IN THE COURT OF
CRIMINAL APPEAL OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA 9 of 1989

BETWEEN:

JOHN ALLAN LOUIS BENDER
Appellant

AND:

THE QUEEN
Respondent

CORAM: NADER, KEARNEY AND RICE JJ

REASONS FOR JUDGMENT

(Delivered 17 August 1990)

NADER J:

The appellant Bender appeals against his convictions for the murders of Leo Godilla Jungari and Lindsay Benson on 21 November 1988 at OT Station. There is no doubt, nor is there any contention, that the appellant shot and killed both men with a Mossberg 12 gauge shot-gun. There were no witnesses to the shootings and, apart from what the appellant himself said on different occasions, there is no direct evidence of his intention or other relevant states of mind at the time of the killings.

The first ground of appeal said that the verdicts of the jury were unsafe or unsatisfactory in that having regard to the whole of the evidence it was not open to the jury to be

satisfied beyond reasonable doubt that the appellant was guilty. The law pertinent to this ground is well settled. In the Queen v Chamberlain [No.2] (1984) 153 CLR 521 at 534, Gibbs CJ and Mason J said:

> "It seems to us that the proper test to be applied in Australia is, as Dawson J said, to ask whether the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal, i.e. must have entertained a reasonable doubt as to the guilt of the accused. To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt. The function which the Court of Appeal performs in making an independent assessment of the evidence is performed for the purpose of deciding that question."

Deane, Toohey and Gaudron JJ said in Morris v The Queen (1987) 163 CLR 454 at 473:

> "...the question whether a verdict is unsafe or unsatisfactory involves a Court of Criminal Appeal undertaking an independent examination of the relevant evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused. That function is not discharged merely by a consideration of whether there was a sufficiency of evidence to sustain a conviction, for it is clear that a verdict may be unsafe or unsatisfactory notwithstanding that there was evidence sufficient to entitle a reasonable jury to convict. ...
>
> A Court of Criminal Appeal must make an independent assessment of the evidence, both as to its sufficiency and its quality."

Having considered the general circumstances of the case and having independently assessed them, it was in my opinion open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused. Indeed, it would be difficult to

see how the jury could have arrived at a different verdict. The Crown case was compelling. The jury must certainly have regarded the appellant as having lied concerning the facts of the case from the very beginning and up to and at the trial itself, not merely about peripheral questions, but about fundamental and central facts. Nor is it surprising that the jury did not accept the opinion of Dr Ridley, a psychiatrist who gave exculpatory expert evidence as to the state of mind of the appellant at the material time and who also said that she considered him to suffer from diminished responsibility. Her evidence depended heavily upon an account of facts supplied to her by the appellant himself. There is no doubt that the jury rejected the factual quality of that account and quite logically they regarded her conclusions as unreliable. Of course, conclusions of an expert witness are as dependent for their cogency upon the facts on which they are based as they are upon the expert's scientific knowledge and experience. The mere fact that Dr Ridley's evidence was not contradicted by other expert evidence did not bind the jury to accepting her conclusions if they did not accept the facts upon which she based her conclusions. See Walton v The Queen [1978] AC 788 at 792 et seq. where their Lordships considered an argument that a jury were bound to accept that a defence of diminished responsibility had been established. After considering The Queen v Matheson [1958] 2 All ER 87 and The Queen v Bailey [1961] Crim LR 828, they said:

> "These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to

consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality. It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence."

Having reviewed the evidence in the course of considering ground 1, I can hardly see how the jury could have had any doubt concerning the appellant's guilt. It is true that evidence of his intention to kill the deceased men and evidence that the killings were otherwise unlawful was circumstantial, but the behaviour of the appellant after the shootings and the lies told by him concerning them, when considered as part of the circumstantial evidence, pointed strongly to his guilt.

The second ground of appeal was in the following terms:

"2. That part of the summing up of the learned Trial Judge before the initial retirement of the jury to consider its verdict was so flawed as to be incapable of correction or balance by subsequent redirection and the summing up as a whole was in error and lacking in balance in that:

(a) The appellant's case was not adequately put."

All of the particular instances of ground 2 were abandoned at the hearing except (a). Although the submissions made in furtherance of ground 2 were lengthy, they were discursive and somewhat imprecise and, in my opinion, none of them raised any question of substance and they do not warrant analysis here.

Both overall and in particular respects, the summing-up of the learned trial judge was appropriate, fair and correct. Some of the criticisms of the summing-up were based on phrases taken out of context. For example his Honour had said such things as "if you accept the account of the accused" where it might have been arguably more correct to say "if you regard the account of the accused as possible". But, as the learned Solicitor-General pointed out, put back into the context of the rest of the summing-up those phrases did not detract from the overall correctness of the summing-up concerning the burden of proof, but were said to illustrate particular points. The summing up as a whole made it clear to the jury where the burden of proof lay on each issue. In this respect one does well to keep in mind the celebrated passage of Barwick CJ from La Fontaine v The Queen (1976) 11 ALR 507 at p515:

> "...a time honoured view is that the adequacy of a summing up ought not to be judged upon a subtle examination of its transcript record or by undue prominence being given to any of its parts. It should be taken as a whole and as a jury listening to it might understand it."

There was indeed an error in the summing up and in the aide memoire which the judge had given to the jury to assist them to remember his directions, but it was not one that could have worked to the detriment of the appellant. The jury were told that, if they were not satisfied beyond reasonable doubt that at the relevant time the accused intended to cause the death of the deceased or to do him grievous harm, the verdict

must be not guilty of murder but that the jury must proceed to consider inter alia whether the accused was guilty of manslaughter. But his Honour then erred in defining manslaughter. He was induced into the error by the urging of counsel for the accused at the trial who had persuaded the learned Solicitor General to agree with him, although the latter, rightly, resiled from that position on the appeal. If there were some way in which his Honour's misdirection could have worked to the appellant's detriment it was not explained. It is significant that the erroneous direction as to manslaughter was in addition to and did not derogate from a correct one. Being of the opinion that such error as his Honour did make could not have amounted to a substantial miscarriage of justice, I would apply subsection 411(2) of the Code.

If I may indulge in a short discursus, the confusion about manslaughter arises by reason of the unusual way in which the Criminal Code treats manslaughter. Those who have been educated and nurtured under the common law understand the broad traditional division of manslaughter into two kinds: voluntary and involuntary. The former occurs where facts that would otherwise amount to murder are mitigated in some way that does not justify a complete acquittal. These manslaughters are usually characterised by the fact that the accused intended to cause death or grievous harm, hence the qualifier "voluntary". Without entering into the old debate about what precisely constitutes involuntary manslaughter at

common law, it is sufficient to say that it is committed when a death is caused as the result of an unlawful dangerous activity, for example, an assault where less than grievous harm is intended. It is characterised as involuntary because the death of the deceased need not be intended or even foreseen. Under the Criminal Code, the term "manslaughter" is reserved exclusively for manslaughters where death is either intended or foreseen as a possible consequence of the accused's conduct. It therefore covers all the voluntary manslaughters as well as a small section of the involuntary manslaughters: namely, those where death is foreseen as a possible consequence but less than a probable one. Otherwise, by virtue of section 31 of the Code the accused is excused from criminal responsibility for the death (the event). Section 31 provides that a "person is excused from criminal responsibility for an ... event unless it was ... foreseen by him as a possible consequence of his conduct." The remainder of what would be involuntary manslaughters at common law are picked up by section 154 of the Code which makes certain dangerous acts crimes and where consequential death is a circumstance of aggravation requiring no mental element.

I think, therefore, that his Honour did err when he directed the jury that the accused would be guilty of manslaughter if the jury were satisfied that he intended to assault or cause bodily harm to the deceased. If the death of a person is caused by a mere assault or by an act done with the intention of causing only bodily harm, the crime is not

manslaughter because, as I have pointed out, responsibility for the death would be excused by virtue of section 31 of the Code. However, this error, if it was one, could not have operated to deprive the appellant of a chance to be convicted of manslaughter instead of murder or even of an acquittal that might have existed if the direction had been correct. It should be remembered that, as well as giving the defective direction about manslaughter, his Honour gave a correct one.

I would dismiss the appeal.

KEARNEY J: I concur.

RICE J: I concur.