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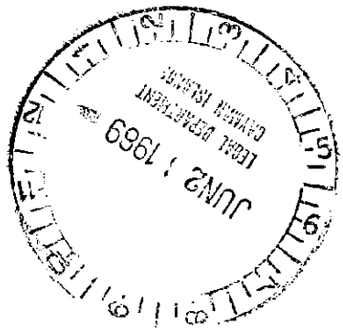
Criminal

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

IND # 12/89

REGINA V. HOWARD SMITH



For the Crown: Mr. A. Smellie
For the defendant: Pierre Lamontagne Q.C., with him Mr. G. Ritchie.

JUDGMENT

The charge in this case of assault occasioning actual bodily harm arose from the actions of the defendant following a motor vehicle collision on the morning of the 7th February 1989. This case is not about the accident, and least of all about who may have been to blame for it. It is about the state of mind of the defendant at the time when the slapping incident which gave rise to the charge took place. I have, nevertheless to make some reference to the accident which immediately preceded it if the issues in this case are to be understood.

Three vehicles were involved. The first was being driven along the Lower Valley main road towards George Town by Mr. Samuel Chesley Connolly, who is 72 years old and suffers from a heart ailment. The second was also being driven towards George Town and the third was being driven in the opposite direction by Miss Janet Gould. Mr. Smith was the front seat passenger in that car.

Mr. Smith and Miss Gould have had a close and loving relationship for several years. They both gave evidence of being suddenly confronted by Mr. Connolly's car as it travelled towards them on their side of the road. They were both put in fear of immediate death. The two vehicles collided, but in the event none of the people involved was very seriously injured. The car in which Mr. Smith and Miss Gould were travelling was spun around and came to rest near the point of impact but off the paved surface of the road and facing towards the direction from which it had come. The car which Mr.

Connolly was driving travelled onward a short way. After both cars had stopped the distance between them was some 235 feet.

In his evidence Mr. Smith described what happened next. By recording his perceptions I am not, at this stage, making any definitive finding as to whether or not those perceptions are accurate. He described how, after his vehicle came to rest, he opened his eyes and looked to see what had happened to Miss Gould. He saw blood on her arms but she said that she was alright. He looked forward through the car window and realised that they were facing the opposite direction to that in which they had been travelling. He could see the car which had hit them travelling slowly away and knocking down fence posts. Then it came back onto the road shoulder, stopped momentarily and drove off again. He remembers shouting 'He's trying to get away'. Miss Gould shouted 'Stop him'.

The next thing which he said that he recalled was running down the shoulder of the road towards the other vehicle.

Mr. Smith then recounted what he described as a strange experience. He said that he seemed to be running in slow motion, taking enormous strides, and that he does not remember his feet touching the ground. It was more of a floating feeling. At the same time he seemed to be watching himself running, as if there were two of him. It seemed to take a very long time to reach Mr. Connolly's car. He felt he had superhuman power and had no doubt he could catch the car even though it was still moving away. As he caught up with the car it stopped. He opened the drivers door. He did not distinctly see the man sitting there, or see him as a person. The man seemed to be surrounded by a kind of evil aura. It was a nightmarish experience.

In cross-examination, he acknowledged that he remembered clearly feeling the impact, and the car being swung round and coming to a stop. He also clearly remembered his anxiety over the welfare of Miss Gould, and knowing where he was, once he had realised that the car had spun round. His description of his experience after he had got out of the car was that he was watching himself do things and

hearing himself speak. He compared the experience to dreaming.

What happened after he reached Mr. Connolly's car was described by other witnesses, as well as the defendant himself. It is common ground between them all that he slapped Mr. Connolly on the face and addressed him in extremely abusive terms.

There is some discrepancy as to the exact number of blows struck and whether Mr. Connolly was standing or sitting for all or part of the time. That does not materially affect my view of this case. It is clear that he was slapped at least once on each side of his face. That is consistent both with the eyewitness accounts and the medical evidence. There is also some discrepancy in the evidence as to precisely what words were used. Whether or not a phrase indicative of racism was used is relevant in my view only in two respects. Firstly it is, if true, an indication that Mr. Smith's perception of Mr. Connolly was clear enough to enable him to draw a conclusion as to the race to which he belonged, but I find that to be so independently of this evidence. Secondly because I accept that the allegation that he used a reference to a person's race in a context which was clearly meant to be insulting was a source of particular anguish to Mr. Smith. It is something which he finds it impossible to believe that he could form the intent to do. It has been a strong inducement to him to find another explanation. I find it quite unnecessary to make a positive finding as to what words of abuse were used. The words which Mr. Smith admits saying, or, as he puts it, hearing himself say, were, apart from the racial slur, no less offensive than those which, in their various versions, the eyewitnesses say they heard. I do accept those witnesses as witnesses of truth, who are giving their personal recollections to the best of their ability.

Of more importance are the words which indicated that Mr. Smith knew why he was standing on the roadside confronting Mr. Connolly. In his statement Mr. Connolly says that those words were "you like to get my girlfriend killed". In his evidence that varied slightly to "you like to get us killed". Two other witnesses gave different versions of the words used - "you almost got us killed" and

'you are trying to kill my wife' - but the import of each version is the same, as indeed is the version which Mr. Smith himself gives -'you could have killed us, you could have killed my girlfriend.'

Mr. Smith was interviewed three days after the accident by Police Constable Khan at the Central Police Station, George Town. He was asked whether he approached Mr. Connolly to speak to him. This is the record of his reply -

> 'I approached him to stop him driving away. His car had travelled a fair distance down the shoulder of the road and was still moving slowly. I assumed he was not going to stay at the scene of the accident. I was in a state of shock. I had nearly lost my life as had my girlfriend, just change the word, that is not the right word. We had both been slightly injured, am, (sic) I was determined that he should not leave the scene. I reached the car and pulled the door the driver was sitting there. He did not look to be an old man and he certainly did not look to be sick. I was enraged at what he had just done and I reached in and struck him once perhaps twice on the side of the head. These were not hard blows. They were delivered with my right hand with the palm open. I am left handed and do not have much strength in my right hand. The driver got out of the car and at that point I realised he was an older man than I had thought. I did not hit him again. There was no need since he was obviously not going to try and leave. When my shock has subsided I apologised to his wife because she seemed distressed and explained that I had been in a state of shock and thought he was about to drive off. My blows left no mark on him and he did not seem to be injured in any way.'

The fact of Mr. Smith having apologised was confirmed by other witnesses.

In his evidence Mr. Smith admitted that he seemed to have lost control but said that loss of control would have been so unusual for him that it did not occur to him as a simple explanation of what he did. He therefore rejected the rationalisation which he gave at the police station. He said that he would be amazed if anger were the explanation.

I do not take the view that Mr. Smith is fabricating symptoms in order to evade the consequences of these criminal proceedings. I do conclude that as a result of the trauma of the accident, and in particular the peril in which Miss Gould was put, he suffered some impairment of his normal mental function and now sees this as being a state which negatives the intent to commit the offence with which he is charged. It now falls to me to consider the effect in law of that proposition.

I can deal quite briefly with the evidence which was given by several lay witnesses about their impressions, in normal circumstances, of Mr. Smith and his personality, and with Mr. Smith's own assessment of himself. From all that evidence emerged a portrait, which I accept as a true one, of a polite man who would hope to be described by others as civilized and who had never consciously displayed racism or hated anyone; who does not act without considering the consequences and is careful in what he does and says; who is educated, well-read and well adjusted; who is non-violent and does not display anger or indeed any strong emotion, or use bad language; and who has been an admirable member of the community both in his professional work as a teacher and in extra-mural activity, particularly in connection with the Bonaventure Boys' Home and in showing personal kindness to people in need of help.

In short, the behaviour of Mr. Smith with which we are concerned today was uncharacteristic to an extraordinary degree.

Two psychiatrists gave evidence, for the prosecution and defence respectively. The first to testify was Dr. Frank Knight, MRC Psych, Consultant Psychiatrist at the Department of Psychiatry at the University of the West Indies. He is highly qualified and his experience is long and impressive. At the outset of his evidence a written question was put to him. I record it in full as it is a cornerstone of the defence -

> 'TAKING INTO CONSIDERATION the whole of the evidence, relating to:
>
> 1. The evidence which led to the indictment of

the accused.

2. The accused's perception of the events.

3. The accused's recollections of that perception.

4. The views expressed by the other witnesses for the defence as to what they have observed in connection with the accused and the conclusions to which they have come as a result of those observations.

ASSUMING that the evidence in connection with the above is true.

TAKING INTO CONSIDERATION the inevitable distortion of people's assessments of themselves and their personality.

ASSUMING that Mr. Connolly was struck without his consent.

ALSO ASSUMING that any use of force to Mr. Connolly would have been unlawful if intended.

WHAT IS YOUR OPINION as to whether the accused, at any time between his having first observed the automobile driven by Mr. Connolly and his having struck Mr. Connolly for the very last time, did form any intent, whatever the degree, to cause Mr. Connolly to apprehend immediate and unlawful personal violence or to use unlawful force to Mr. Connolly without his consent."

To that question Dr. Knight gave the answer that he would say "No". He then gave the basis on which he would say that. It was that Mr. Smith's own description of his recollection made him feel that he was in a state of dissociation or altered consciousness following an accident, associated with an out of body or depersonalisation experience which he had. That in turn would be related to his finding himself faced with a threat of imminent violent death.

In cross-examination Dr. Knight acknowledged that there would be no clinical signs of the state which he described and that if he had seen the record, without hearing the evidence, he would simply think that Mr. Smith was very angry. He also acknowledged that he would not come to the same conclusion if he did not know of the description of his feelings given by Mr. Smith himself.

Dr. Knight also acknowledged that there was a distinction

between a fear of being killed and a confrontation with immediate death. It was in the latter circumstances that people experience unreality. He then described other circumstances in which he had previously come across an 'out of body experience.' In some of these there had been unconsciousness, as for example under general anaesthesia and the state has been known to occur also in cases of epilepsy. He had never heard of a case where striking and verbal abuse formed part of an out-of-body experience. He had not come across anything specifically like the present case and had no experience of what a person confronted with imminent death did once fear had been removed.

In further cross-examination Dr. Knight was referred to a paragraph in a written report which he made following an interview with Mr . Smith on 17th March, 1989 in which he said that he would be inclined to accept Mr. Smith's account that his conscious intention was simply to stop the car and that while running after it (possibly up to the time he opened the door) he had no idea that he would strike the driver. Dr. Knight was asked, however, if he thought that while running after the car he would have been capable of forming a conscious intention to use force against the driver even if he did not in fact form that intention. He answered that he would.

The other Psychiatric testimony came from Dr. Franklin LaHee. He is consultant psychiatrist at the Cayman Islands Government Hospital. His written report was put in evidence. It was based on an interview with Mr. Smith on 16th May 1989 and before writing his report Dr. LaHee had, unlike Dr. Knight, seen the statements of the witnesses and the statement which Mr. Smith made to the police.

Dr. LaHee's conclusions are set out in the final 3 paragraphs of his report which read as follows -

> 'Two days after the incident Mr. Smith quite clearly stated he was enraged at what the old man had done and struck him on the side of his head. A few months after he claims to have had an abnormal experience which led to his action.
>
> From his behaviour Mr. Smith was not disorientated. The behaviour displayed reveals little firm

> evidence of loss of awareness of the environment during the episode or the result of abnormal mental process. As a matter of fact he showed well integrated behaviour. The personal emotional factor of being enraged in Mr. Smith's own words appeared to be operative in the carrying out of the offence. Mr.. Smith's motor coordination was not faulty and his expression of 'you black son of a bitch' witnessed by a few people revealed the emotional state of Mr. Smith at the time when his consciousness did not appear to be clouded.
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> It would appear that Mr. Smith has acted out of character and is obviously distressed by this. It is unfortunate that in some reserved personalities sometimes when a threshold of provocation or frustration has been exceeded, behaviours quite out of character do occur, even when not intended.'

I have to reach a conclusion as to whether the mental state of the defendant entitles him to an acquittal. It turns, as the defence has submitted, on the question of his intent, or mens rea. In his judgment in R v. Tolson (1889) 23 QBD at p181 Stephen J pointed out the difficulties inherent in adopting a phrase which suggests that, apart from all particular definitions of crimes, such a thing exists as a 'mens rea' or 'guilty mind' which is always expressly or by implication involved in every definition. However, in relation to this case I need go back no further in history than the reference to that judgment and the conclusions drawn from it in the speech of Lord Elwyn Jones LC in R V. Majewski (1976) 2 ALL ER at page 147. That was a case of assault, and the speech of Lord Elwyn Jones included the following -

> 'Stephen J concluded:
>
> > 'The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to be absent in any given case, the crime so defined is not committed; or again if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition.'

"What then is the mental element required in our law to be established in assault? This question has been most helpfully answered in the speech of Lord Simon of Glaisdale in DPP v. Morgan

> "By crimes of basic intent I mean those crimes whose definition expresses (or more often, includes) a mens rea which does not go beyond the actus reus. The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus. I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act. The actus reus of assault is an act which causes another person to apprehend immediate and unlawful violence. The mens rea corresponds exactly. The prosecution must prove that the accused foresaw that his act would probably cause other person to have apprehension of immediate and unlawful violence or possibly have that consequence, such being the purpose of the act, or that he was reckless whether or not his act caused such apprehension. This foresight (the term of art is 'intention') or recklessness is the mens rea in assault ."

What then are the circumstances in which one man may strike another and yet be innocent of assault? One obvious circumstance was described as long ago as 1669 in Tubervell v. Savage Mod Rep 3 at 4 -

> "The intention as well as the act makes an assault. Therefore, if one strike another upon the hand or arm or breast in discourse it is no assault there being no intention to assault"

The striking has to be done with a hostile intention.

There are other instances where a person's mind does not go with his action. One is insanity. We are not concerned with that in this case. Mr. Smith suffers from no such disorder of the mind, and did not do so at the time of the incident. There is also the state of mind which was defined by the House of Lords in Bratty v. AG of Northern Ireland as connoting the state of a person who, though capable of action, is not conscious of what he is doing. It means unconscious involuntary action, and it is a defence because the mind does not go with what is being done.

There are other states of mind which do not constitute a defence. They were described as follows by Lawton LJ in the Court of Appeal in Isitt v. R (1977) It was a case of dangerous driving but the following passage from the judgment applies in my view equally to assault -

> 'As we understand the law the position is that in general, certainly with offences like dangerous driving, the Crown have to prove that the conduct which is alleged to be criminal was voluntary conduct in the sense that the accused's mind went with the acts alleged to be criminal. If his mind for any reason did not go with the acts alleged to be criminal, then he cannot in law commit an offence.
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> There are people, however, whose minds go with the acts which they are doing but whose minds do not function properly. They may not be responsible in law for what they have done. It is not however every malfunctioning of the mind which entitles a person to a defence; it is only some malfunctionings which do so. If the malfunctioning of the mind produces the consequences set out in the judgment of the House of Lords in Mac Naughton's case (1843) 4 SITr (NS) 847, then the accused has the defence of insanity. At the other end of the mental spectrum, in cases in which the accused acts during an epileptic attack, the mind does not function at all. What the accused does in those circumstances is involuntary. Acts performed involuntarily have come to be known as automatism.
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> It is a matter of human experience that the mind does not always operate in top gear. There may be some difficulty in functioning. If the difficulty does not amount in law to either insanity or automatism is the accused entitled to say 'I am not guilty because my mind was not

working in top gear?' In our judgment he is not.'

The Court concluded that there was a grey area between insanity and automatism but that evidence indicating that a case fell within that area would have value in relation to mitigation of penalty and not by way of a defence in law.

The passage which I have just quoted is referred to in Archbold (42nd Edition pp 1194-5) as authority for the general proposition which it contains, although the offence with which the case was concerned was dangerous driving, an offence of strict liability.

I must here make some reference to the burden of proof in cases such as this. As in every criminal case, the burden of proving every issue lies on the prosecution, subject to a few exceptions which do not concern us now. But at a certain stage of a trial the prosecution may adduce evidence sufficient to discharge the probative burden provisionally and thus call for some explanation on behalf of the accused. In a crime of basic intent such as assault, proof of the actus reus generally raises a presumption of a corresponding mens rea. It is sufficient prima facie proof of mens rea to shift the evidential burden of proof onto the defence. A proper foundation for a defence of lack of mens rea must be laid. But the burden of proving its case remains throughout on the prosecution, and it is for the prosecution to negative the defence. See DPP v. Morgan (1975) 2 ALL ER per Lord Simon at p 364.

Now the defence is making the following submission. It says that this case is not about automatism but intent and, quite rightly, that it is for the Crown to prove all necessary ingredients of the offence, including intent. Lack of proof of intent is a failure by the Crown to prove its case. It was argued that a distinction can be drawn between 'automatism' and 'lack of intent', and that lack of intent short of automatism, in cases where the issue turns on the accused's mental condition, may still negative mens rea. That is crucial, as clearly Mr. Smith's mental state was something other than automatism.

Decisions subsequent to Bratty have treated it as the leading case. The following passages are from the speech of Lord Denning, in Bratty in which he considered the requirement that a criminal act should be voluntary to carry guilt. -

> 'The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as 'automatism' - means an act which is done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleepwalking.'

Lord Denning then goes on to consider mental state which do not provide a defence. He says this -

> 'Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it. When a man is charged with murder, and it appears that he knew what he was doing, but that he could not resist it, then his assertion 'I couldn't help myself' is no defence in itself... Nor is an act to be regarded as an involuntary act simply because it is unintentional or its consequences are unforeseen. When a man is charged with dangerous driving it is no defence for him to say, however truly, 'I did not mean to drive dangerously.' There is said to be an absolute bar against that offence whether he had a guilty mind or not (see Hill v. Baxter (1958) 1 ALL ER per Lord Goddard CJ at p.195) but even though it is absolutely prohibited, nevertheless he has a defence if he can show that it was an involuntary act in the sense that he was unconscious at the time and did not know what he was doing.'

Now counsel for the defence has submitted that what is said by Lord Denning about involuntary conduct was not about mens rea or intention at all. Bratty was a case of murder, a crime of specific intent. The other crime mentioned by Lord Denning in the passage to which I have referred - dangerous driving - is a crime of strict liability, in relation to which questions of involuntariness should relate to the actus reus rather than the mens rea.

The line to be drawn between the involuntariness of an actus

reus brought about by the condition of a person's mind and the absence of the necessary mens rea is a fine one, but it may be of more than academic interest in crimes of strict liability. Professor Glanville Williams has this to say about that at page 663 of his textbook of Criminal Law (2nd Edition) -

> "Automatism is sometimes regarded as being incompatible not only with the mental element of a crime but with the notion of an act. If it were a matter of pure theory this could characterised as am unnecessary refinement, but the 'act' doctrine has the advantage of making automatism a defence to a charge of an offence of strict liability requiring an act."

Counsel for the prosecution put forward the proposition that to the extent that a non-specific abnormality of state of mind of a defendant can serve as a defence to any crime, that abnormality must fall within at least one of the only two categories recognised by law, namely -

(a) insanity, including diminished responsibility in a case of murder; or

(b) automatism -

and that the law does not recognise any 'abnormality' that falls within the grey area between these two.

That was the view of the Court of Appeal with regard to another case of dangerous driving - Isitt v. R,- to which I have already referred. To the extent that they made more general observation their views are obiter and the question of whether Mr.. Smellie's formulation covers every offence involving basic intent may be argued one day in an appropriate case. This is not a case which calls for such refinement.

I have already referred to DPP v. Majewski, in which Lord Elwyn Jones cited and applied Lord Simon's definition of the mens rea applicable to assault in DPP v. Morgan. In my view the prosecution have amply proved the requisite mental element in this assault notwithstanding the evidence brought in rebuttal.

In the moments after the accident Mr. Smith and Miss Gould

had just been put in fear of their lives. They both thought they were dealing with a hit and run driver and Miss Gould urged Mr. Smith to give chase. He did so. What is more, the other driver had come at them on the wrong side of the road. Whatever the reason for that, it would be normal to regard this as a serious aggravation.. Mr. Smith displayed all the external signs of extreme anger. Even a saint might have felt that in the circumstances which I have described. It was perfectly normal and commonplace reaction. Mr. Smith gave an interview to the police three days after the event. He said that he was enraged and in a state of shock and that when his shock had subsided he apologised for what he had done. Now he says that account was a rationalisation which he now rejects. In my view it is the later account which is the attempt to rationalise actions which he finds it intolerable to believe that he took.

Dr. LaHee referred in his report to behaviour out of character "even if not intended". He clarified this in his evidence by saying that it did not indicate lack of ability to form intention. He was referring to lack of premeditation rather than lack of basic intent. Dr. Knight acknowledged that while running after the car Mr. Smith could have formed the intention to strike the driver. From that it cannot be doubted that he could have formed it when he reached the car. His actions and words - whichever of the various versions of those events in true - satisfy me beyond doubt that he did so. He was not disorientated and expressed quite clearly the reasons for his anger with the driver. He knew the situation he was in, and his acts were purposeful to the necessary extent. He was in the grip of an extreme emotion with which he was unfamiliar, and which he finds it hard to accept that he is capable of feeling. To find otherwise would be to accept that he experienced out of body experience which would be unique, at any rate in the experience of Dr.Knight and Dr. LaHee , as an accompaniment to the actions and words of Mr. Smith. Dr. Knight did refer to a state of dissociation or altered consciousness, and I should mention my view on that. Where a person who is fully awake attacks another , and there is a perfectly ordinary explanation such as anger to account for it, it is hard to credit that this convenient state descended on a person at the very moment when he was face to face with a person whom he had a strong motive for attacking. The

more down-to-earth explanation for any 'altered consciousness' is that it resulted merely from overwhelming passion which led him to pay no attention to normal moral and prudential considerations.

I have no doubt that anger is the explanation for Mr. Smith's conduct and that he is guilty of the offence charged.

Some of the factors which I have mentioned do, of course, go to mitigation of penalty in this case and I shall listen attentively to any further observations which Mr. Smith's counsel may wish to make on that aspect. It may save time if I say that I accept entirely that Mr. Smith did not realise until too late that it was such an elderly gentleman whom he was confronting.

G.E. Harre

Dated 9th June 1989