the way the wife gave her evidence. In evidence in chief she gave evidence that the man at the wire made a grab at her like a clasping motion. When I went out to the store on the second occasion, and before she was cross examined, I attempted to see whether I could myself get through the opening and was able to do so and I put my hands through the wire grasping the front of the counter. In cross examination when asked she demonstrated this different action. Further she said the door was in the same condition when she was cross examined as when it was at the time

> of the incident. When the first view was held on 19th September, 1967 the nails were in the door but not tightly driven in; at the time of the second view the door had been wrenched apart and the nails pulled out. It had obviously been tampered with. It seems to me that the account of the accused and his wife is so improbable that I must reject it."

From these remarks it is impossible to avoid the conclusions that his Honour thought, rightly or wrongly, that the door had been tampered with during the trial, that this had been done to support the case put forward by the defence and that this was one of the factors which caused him to reject the evidence of the applicant's wife. Further we were told that at no time prior to the delivery of his Honour's reasons for judgment on 29th September 1967 was mention made of the suggested change in the condition of the door after the first and before the second view was held nor was any mention made of the inference drawn by his Honour from what he saw that the door had been tampered with. In the result no opportunity was given to the defence of showing, if it could, that the condition of the door was the same on both occasions or, if it was not the same, that whatever change had taken place was not due to any "tampering" with it.

The limits of the use that may be made of a view have often been stated and it is sufficient to refer to what was said by this Court in Scott v. Numurkah Corporation 91 C.L.R. 300 in which a statement on the subject by Davidson J. in Unsted v. Unsted 47 S.R. (N.S.W.) 495 was approved. In the present case it cannot, we think, be gainsaid that the learned trial judge overstepped those limits and substituted for sworn evidence inferences which, rightly or wrongly, he had formed from the views which he had of the locus and that the defence was not given the opportunity of dealing by evidence or argument or both, with the suggestion that there had been some "tampering" with the door for the purpose of advancing the case for the defence.

For these reasons we are of opinion that leave to appeal should be granted, the appeal allowed, the conviction set aside and a new trial ordered.

P.S. Sturgess (instructed by A.G. Knox), appeared for the applicant.

D.G. McGregor Q.C., with him B.R. Kinchington (instructed by the Commonwealth Crown Solicitor), appeared for the respondent.