

CANADA / JUDGMENT

McMillan v. R.

[1977] 2 SCR 824

COURT

Supreme Court of Canada

DECIDED

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McMillan v. R.

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Report

[1977] 2 SCR 824

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

McMillan v. R., [1977] 2 S.C.R. 824

Date: 1977-04-04

William George McMillan (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1976: November 22; 1977: April 4.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Evidence—Admissibility of rebuttal evidence—Psychiatric evidence as to probability of third party being perpetrator of offence—Limitation on admissibility and relevance—Right of Crown to cross-examine—Right of Crown to introduce rebuttal evidence of a like or related nature.

Appellant was found not guilty of the murder of his infant child. He confessed to the police to injuring the child to prevent it from crying but later at his trial testified that he had not injured the child and that he had only confessed in order to protect his wife. Both he and his wife denied knowing how the injuries were caused. At trial the defence was permitted to adduce psychiatric evidence as to the mental state of the wife tending to show that she was more probably the one who had injured the child. The trial judge did not however permit the Crown the right to full cross-examination of the psychiatrist or to call rebuttal evidence. The Court of Appeal allowed the Crown's appeal and ordered a new trial.

Held: The appeal should be dismissed.

While, in general, character evidence adduced by the defence must only be evidence of general reputation and evidence brought by the Crown in reply must be confined to similar evidence of general reputation, in the particular circumstances, appellant having given evidence and adduced evidence as to his mental and emotional condition, such evidence should have been subject to cross-examination. Further, by leading evidence as to his wife's mental condition he opened up his own mental and emotional condition for cross-examination and made admissible Crown expert psychiatric evidence in reply.

While the Crown argued that the trial judge should not have allowed the defence to adduce the psychiatric evidence as to the wife's mental state to indicate the probability that she had assaulted the child, for the reason given by the Court of Appeal, that Court was correct in affirming that the evidence was relevant and admissible, within the proper sphere of expert evidence and not excluded by a policy rule.

The question as to how far a defence may go in adducing evidence that some third party was by virtue of that party's mental or emotional state a more probable perpetrator than the accused is simply a question as to the relevance of the evidence. In the present case there can be no question as to relevance; the accused and his wife were alone in an apartment with the child at all relevant times; during a very large part of the time they were together with the child, and on occasions each of them was alone with the child.

Lowery v. The Queen, [1974] A.C. 85 referred to.

APPEAL from a judgment of the Court of Appeal for Ontario^[1] allowing an appeal from an acquittal verdict by a jury and directing a new trial on an indictment charging non-capital murder. Appeal dismissed.

Bernard Cugelman, for the appellant.

E.G.Hachborn, for the respondent.

The judgment of the Court was delivered by

SPENCE J.—This is an appeal by the accused William George McMillan from the judgment of the Court of Appeal for Ontario pronounced on February 14, 1975. By that judgment, the said Court of Appeal allowed an appeal by the Crown from McMillan's acquittal verdict by a jury upon an indictment charging non-capital murder.

The reasons for the Court of Appeal for Ontario were given by Mr. Justice Martin in a long and carefully detailed judgment which included a meticulous recital of the facts. That judgment has been reported in (1975), 7 O.R. (2d) 750, and I therefore am of the opinion that I need not repeat that detailed statement of facts.

The appeal to the Court of Appeal for Ontario by the Crown was under the provisions of s. 605(1) (a) of the Criminal Code and that section limits the appeal to "on any ground of appeal that involves a question of law alone". The notice of appeal sets out in its first three grounds those with which the appeal to that Court and to this Court are concerned and they are as follows:

1. The learned trial judge erred in admitting evidence concerning the mental state of the wife of the accused.
2. The learned trial judge erred in denying counsel for the Crown the right to full cross-examination.
3. The learned trial judge erred in rejecting reply evidence tendered by the Crown.

As will be seen from a perusal of Mr. Justice Martin's reasons, the Court of Appeal upheld the decision of the learned trial judge that the defence was permitted to adduce psychiatric evidence tending to show that Roberta Gayle McMillan, the wife of the accused, here appellant, was of such a psychiatric disposition as would make it more probable that she so assaulted her child as to cause the latter's death. Martin J.A. further held, here accepting the argument of the Crown, that the learned trial judge erred in not also permitting the Crown to cross-examine the same psychiatrist upon the psychiatric condition of the accused and that he further erred in refusing to permit the Crown to adduce in reply psychiatric evidence as to the mental condition of the said accused. The learned trial judge had based his ruling that the Crown could not proceed with the cross-examination or adduce such expert evidence upon the

very well established [principle that] where character evidence has been introduced by the accused or on behalf of the accused that should be general character evidence and on cross-examination and in reply the parameter must be confined to general reputation.

Martin J.A. was in agreement with the statement that in general character evidence adduced by the defence it must be only evidence of general reputation and that evidence adduced by the Crown in reply thereto must be confined to like evidence of general reputation. However, he was of the opinion, which I share, that in the particular circumstances of the present case the accused having given evidence and adduced evidence as to his mental and emotional condition such evidence should have been subject to cross-examination and, in addition, having adduced expert evidence as to his wife's mental condition, he opened up his own mental and emotional condition for cross-examination by the Crown and made admissible Crown expert psychiatric evidence in reply upon that subject.

Counsel for the Crown in this Court took the position that the learned trial judge had erred in allowing the defence to adduce as part of its defence psychiatric evidence that the wife of the accused was from her character and mental state a probable person to have committed the assault upon her child which caused the latter's death. As I have said, that was the position of the Crown in its appeal to the Court of Appeal for Ontario and Martin J.A., giving the reasons for that Court, concluded that such evidence was relevant and admissible holding that the psychiatric evidence was (a) relevant, (b) not excluded by a policy rule, and (c) that it fell within the proper sphere of expert evidence. I have perused with care the extensive reasons given by Martin J.A. and, despite the very able argument by counsel for the Crown made in this Court, feel that I may accept those reasons and I need not add thereto.

There is, of course, a question as to how far the defence may go in adducing evidence that some third party was, by virtue of that party's mental or emotional state, a more probable perpetrator than the accused. In my view, that is simply a question as to the relevance of the evidence. There would be no probative value in the evidence that some other person quite unconnected with the circumstances surrounding the charge might because of his or her mental or emotional state be a more probable person to have committed the crime. That situation is not reflected in the present circumstances. Here, the accused and his wife were alone in their apartment with this child at all relevant times. During a very large part of the time, they were together with the child but there were occasions when the accused was alone with the child and there was at least one occasion when the mother, the wife of the accused, was alone with the child. The evidence which under other circumstances might be quite irrelevant and have no probative value under such circumstances becomes very relevant and of high probative value. An illustration in which it was so considered by the Privy Council is that discussed by Martin J.A., i.e., *Lowery v. The Queen*[2]. Lord Morris of Borth-y-Gest at p. 102 adopted what had been said by the Court of Criminal Appeals of Victoria as follows:

It is, we think, one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof of his own guilt. We see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person.

I further agree with Martin J.A. that when such evidence is adduced by the defence there is no policy preventing its admission such as the requirement of fairness to the accused which applies to prevent its being adduced by the Crown. Certainly the psychiatric evidence given in this case by Dr. Cooper was expert evidence upon a subject which was not within the knowledge of the ordinary citizen. I am, therefore, not ready to accede to the first proposition advanced by counsel for the Crown and I am of the view that the Court of Appeal for Ontario were correct in refusing to hold that the learned trial judge had erred in permitting the adducing by the defence of the evidence of Dr. Cooper as to the mental and emotional state of the wife of the accused. The fact that the counsel for the accused had called the said wife as a witness for the defence did not bar the production of such evidence.

The appellant here contends, however, that the Court of Appeal for Ontario erred when it held that the learned trial judge should have permitted the cross-examination by the Crown of the same defence witness, Dr. Cooper, as to the mental and emotional state of the accused. Dr. Cooper had seen the accused on two occasions. The second occasion was during the trial, was momentary and was not the subject of any particular discussion during the voir dire held by the learned trial judge. On the first occasion, Dr. Cooper had examined the accused in the jail at Toronto to “make an assessment of him”. No defence of insanity was advanced at the trial. In giving evidence upon the voir dire held by the learned trial judge, Dr. Cooper in his answers to cross-examination revealed this earlier visit to the accused and expressed the opinion that the accused, as well as his wife, was a psychopath but a psychopath of a different type, one which he called an “inadequate psychopath, someone who is not physically dangerous”. It was this evidence which counsel for the Crown sought to make the basis for his cross-examination of Dr. Cooper and which the learned trial judge excluded for the reason I have outlined above.

In dealing with this question, Martin J.A. said:

In my view, the entire nature of the defence involved an assertion that the respondent was a person of normal mental make-up. In those circumstances, Crown counsel was entitled to show, if he could, that there were two persons present in the house who were psychopaths, not one. Any other conclusion would permit an accused to present an entirely distorted picture to the jury. The respondent, having introduced psychiatric evidence to show that it was more probable that his wife had caused the injuries to the child than that he had caused them, because he lacked her dangerous characteristics, lost his protection, in the circumstances of this case, against having his own mental make-up revealed to the jury.

I can see no answer to that conclusion. It would be obviously improper to permit an accused man to put in issue (a) his own calm and normal disposition, and (b) the psychiatric condition of his wife, by expert evidence and then prevent the cross-examination of that evidence by reliance

upon any principle that character evidence had to be only that of general reputation. The expert evidence adduced by the defence from Dr. Cooper as to the mental and emotional state of the wife was not character evidence in the ordinary sense but was evidence to show a psychical propensity for the obvious violent assault which caused the death of her child. It was adduced by the defence. The evidence which the Crown sought from Dr. Cooper by cross-examination was exactly the same kind of evidence as to the mental and emotional state of the accused and was intended to meet the accused's own evidence that he was of a normal mental make-up. Once the accused gave that evidence and adduced the expert evidence of Dr. Cooper as to his wife's condition, there could be no impropriety in permitting that witness to be cross-examined as to his rather fortuitous knowledge of the mental and emotional state of the accused who had just testified to his own normality.

It was the opinion of Martin J.A. that the refusal to permit such cross-examination of Dr. Cooper did not result in any particular miscarriage of justice as, had such cross-examination been allowed to proceed, it would have been unlikely to have affected the verdict. Dr. Cooper's opinion was that the accused man was of such a type of psychopath as not to be one of dangerous propensity. I am of the opinion that the Crown was entitled to do its best upon such a cross-examination and should be entitled to cross-examine on the new trial which was directed by the Court of Appeal.

There remains the issue as to whether the learned trial judge was correct in not only refusing to permit cross-examination of Dr. Cooper as to the accused man's mental and emotional condition but also his refusal to permit the Crown to call other psychiatric evidence available to it upon the same subject. It was this latter refusal which Martin J.A. found justified the direction for a new trial which, as I have said, was the course directed by the judgment for the Court of Appeal for Ontario.

It happened that the Provincial Court Judge had remanded the accused for a mental assessment in connection with the charge of manslaughter then pending against the accused and arising out of the same circumstances upon which the accused was later tried for non-capital murder. This examination was carried out by a Dr. Common. The report thereon by Dr. Common stated that the accused was mentally fit to stand trial and made certain references to his personality traits. Since the main purpose of the examination and report was to consider the issue of fitness to stand trial, the report was far from conclusive as to whether personality traits rendered it more probable that the accused had assaulted his child causing her death rather than had the mother of the child. It was the evidence of Dr. Common and perhaps other psychiatric evidence that the Crown sought to adduce in reply. In my view, the admissibility of this evidence is exactly on the same basis as the right of the Crown to cross-examine the witness Dr. Cooper. The accused had put at issue his own mental and emotional state. The learned trial judge remarked:

After all, there is a great deal of evidence in that this is a very gentle man who loves his child very dearly. It was a proud father. This recurs in the evidence and I should have thought that—that opens the door to you to have said “Well we have evidence that this is not so”.

The accused had also been permitted to adduce evidence that the mental and emotional condition of his wife would make it probable that she could have committed the assault which resulted in the child's death. To refuse to grant the right to meet that combination of testimony with psychiatric evidence that the accused himself exhibited like propensities did, as Martin J.A. remarked, permit the accused to present an entirely distorted picture to the jury. I, therefore, am of the opinion, with respect, that Martin J.A. was correct in his view that the Crown should have been permitted to adduce such psychiatric evidence in reply and that the refusal to do so could well have resulted in a miscarriage of justice.

In the result, I would dismiss the appeal and affirm the judgment of the Court of Appeal for Ontario directing a new trial.

Appeal dismissed.

Solicitor for the appellant: Bernard Cugelman, Toronto.

Solicitor for the respondent: Ministry of the Attorney General for Ontario, Toronto.

[1] (1975), 7 O.R. (2d) 750.

[2] [1974] A.C. 85.

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