Spencer v The Queen [2003] NTCCA 1

PARTIES:	BRYCE JABALTJARI SPENCER
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA15 of 2001
DELIVERED:	9 January 2003
HEARING DATES:	19 and 20 September 2002
JUDGMENT OF:	Mildren, Bailey JJ and Priestley AJ

CATCHWORDS:

Statutes:

Criminal Code s 410(b)

Cases:

Alford v Magee (1952) 85 CLR 437 at 466, applied
Bedi v The Queen (1993) 61 SASR 269 at 273, applied
Fitzgerald v Penn (1955) 91 CLR 268 at 274, applied
Mogg (2000) 112 A Crim R 417 at 430, applied
R v Schmahl [1985] VR 745 at 747-748, applied
R v Williams (1999) 205 LSJS 472 at 472-3, referred to
R v Wingfield (1994) 156 LSJS 14 and 18, referred to

Criminal law – Intoxication - Appeal – Appeal against conviction – Judge's summing up – Evidence of intoxication relevant to the accused's state of mind – Where there is evidence of intoxication relevant to the issues to be decided by the jury the trial judge is bound to identify that evidence and give appropriate directions on the law in the context of the factual considerations arising from the evidence

REPRESENTATION:

Counsel:

Appellant:	M Shaw QC and I Read
Respondent:	R Wild QC and R Noble

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

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

Spencer v The Queen [2003] NTCCA 1
No. CA15 of 2001

BETWEEN:

BRYCE JABALTJARI SPENCER
Appellant

AND:

THE QUEEN
Respondent

CORAM: Mildren, Bailey JJ and Priestley AJ

REASONS FOR JUDGMENT

(Delivered 9 January 2003)

Mildren J:

[1] The appellant was found guilty by a jury and convicted of a murder committed at Alice Springs on 3 September 1998. The appellant appeals his conviction on a number of grounds, not all of which were argued on the appeal. To the extent that leave to appeal is required by s 410(b) of the Criminal Code, leave has already been granted by the Chief Justice.

[2] The principal grounds urged upon us related to the directions which the learned trial judge gave to the jury in relation to intent and intoxication, but before dealing with the grounds of appeal it is necessary to briefly

summarize the Crown case and the case presented to the jury on behalf of the appellant.

The Crown case

[3] The appellant and the deceased, who are both Aboriginal, were in a relationship together as husband and wife. At the time of the deceased's death, they lived in a bush camp in the scrub near Alice Springs. There were a lot of other Aborigines camped nearby. During the day, a lot of alcohol had been consumed by those in the camp, including both the deceased and the appellant. The group had been consuming a number of five litre casks of wine. At some stage during the evening, an argument broke out between the appellant and the deceased. The argument related to accusations made by the deceased that the appellant had been going with another woman or women. The deceased also used quite a bit of bad language and was very agitated. At about 9 p.m. a witness, Amy Nambulla (Amy) who had been sleep, was woken by screams coming from the camp occupied by the deceased and the appellant. The deceased at this stage was lying on the ground. The appellant asked her to come and have a look and said that he had killed his wife. Amy, after looking at the deceased, according to her evidence, went into town and called the police and an ambulance. According to other witnesses, the ambulance was called by a part Aboriginal person who was present at the time. In any event, an ambulance arrived near the scene at about 10.18 p.m. and was led to the place where the deceased was lying. She was found lying on her back,

unconscious, with burns to her chest and blood on her skirt. She was still alive at that time, but died soon afterwards, shortly before the police arrived.

[4] The deceased died from haemorrhage caused by a stab wound to the left thigh, which severed the left femoral artery and vein. The evidence of the pathologist, Dr Sinton, was that this wound commenced from the outer side of the left thigh and ran horizontally across the outer surface of the left thigh, passed deeply through the muscles on the upper part of the thigh and passed directly into the pelvic cavity, severing the femoral nerve artery and vein on the left side. The wound track from the surface of the skin to the peritoneum was approximately 10 centimetres long, but beyond the peritoneum there is "empty space" so it is not possible to say how much further the point of the weapon used proceeded. The weapon, which was located at the scene, was an "Aide-de-Chef" knife, 20 centimetres in length with a serrated edge and 25 millimetres in hilt width, tapering towards the tip. The evidence was that the knife had been purchased by the witness Queenie Singleton earlier in the day to cut up meat and vegetables for dinner that evening.

[5] The deceased also had seventeen other fresh wounds on various parts of her body consistent with having been caused by the knife. Each of the 18 wounds was described in the evidence in detail, as follows:

1. A wound to the right side of the head just behind the upper ear, about 25 millimetres long, gaping to 5 millimetres which lacerated the periosteum and underlying skull.

2. A wound to the right side of the head, just above the upper part of the right ear, 15 millimetres long with a maximum width of one millimetre and a depth of 5 millimetres, lacerating the periosteum and underlying skull.

3. A wound to the right side of the head immediately in front of the right ear, 20 millimetres long, gaping to 5 millimetres with a depth of 10 millimetres, hitting underlying skull.

4. A wound to the forehead above and to the left of the right eye. 5 millimetres in length, l millimetre in width and 5 millimetres in depth, passing through the periosteum striking the skull.

5. A wound to the forehead in the midline running obliquely for about 30 millimetres, with a maximum width of 2 millimetres and 10 millimetres deep, causing a small puncture wound to the outer skin and fracturing the outer table or plate of the skull.

6. A wound to the left side of the forehead above the left eyebrow, 12 millimetres long, 2 millimetres wide and 5 millimetres deep, cutting the periosteum

All of the above wounds required only mild force.

7. A wound to the left side of the back of the trunk immediately over the lower posterior rib margin, 15 millimetres in length, running horizontally but with a twisted vertical axis indicating movement either of the body or the knife. The maximum width was 8 millimetres. The wound passed deeply to impact at the midpoint of the llth rib at the tip of the 12th rib. The force required was just above mild.

8. A wound to the left upper chest running obliquely for a maximum length of 15 millimetres and a width of 10 millimetres, passing backwards and slightly downwards between the deltoid and pectoralis muscles for approximately 50 millimetres and running alongside the upper part of the cephalic vein. The force required was on the mild side of mild to moderate.

9. A wound to the stomach above the waist, 10 millimetres in length gaping to 8 millimetres, passing deeply through the muscles of the abdominal wall and terminating at the peritoneum, causing bruising to the latter. The track of the wound was not measured, but estimated as being 10 millimetres to 20 millimetres. This wound required mild force.

10. This was the fatal wound, already described in para [4] above.

11. A stab wound to the left leg on the top of the thigh, 15 millimetres long gaping to 5 millimetres, passing deeply for 40 millimetres into the underlying muscle tissue. This wound required mild to moderate force.

12. A wound to the outer surface of the left thigh, 18 millimetres in length and 5 millimetres wide, penetrating 50 millimetres into underlying muscle. The force required was between mild to moderate.

Wounds 11 and 12 were likely to bleed profusely.

13. A wound to the outer surface of the left thigh 20 millimetres long, gaping to 8 millimetres and 50 millimetres deep into underlying muscle, requiring mild to moderate force.

14. A wound to the back and side of the left thigh, 40 millimetres long gaping to 25 millimetres with a depth of approximately 10 centimetres, passing immediately behind the thigh bone and with some localised soft tissue hemorrhage requiring mild to moderate force. This wound would have bled profusely.

15. A wound above the axis of the left lower forearm, 15 millimetres in length with a maximum width of 5 millimetres and just passing superficially into underlying muscle, requiring only mild force.

16. A wound towards the back of, and along the axis of, the left lower forearm, 20 millimetres long and 5 millimetres deep, penetrating into underlying muscle, requiring only mild force.

17. A wound on the lower outer surface of the left forearm, 25 millimetres long and 5 millimetres wide, superficially through skin and fat only and requiring only mild force.

18. A wound to the lower left forearm, 30 millimetres long, 5 millimetres wide and 2 millimetres deep, passing superficially into subcutaneous fat only and requiring only mild force.

All of these wounds occurred prior to the deceased's death.

[6] As to the burns to the chest area, these were described by Dr Sinton as superficial burns across the upper part of the chest and neck with the central area showing scorching and extreme blistering. The burns extended from the point of the chin, beneath the chin, on the anterior surface of the neck and extended laterally on the upper left and right sides of the chest reaching down to the level of both nipples. There was scorching over the full length of the sternum. They were not consistent with the deceased rolling into a camp fire, but were consistent with the shirt she had been wearing being set fire to in some way and whilst she was still alive.

[7] Some swelling was also found to the deceased's left upper lip consistent with a recent blow.

[8] It was the opinion of Dr Sinton that the deceased probably died from all of these wounds within five minutes, although it is possible she may have lived as long as twenty minutes.

[9] Dr Sinton conceded in cross-examination that each of the knife wounds could have been self-inflicted and he observed no defensive injuries to the deceased. The deceased also had a blood alcohol reading of 0.29%. Dr

Sinton offered the opinion that the alcohol consumed was a contributing factor to the deceased's death as the alcohol would cause a greater degree of bleeding from the wounds; in addition, the shock from the burns would have also been a contributing factor. Dr Sinton's opinion was that wound 10 made it probable that the deceased would die and likewise, but for wound 10, it is probable that she would not have died.

[10] The Crown led evidence from one of the ambulance officers, Mr Keetch, who said that after attending the scene, he had a conversation with the appellant who said that the deceased had stumbled into the camp bleeding and with burns to her chest and that she collapsed and died in his arms. The appellant said that the wounds were inflicted by the deceased's ex-husband. Mr Keetch said that the appellant appeared to be walking and speaking clearly and normally at the scene and on the way to, and back at, the ambulance. Senior Sergeant Sullivan also spoke to the appellant at the scene. That conversation was tape recorded and played to the jury. The conversation occurred at 2235 hours. It recorded the fact that the appellant had been arrested for murder and advised the appellant of his rights as required by s 140 of the Police Administration Act. During the course of that conversation, which lasted for five minutes, the appellant spoke to Sergeant Sullivan. The jury were able to make their own assessment of the degree of sobriety of the appellant at that time. Having listened to that tape, I formed the view that the appellant was unlikely to have been significantly affected by liquor, although he may have been slurring some of his words.

Sergeant Sullivan's opinion was that although the appellant had been drinking and was intoxicated, he was not "overly intoxicated".

[11] On the other hand, there was evidence from a number of the Aboriginal witnesses to the effect that the appellant was intoxicated that evening. Amy Nambulla described the appellant, as well as herself and everyone else at the camp, as "drunk" (AB 55). Adam Oldfield, who admitted that he was "getting drunk", described the appellant as "sparked up" (AB 86), but more intoxicated than the deceased (AB 88). Queenie Singleton said everybody was getting "full drunk" (AB 103). Similar evidence was given by Patrick Singleton (AB 111).

[12] The prosecution also tendered a record of interview between the appellant and the police which was conducted at the Alice Springs Police Station commencing at 1:40 pm on Friday 4 September 1998. In summary, the appellant told police that the deceased had accused him of chasing other women and there was a "jealous argument" over that subject. The appellant then stabbed the deceased with the knife in the leg and that was all he did to her. He claimed that the deceased, whilst lying on his bed, inflicted the other cuts and wounds to her head and that she went across to a camp fire she made and burnt herself with a piece of cardboard from a wine cask whilst he was adjusting a cassette in his stereo player, and that she tried to commit suicide. He further stated that after that she lay down near a fire which she had made for herself. The cut to the leg was bleeding. He asked Amy Ross to intervene, as he was unable to do so because of an injury to his

leg from a previous accident. Amy poured water from a bucket over the deceased. She then dragged the deceased away from the fire, laid her down and felt her pulse. Amy said she could not feel her pulse. The appellant thought Amy was lying and he got up slowly. Two others, Adam and Queenie, came out to the deceased and Queenie also tried to feel for a pulse. The appellant came over to the deceased and tried to revive her with mouth to mouth resuscitation, whilst Adam or Queenie went to some flats to call for an ambulance. The appellant said he had begun drinking cask wine from before 10 am and was drunk at the time he stabbed the deceased. He said he did not remember which leg he stabbed, nor did he know how deep the wound was that he inflicted because he was drunk and acted blindly. He said he stabbed the deceased "to keep her mouth shut". Later, when asked if he stabbed the deceased only once, he said, "I stabbed her maybe once or twice, I couldn't remember ... on the leg". He said that the deceased stabbed herself only on the head, but he was mucking around with the stereo at the time because "it was a bit buggered". He said that when he stabbed the deceased she was sitting beside the fire in front of him and he was sitting up as well. He was unable to see if she stabbed herself elsewhere because she was behind him at the time she stabbed herself and he was looking at the stereo. When asked about stab wounds to the shoulder and the back, he said he couldn't remember if he caused these wounds as he was too drunk. After being asked about a number of the other wounds he said, "I remember stabbing her but I couldn't remember how many times. I was drunk". He

said he did not mean to hurt the deceased; he just wanted to keep the noise down as the people in the nearby flats might call the police and he did not want to be moved along. He also said he was angry because she had "kept on blaming someone, some women".

[13] Another prosecution witness, the ambulance officer, Sheree Schneider, also spoke to the appellant. She said to him, "You have blood on your neck" (or "chest") and the appellant said, "She hugged me".

[14] At the trial, it was an admitted fact that blood found on the knife, the bedding and the appellant's clothes was that of the deceased, that no fingerprints were found on the knife and that the deceased had a blood alcohol reading of .297%. There was no evidence as to the appellant's blood alcohol reading as no tests were conducted on him. The evidence was that there were large blood stains on the front of the legs of the appellant's jeans and also a very large blood stain on the back of his jeans covering an area just below the belt on the left side, the whole of the left buttocks and down the left leg almost to behind the knee and across the seat of the pants to the area of the right buttocks.

[15] In short, the Crown case was that the appellant had inflicted all of the wounds to the deceased, including the fatal wound, that he intended to kill the deceased or at the very least, intended to cause her grievous harm, that his story that she had inflicted the wounds to herself in an attempt at suicide was a lie and that the story he told to each of the ambulance officers was

also a lie. The prosecutor intended to submit to the jury that these lies were evidence of a consciousness of guilt, but the learned trial judge ruled in the absence of the jury (and at counsel for the appellant's request) that, in effect, it was not open to the prosecution to make that submission, and accordingly she did not propose to give an "Edwards direction".

The defence case

[16] The appellant neither gave evidence nor called evidence in his defence. The defence case was, in short, that the prosecution had not proved that the accused intended to kill or cause grievous harm to the deceased. The principal plank in this argument was that an adverse inference as to the appellant's intent could not be drawn from the facts because of the degree of the appellant's intoxication. Alternatively, the defence submitted that the prosecution had not proven that the appellant had not killed the deceased due to provocation. The learned trial judge left murder, manslaughter (both voluntary and involuntary) and aggravated dangerous act to the jury.

The grounds of appeal

[17] The first two grounds of appeal challenged the learned trial judge's directions to the jury concerning the necessary mental element which the Crown had to prove before the jury could find the accused guilty of murder, and the way in which the learned trial judge instructed the jury on the relevance of intoxication to the question of whether or not the prosecution

had proved that element. These two grounds were argued together and were put forward as the appellant's prime argument.

[18] The argument rested on a number of propositions but as, in my opinion, the summing up did not adequately explain to the jury how intoxication was relevant to the issue of intent it is not necessary to consider all of the arguments put by counsel for the appellant in order to dispose of this appeal.

[19] So far as the appellant's intent was concerned, the prosecutor invited the jury to infer from the facts proven that the appellant had the necessary intent, despite the appellant's statements to the contrary in the record of interview. Obviously, if a sober person stabs another with a sharp knife in a vital organ, such as the heart, that fact might well lead a jury to find that the person intended to kill or cause grievous harm as a matter of inference, there being no other explanation reasonably open consistent with the accused's innocence. A significant part of the process of reasoning depends upon acceptance of the fact that the wound was to a vital organ and, being sober, the appellant, it might be inferred, intended to stab the victim in the heart. However, if the appellant was drunk, it might raise a doubt as to whether or not the knife was aimed at the heart. Depending on the circumstances, it might be open to the possibility that the accused intended to wound in a non-vital area of the body. In those circumstances, the inference of an intent to kill or cause grievous harm might not be so readily inferred.

[20] In the present case, there was evidence critical to the appellant's defence that the appellant was intoxicated and it would have been necessary for the jury to consider whether, in the circumstances, an inference could be drawn from the nature of the wound which caused the deceased's death, that the prosecution had proven an intent to kill or cause grievous harm, particularly as that wound was to the area of the thigh which I have previously described and required only mild force. In those circumstances, the learned trial judge was required not merely to draw to the jury's attention the evidence which bore on the extent of the appellant's intoxication, but to instruct the jury that an inference of an intent to kill or to cause grievous harm might not be as readily drawn from the nature of the injury or injuries inflicted if he were intoxicated as might be the case if he were sober and that the critical question was whether by reason of his intoxication, he might have inflicted that fatal wound without intending to kill or cause grievous harm: see *R v Wingfield* (1994) 156 LSJS 14 and 18; *R v Williams* (1999) 205 LSJS 472 at 472-3.

[21] In a case like this, the direction required to be given should have been explained, moreover, in the context of the relevant factual considerations which arise from the evidence: *Bedi v The Queen* (1993) 61 SASR 269 at 273; *Alford v Magee* (1952) 85 CLR 437 at 466; *R v Schmahl* [1965] VR 745 at 747-748; *Fitzgerald v Penn* (1955) 91 CLR 268 at 274. As was said by Thomas JA in *Mogg* (2000) 112 A Crim R 417 at 430:

> A trial judge's duty ... will rarely if ever be discharged by presenting in effect an abstract lecture upon legal principles ... followed by a summary of the evidence. ...
>
> The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken ...

[22] In this case, the relevant factual considerations were, apart from the evidence of intoxication, the fact that the force used to have caused the relevant injury need only to have been mild, the location of the wound on the body and the proximity of the track of the wound to any vital organs, veins or arteries, the effect movement of the deceased may have had on the track of the wound, as well as the accused's admittedly self-serving statements to the police in the record of interview and efforts to resuscitate the deceased. Whilst some of these matters were mentioned in the charge to the jury, they were not related to the issue of intoxication as it bore on the issue of intent in any intelligible way, other than a mention at one stage of how intoxication might have affected the appellant's co-ordination. The trial judge was not assisted by the address of counsel for the appellant at trial who likewise failed to adequately put these matters to the jury in an easily understandable way, nor by any submissions to the trial judge and it is my impression that the trial judge did not appreciate how it was that counsel was putting intoxication to the jury that in part led to the problem with the summing up in this case. Of course, it would also have been

necessary to draw to the jury's attention any specific evidence relied upon by the Crown which may have pointed in the other direction.

[23] It was submitted by counsel for the appellant that we ought to allow the appeal and substitute a verdict of manslaughter. In my view, whilst the appeal should be allowed, the evidence relating to intoxication is not so strong that we ought to take this course. There is also other evidence available to the Crown to support a conviction for murder. I would allow the appeal and order a retrial.

Bailey J

[24] I have had the advantage of considering a draft of the judgment of Mildren J. I agree with the reasons advanced by his Honour and the orders proposed, allowing the appeal and ordering a retrial on the charge of murder.

Priestley AJ

[25] In par [22] of his reasons, Mildren J. has set out the relevant factual considerations which, in the circumstances of the present case should have been mentioned in the charge to the jury and related to the issue of intoxication as it bore on the issue of intent in an easily understandable way. In his view, for the reasons suggested in that paragraph, the trial judge's charge to the jury was not adequate in relating the relevant facts to the intoxication/intent issue. This issue was of primary importance in the trial.

[26] I agree with the reasoning in par [22] of Mildren J's reasons, and also with his conclusion that the evidence on the intoxication/intent issue is not so strong that upholding the appeal should lead to the substitution of a verdict of manslaughter for the jury's murder verdict, but that rather the Court's order should be that the appeal be allowed and a retrial ordered.
