

People v Gibian

2006 NY Slip Op 30143(U)

October 3, 2006

Supreme Court, Suffolk County

Docket Number: 0000599/2005

Judge: Robert W. Doyle

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The People now seek an in limine determination that will preclude defendant from any mention of the victim's military collections either during opening statements or the direct or cross examination of any witness. The People assert that references to the military collections are not relevant to any issue in the trial of this action. According to the People "references relating to the victim's military memorabilia collection do not reasonably relate in time and quality to any possible defense and therefore are not relevant to this case before the Court."

In response to the People's motion, defendant argues that evidence that the deceased victim possessed weapons is relevant to the potential defense of justification. He further asserts that evidence that the victim "tortured" defendant with pictures from Nazi war camps would be relevant to the defense of "extreme emotional disturbance." Defendant contends that evidence "which reflects the tyrannical nature of the deceased and the manner in which he ruled over this household and threatened this family" is highly probative and relevant to the issues in this trial. Defendant further contends that evidence of the deceased's warped allegiance to Adolph Hitler and the Third Reich is relevant to the issue of whether the deceased presented a real, present and danger to members of his family.

Turning first to defendant's claim that the evidence in question is relevant to establish the victim's violent nature, such evidence would be admissible were defendant to interpose the defense of justification and then, only under certain limited circumstances. A defendant in a homicide or assault prosecution may assert, as a defense, that his use of physical force upon the alleged victim was not unlawful since it was necessary to protect himself or others from the victim's aggression. (*See* Penal Law, § 35.15.) The defense is only available where the belief of the defendant that he was subject to an imminent attack is a reasonable one. Where such is the case, it has long been the rule in this State that a defendant, in a prosecution for homicide, may introduce evidence that the deceased had a reputation as a 'quarrelsome, vindictive or violent' person, provided that defendant was aware of this reputation at the time of the incident. (*People v. Rodawald*, 177 NY 408, 423, 70 NE 1, 5; *People v. Gaimari*, 176 NY 84, 95, 68 NE 112, 116; *People v. Flournoy*, 14 AD2d 854, 221 NYS2d 142.) 'The character of the deceased with reference to violence, when known to the accused, enables him to judge of the danger, and aids the jury in deciding whether he acted in good faith, and upon the honest belief that his life was in peril. It shows the state of his mind as to the necessity of defending himself.' (*People v. Rodawald*, *supra*, p. 423, 70 NE p. 6). This long standing rule has been expanded to include not only proof of the victim's reputation for violence but also to allow proof of specific acts of violence (*People v. Miller*, 39 NY2d 543, 384 NYS2d 741). Thus, evidence of specific acts of violence committed by a deceased victim may be admitted if the evidence is relevant and probative to show the state of defendant's mind as to the necessity of defending himself and provided the acts sought to be established are reasonably related to the crime for which defendant stands charged.

Here, there has been no indication from defendant that he intends to interpose the defense of justification. While the Court is aware that defendant does not have to notify either the People or the Court of his intent to offer this defense, the facts as alleged by the People and as brought out during the course of the hearing through defendant's own confession, do not

appear to support such a defense. Defendant's statements to the police indicate that the victim was asleep on the living room couch at the time that defendant first attacked him with the sword. Under no view of the evidence at the hearing did it appear that the victim posed a threat to defendant or that an attack against defendant was imminent.

Moreover, were defendant to interpose the defense of justification, he would then only be able to offer evidence of the victim's general reputation for violence along with such specific acts of violence which were reasonably related to the crime for which defendant stands charged (People v. Miller, supra). The possession of military memorabilia, whether in the form of weapons, souvenirs or pictures, fits neither of these categories. Evidence of the victim's possession of these items certainly does not constitute proof of his general reputation for violence nor is it proof of such specific acts of violence which are reasonably related to the crimes with which defendant is charged. Thus, proof of the existence of this collection or of the victim's interest in the military would not be admissible to support any justification defense that defendant might interpose.

Defendant also raises the issue that this evidence would be relevant on a defense raised by him at trial that at the time of the commission of the murder, he was acting under the influence of extreme emotional disturbance.

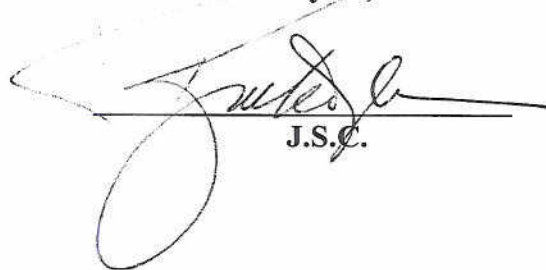
Penal Law § 125.25 subd 1 (a) provides that it is an affirmative defense to a charge of Murder in the Second Degree under that section when defendant can establish that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse..." CPL § 250.10 provides that in instances where a defendant intends to offer psychiatric evidence in support of this affirmative defense, he must serve upon the People and file with the Court a notice of his intention to offer psychiatric evidence. Said notice must be filed no more than 30 days after the entry of a not guilty plea to the indictment. In this instance, defendant did not file such notice with either the People or the Court and, therefore, may not offer any such evidence at trial. While CPL § 250.10 subd 2 does provide that in the interest of justice and for good cause shown, a defendant may permit such notice to be filed at any time prior to the close of evidence, no such showing has been made in this instance. In fact, at a conference held with the Court in this matter, defendant acknowledged on the record and in open court that he did not intend to offer psychiatric evidence.

However, the fact that defendant will not offer psychiatric evidence at trial does not preclude his assertion of the affirmative defense of extreme emotional disturbance at trial (*see, People v. Moye*, 66 NY2d 887, 498 NYS2d 767; *People v. Roche*, 98 NY2d 70, 745 NYS2d 775). Certainly the absence of such testimony will be relevant on the issue of whether or not sufficient evidence of the defense has been presented at trial. But psychiatric testimony, as important as it might be for a defendant seeking to establish extreme emotional disturbance, is not absolutely necessary. Thus, in this case, defendant may raise the defense that at the time of the murder, he was acting under the influence of extreme emotional disturbance despite the absence of any psychiatric testimony.

In order to prove such an affirmative defense, defendant must demonstrate, first, that he acted under the influence of an extreme emotional disturbance and, second, that there was a reasonable explanation or excuse for that disturbance (*see, People v Harris*, 95 NY2d 316, 318, 717 NYS2d 82). The first element, which is a subjective one, is met if there is proof that defendant's conduct at the time of the murder was actually influenced by an extreme emotional disturbance. In this regard, it must be noted that a defendant cannot establish an extreme emotional disturbance defense in the absence of evidence that he suffered from a mental infirmity not rising to the level of insanity (*People v. Roche, supra* at p. 75). The second, objective element requires proof that defendant's emotional disturbance was supported by a reasonable explanation or excuse. This is "determined by viewing the subjective mental condition of the defendant and the external circumstances as the defendant perceived them to be at the time, however inaccurate that perception may have been, and assessing from that standpoint whether the explanation or excuse for [the] emotional disturbance was reasonable" (*People v. Harris, supra* at p. 319, quoting *People v. Casassa*, 49 NY2d 668, 679, 427 NYS2d 769).

Accordingly, in light of the fact that defendant can interpose the defense of extreme emotional disturbance despite the absence of psychiatric testimony, he will be permitted to offer evidence that the conduct of the victim contributed to the existence of an extreme emotional disturbance on defendant's part. To this limited extent, the People's application is denied. If, as part of his proof, defendant offers evidence that the collection of military weapons and memorabilia was used by the victim to create an extreme emotional disturbance in the mind of the defendant, such evidence will be permitted. However, the Court must point out in the strongest terms, that the presentation of this defense, including comments and questions interposed during jury selection and opening statements, will be carefully limited by the Court to evidence tending to establish specific instances of actions on the part of the victim, in the presence of defendant, which contributed to this defendant's alleged mental infirmity. The Court will not permit defendant to offer evidence, ask questions or make statements, merely for the purpose of attacking the character of the victim or to suggest that possession of this collection alone somehow contributed to defendant's actions on February 27, 2005.

DATED: OCTOBER 3, 2006



J.S.C.