Comment

Osland vs The Queen

High Court of Australia: Gaudron, McHugh, Gummow, Kirby and Callinan JJ:
10 December 1998
(1999) 159 ALR 171

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The appellant, Heather Osland, was convicted of the murder of her husband, Frank Osland in the Supreme Court of Victoria. She was sentenced to a term of imprisonment of 14½ years with eligibility for parole after 9½ years.

THE FACTS

The appellant and her son, David Albion were both charged with the murder of Frank Osland some 3½ years after he was killed. The trial of the appellant and the first trial of David Albion took place in October 1996. The 22 day trial resulted in the conviction of the appellant for murder and a disagreement by the jury with respect to David Albion. A retrial in December 1996 of David Albion resulted in his acquittal of both murder and manslaughter.

The prosecution's case was that Heather Osland and David Albion together planned to murder Frank Osland. They dug a 'hole' during the day of 30th July 1991 and later, on the evening of the same day, the appellant mixed sedatives with Frank Osland's dinner in sufficient quantity to induce sleep. David Albion carried the 'plan' to finality after Frank Osland went to bed, by fatally hitting him over the head with an iron pipe in the presence of the appellant. Later, David and the appellant buried the deceased in the 'hole' they had earlier prepared. They later acted as if he had simply disappeared by engaging in a series of deceptions. Neither the appellant nor David Albion disputed these allegations, though they both claimed that the 'hole' was dug without any intention at that stage of killing Frank Osland.

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Against a background of many years of tyrannical and violent behaviour by Frank Osland, David Albion and Heather Osland relied on self-defence and provocation.

There was conflicting evidence as to whether or not the deceased had been abusive and violent just prior to his death. Both David Albion and Heather Osland gave evidence of abuse just prior to the killing. The evidence of David Albion was that when the accused came home on the night of the killing, he was working on his car when he heard the appellant scream. He went into the house and saw her up against the wall with the deceased standing over her. He was yelling at her and she was pleading with him. He ran in and told the deceased to "get the fuck off her". The deceased then turned on him and told him to "get the fuck out of the house". When he said that he would not leave without his mother, the deceased screamed "I'll kill you", after which he felled David with a punch to the head. The evidence of the appellant was along similar lines – that she knew she was in trouble just on seeing her husband arrive home from work with his mates; and that he had been verbally abusive towards her for upwards of an hour. Some of this abuse was over the fact that she had had a haircut that day. The appellant gave evidence that she blocked all the rest out of her head.

The prosecution accepted that the deceased had been violent and abusive towards the appellant in the past but contended that such behaviour had ceased well before his death. This contention was made on the basis of certain intercepted telephone conversations to which the appellant was a party, which took place well after his death. The appellant had made statements in those conversations to the effect that the deceased's violence had ceased some years before his 'disappearance'.

It is reasonable to assume that the jury believed the prosecution's evidence in this regard over that of the appellant.

Evidence of the appellant's relationship with the deceased was given at the trial. The appellant gave evidence that she had met Frank Osland some 20 years prior to his death in 1970 and had begun to live with him in 1977. At that time she had 4 children from a previous marriage. From the outset of their cohabitation he was violent and abusive. He was dictatorial in all domestic, social, familial and sexual matters. As often as once weekly, the appellant or one of the children was struck by the deceased. He was very jealous. He would often accuse the appellant of 'slutting around' and dominated almost all of her and the family's activities. He inflicted physical abuse upon the appellant and threatened to kill her and the children.

He frequently raped the appellant by imposing anal intercourse upon her without her consent. She was suffering from cystitis which the court considered was 'possibly' related to the deceased's insistence upon anal intercourse against her will. He threatened that he would kill her and the children if she ever tried to leave him. He would speak to the children of killing and chopping up animals. He would lock the appellant and the children out of the house when they returned from church on Sundays and on two occasions he pointed a firearm at the children. There were outbreaks of violence against the children and threats of death made to the appellant's mother. The appellant gave evidence that in the early days of their cohabitation the deceased was a big man of 16 stone and that she was a small woman of only 5 feet 3inches in height.

The appellant and the deceased separated a number of times throughout the course of 20 or so years. The appellant generally described her life with the deceased as involving a pattern of threats, physical violence, short-lived reconciliations, illness (cystitis and hypertension), repression and fear.

She gave evidence that in the week before the deceased was killed, he literally kicked her out of bed and punched her in the chest numerous times. She feared that he might attempt to smother her when she was sleeping. She thought that an attempt by him to kill her was imminent.

Decision and grounds of appeal

The Court of Appeal of Victoria dismissed an application for leave to appeal by the appellant, Heather Osland. By special leave, she appealed to the High Court contesting her conviction of murder.

The High Court majority (McHugh, Kirby and Callinan JJ) in separate judgments, dismissed the appeal. Gaudron and Gummow delivered a joint dissenting judgment.

The issues arising out of the appeal are summarised in Kirby J's judgment. The court unanimously held that directions given by the trial judge to the jury, on a number of matters, in particular those with respect to connecting evidence of 'Battered Woman Syndrome' (BWS) with provocation and self-defence, were appropriate. Further, transcripts of intercepted phone conversations between the appellant and her daughter were correctly admissible.

Inconsistency of the verdicts of Heather Osland and David Albion was the only issue which divided the court.

This issue was addressed most fully by McHugh J (with whom Kirby and Callinan JJ agreed) who referred to principles of criminal liability where persons are acting in concert:[1]

> Where parties are acting as the result of an arrangement or understanding, there is nothing contrary to the objects of the criminal law in making the parties liable for each other's acts and the case for doing so is even stronger when they are at the scene together. If any of those acting in concert by not being the actual perpetrator has the relevant *mens rea*, it does not seem wrong in principle or as a matter of policy to hold that person liable as a principal in the first degree. Once the parties have agreed to do the acts which constitute the *actus reus* of the offence and are present acting in concert when the acts are committed, the criminal liability of each should depend upon the existence or non-existence of *mens rea* or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator. So even if the actual perpetrator of the acts is acquitted, there is no reason in principle why others acting in concert cannot be convicted of the principal offence. They are responsible for the acts (because they have agreed to them being done) and they have the *mens rea* which is necessary to complete the commission of the crime.

McHugh J also referred to the 1977 High Court decision of *Matusevich v. The Queen*,[2] and held that the appellant's reliance on a 1989 decision of the Full Court of the Supreme Court of Victoria, *R v. Demirian*[3] was untenable.[4] McHugh J stated that when verdicts are in accordance with the evidence and the directions of the trial judge, inconsistency of verdicts is not a ground of appeal.[5]

Gaudron and Gummow JJ in their dissenting judgment,[6] considered that a person cannot act pursuant to an understanding or arrangement with another that together they will kill a third person and at the same time, act under provocation. Provocation only arises where there is some act of the deceased which results in the loss of self-control to the point of committing

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1 *Osland v. The Queen* (1999) 159 ALR 171, para 93.

2 (1977) 137 CLR 633.

3 [1989] VR 97

4 McHugh J held that the court in *R v. Demirian* incorrectly treated *Matusevich* as a case of innocent agency and that *Demirian* should not be followed. He further stated (at paragraph 94) that it is not possible to reconcile *Demirian* with modern cases.

5 *Osland v. The Queen* (1999) 159 ALR 171, para 117.

6 *Id.* para 34.

the act which caused death. In this situation an accused cannot also be taken to have acted so as to give effect to some prior understanding or arrangement with respect to the victim's death. A fortiori, if he or she is acting in self-defence in response to some threat or attack by the deceased.

They considered that a jury could only convict Heather Osland of murder and fail to reach a verdict with respect to David Albion, if it determined that there was no agreement between them to kill.

Commentary

This is the first time that the High Court has considered the role of 'Battered Woman Syndrome', rather, 'Battered Woman Reality' evidence. As stated above, the court unanimously held that directions to the jury by the trial judge, in particular those with respect to connecting the expert evidence of Dr Kenneth Byrne (a clinical and forensic psychologist) of 'Battered Woman Syndrome' (BWS) with provocation and self-defence, were appropriate.

As a basis for understanding BWS, it is worth noting the evidence given by Dr Byrne, which outlines some of the general characteristics of battered women:[7]

1. They are ashamed, fear telling others of their predicament and keep it secret;
2. They tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocussed;
3. They have an increased arousal and become acutely aware of any signal of danger from their partner;
4. They may stay in an abusive relationship because they believe that if they leave, the other person will find them or take revenge on other members of the family;
5. In severe cases, they may live with the belief that one day they will be killed by the other person.

With the exception of McHugh, all five Judges chose to comment on BWS. All agreed that the trial judge's directions on the matter were sufficient.

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7 *Id.* para 51. See also Tolmie J., "Secretary" (1996) 20 (4) Criminal Law Journal 223 at 225-7.

Gaudron and Gummow JJ agreed that expert evidence of BWS is relevant when considering the gravity of the provocation,[8] particularly when considering the battered woman characteristic of heightened arousal or awareness of danger. They also considered that this may also be relevant to self-defence. They also approved the comments of Wilson J in the leading Canadian case of *Lavallee*,[9] that the issue is not just whether an accused woman *is* a 'battered woman', but whether she acted in self-defence or under provocation.[10] Gaudron and Gummow JJ also noted that if expert evidence is given in general terms and not specifically linked to events which were said to raise provocation and self-defence – the obligation is on counsel to make clear to a jury and a trial judge the precise manner in which they are to rely on such evidence.[11]

Callinan J specifically rejected the submission for the appellant, that the High Court should adopt a new and separate defence of BWS as such 'goes too far for the laws of this country.'[12]

Kirby J comments quite extensively on Battered Woman Syndrome and prefers to call it Battered Woman Reality.[13] Whilst he seems supportive of the recognition of BWS evidence he also highlights controversies associated with it and is indeed critical of it.

Kirby J recognises that although other courts have addressed the implication of BWS evidence in criminal trials,[14] this was the first time that the High Court had considered the relevance of BWS evidence. He recognises a substantial quantity of Australian and overseas literature in this area. Kirby J acknowledges that BWS overwhelmingly affects women yet he states that 'unlike conception and childbirth' there is no inherent reason why a battering relationship should be confined to women as victims.[15] He is somewhat critical of BWS as a 'female' construct:[16]

> ...[A]s evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex specific or otherwise discriminatory terms. Such categories tend to reinforce

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8 *Osland v. The Queen* (1999) 159 ALR 171, para 55.

9 [1990] 1 SCR 852

10 *Id.* para 58.

11 *Id.* para 69-70.

12 *Id.* para 239.

13 See paragraph 161. Kirby J has sympathy for the appellants criticism of the word 'syndrome'.

14 See Tolmie J., "Secretary", (1996) 20(4) Criminal Law Journal 223 at 228. Tolmie notes that there have been at least 17 Australian decisions which have accepted some form of BWS evidence.

15 *Osland v. The Queen* (1999) 159 ALR 171, para 159.

16 *Id.* para 158.

> stereotypes. They divert application from the fundamental problem which evokes a legal response to what is assumed to be the typical case...

Despite this criticism, Kirby J agrees with some of the literature in this area that BWS does appear to be an advocacy driven construct. He agrees that the 'syndrome', medicalises evidence in order to avoid difficulties which may arise from a conclusion that the accused's motivations are complex and individual, arising from personal pathology and social conditions, rather than from a universal or typical pattern of conduct sustained by scientific data.[17] He further agrees that BWS may misrepresent many women's experiences of violence, and recognises that race, economic and ethnic background (etc) all determine how women may have different responses to abusive relationships. He is mindful that BWS is based largely on the experiences of Caucasian women of a particular social background and that this may impact adversely. He also recognises the concern that if a particular woman does not fit within the 'syndrome', a claim to self-defence or provocation may not be fairly decided.[18]

Kirby J endorses the judgment of Thomas J in the 1997 New Zealand decision *of Ruka v, Department of Social Welfare*:[19]

> There is a danger that in being too closely defined, the syndrome will come to be too rigidly applied by the Courts. Moreover, few

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17 *Id.* para 161.

18 Kirby J refers to: Goodyear-Smith, "Re Battered Woman's Syndrome [1997] NZLJ 436-438", (1998) *New Zealand Law Journal* 39; McDonald, "Battered Woman Syndrome", (1997) *New Zealand Law Journal* 436 at 427; Budrikis, "Note on *Hickey*: The Problems with a Psychological Approach to Domestic Violence", (1993) *15 Sydney Law Review* 365; Stubbs and Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study", (1995) 8 *Canadian Journal of Women and the Law* 122; Faigman and Wright, "The Battered Woman Syndrome in the Age of Science" (1997) 39 *Arizona Law Review* 67 at 111-113; Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v. Lavallee*", (1997) 47 *University of Toronto Law Journal* 1 at 13-14, 25-33; Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering", (1986) 9 *Women's Rights Law Reporter* 195; Freckelton, "Battered Woman Syndrome", (1992) 17 *Alternative Law Journal* 39; Volpp, "(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'", (1994) 17 *Harvard Women's Law Journal* 57 at 93; Moore, Battered Woman Syndrome: Selling the Shadow to Support the Substance", (1995) 38 *Howard Law Journal* 397; Beri, 'Justice for Women Who Kill: A New Way?", (1997) 8, *Australian Feminist Law Journal* 113 at 123.

19 [1997] NZLR 154.

> aspects of any discipline remain static, and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships.... The syndrome, where it is found to exist, is not in itself a justification for the commission of a crime. It is the effects of the violence on the battered woman's mind and will, as those effects bear on the particular case, which is pertinent. It is not....simply a matter of ascertaining whether a woman is suffering from battered woman's syndrome and, if so, treating that as an exculpatory factor. What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case.[20]

A general concern expressed by Kirby J is that BWS may become too narrow in its usefulness. He notes a number of controversies as recorded by various authors and endorses that BWS as a 'scientific phenomenon',[21] distracts attention from 'conduct which may constitute a perfectly reasonable response to extreme circumstances'.[22]

Kirby J also highlights as a 'catch 22' that BWS denies the rationality of the victim's response to prolonged abuse and instead, presents the victim's conduct as irrational and emotional. He notes that the purpose of BWS is to show how a victim's actions in taking lethal self-help against abuse is reasonable in the extra-ordinary circumstances which a victim may face. This author agrees, yet wonders how many jurors and indeed judges could determine what is a reasonable response in such situations without having the effects of long term abuse on a person set out by an expert.

Kirby J refers to the numerous controversies about BWS as a warning of the need for caution in accepting testimony of BWS. He refers to his dissenting judgment in *Green*[23] and states:[24]

> No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. It if were so, it would expose to unsanctioned homicide a large number of persons who.....would not be able to give their version of the facts.

Certainly most would agree with Kirby J that the over-riding notion of sanctity of human life must always be upheld. The decision of the jury in

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20 *Id.* 173-174.

21 This authors interpretation.

22 *Osland v. The Queen* (1999) 159 ALR 171, para 164.

23 *Green v. The Queen* (1997) 191 CLR 334 at 393.

24 *Osland v. The Queen* (1999) 159 ALR 171, para 165.

this matter upholds such notion. However, it is disappointing that our criminal system leaves us with the reality of decisions such as *Green*[25] and *Giannikos*[26] which validate questionable exceptions to this notion.[27]

There does seem to be judicial acceptance of BWS by the High Court despite various judicial critcism. It is curious that most of Australian society would probably agree with the above statement made by Kirby J. Nevertheless, society continues to uphold its biases and stigmas against homosexuality[28] and remains generally sympathetic to male perpetrators who kill to uphold their 'honour'.[29] But for the woman who has been beaten, intimidated, sodomised, harassed, stalked, or made choices unacceptable to a 'hurt' husband or partner, the reality is quite different. She will rarely fall into the present construct of 'provocation'[30] and will be less likely to raise self-defence successfully.

Largely, what juries choose to believe and excuse lies in what they consider to be acceptable or non-acceptable behavior. It is reasonable to expect that biases, unfair stereotyping and discrimination in our society be corrected by the initiative of the law makers and interpreters.

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25 *Green v. The Queen* (1997) 191 CLR 334.
In this case a non-violent sexual advance by a homosexual male, was made towards a heterosexual male. The accused violently killed the victim by repeatedly punching him in the head, pushing his head into a wall and by repeatedly stabbing the victim with scissors. The majority of the High Court (Kirby and Gummow JJ dissented) ruled that there was the possibility of a substantial miscarriage of justice as a result of the trial judge's determination that the appellant's family history was not relevant to the issue of provocation and ordered a new trial.

26 *R v. Giannikos* (Unreported, Supreme Court of Queensland Townsville, Cullinane J, March 1999)
In this case, a jury found the husband, charged with the murder of his wife, as having acted under provocation. The accused killed the victim by strangling her at night, with a piece of boat wire he happened to have been carrying around all that day. She was going to leave the relationship to be with her lover. The accused was convicted of manslaughter and was sentenced to a term of imprisonment of eight years with a recommendation for release after three.

27 This author considers that these are exceptions based on stereotyping and gender bias.

28 As borne out by the decision of *Green v. The Queen* (1997) 191 CLR 334.

29 See *R v. Giannikos* (Unreported, Supreme Court of Queensland Townsville, Cullinane J, March 1999).

30 See Bradfield, "Green v. The Queen", (1998) 22 Criminal Law Journal 296 at 302.

Despite the appellant's evidence of the relationship she had with the deceased, the jury chose to believe enough of the prosecution's evidence to find her guilty of murder. In the event, Heather Osland was convicted of murder and her son, David Albion was not. Ironically, and tragically, she additionally suffered at least 16 years of extreme violence.