

Comparative Law and Social Science

R v The Queen(1981) 28 SASR 321

Brief outline of facts:

A mother, Mrs Wagner, has two daughters and one son. She is systematically abused by her husband Mr Wagner over the course of their relationship. Mr Wagner is extremely violent, and physically and verbally assaults Mrs Wagner on a regular basis. Unknown to Mrs Wagner, Mr Wager has been sexually harassing her two daughters since they were both around about the age of six years old. One day, Denise goes out for a drive with Mr Wagner. Mr Wagner tries to rape his daughter Denise, but Denise claims she is on her period, and he stops. Denise comes home that night, and tells Mrs Wagner that 'Mum, he tried to rape me.' Mrs Wagner told her to 'Go to bed, and don't stay up'. Mr Wagner arrives home later that night and Mrs Wagner makes him a cup of coffee. Mrs Wagner goes to bed, and Mr Wagner follows about twenty minutes later. Mrs Wagner, lying in bed, comes to terms with what had happened that day. Approximately 3 hours later, she goes to the shed, gets an axe, and strikes Mr Wagner on the head, killing him. Whilst she strikes she screams "Die, you bastard, die!".

Mrs Wagner sought to rely on the defence of provocation under the Criminal Code.

Issue:

The issue is that the defence of provocation requires that the killing take place 'amidst a heat of passion' where the accused has lost a degree of self control, directly triggered from the victim. There was uncertainty as to whether Mrs Wagner was acting amidst a heat of passion, as there had been at least 3 hours between the 'trigger' and when she had killed him. The prosecution argued that the accused's passion had 'cooled' in those three hours, and that the attack was indeed pre meditated. The defence argued that a heat of passion is able to 'mount over time' and did not indeed cool. The legal significance to this subject is that each party had a expert witness testify in order to determine if her actions were premeditated or not.

Expert Witnesses:

The expert witness for the prosecution made remarks such as 'the ferocity of the attack' is typical of a person who is in a state of lost self control. Further, the expert witness argued that in such an extreme situation, accompanied by circumstances of an abusive nature (the domestically violent nature) a reasonable person too, faced with the same gravity of provocation, could lose control, and form an intention to kill amidst a heat of passion. The prosecution also argued that it is quite possible that a period of time between the trigger and the killing does NOT bar the defence of provocation, as it is possible that passion can inflame over a period of time, it does not necessarily have to cool.

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The defence witness argued that there was too much evidence of pre meditation, for example, Mrs Wagner was able to make Mr Wagner a cup of tea. Further, there was no evidence of rage from Mrs Wagner at the first hearing of the events. From the facts, Mrs Wagner seems to be calm and completely in control of her emotions. The fact that the loss of self control was not 'suddenly following the trigger', the expert witness says, proves that there is a high possibility of pre meditation.

Held:

***Note that in raising this defence, the onus of proof is reversed, and the accused must prove beyond reasonable doubt that she was acting amidst a heat of passion.

It was held that the evidence could not prove beyond reasonable doubt that she was acting amidst a heat of passion, resulting in the defence of provocation failing. Mrs Wagner was found guilty of murder.