England and Wales Court of Appeal (Criminal Division) Decisions

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

No: 200700340/C2
Royal Courts of Justice
Strand
London, WC2A 2LL
9th July 2007

B e f o r e :

LORD JUSTICE LATHAM
(Vice President of the Court of Appeal Criminal Division)
MR JUSTICE ROYCE
MR JUSTICE KING

R E G I N A

v

DEAN JOHNSON

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MISS E LOWRY appeared on behalf of the APPLICANT

MR G LADENBURG appeared on behalf of the CROWN

HTML VERSION OF JUDGMENT

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1. THE VICE PRESIDENT: On 13th December 2006 in the Crown Court at Kingston upon Thames, this appellant, as he now is our having given leave to appeal, was convicted of one count of wounding with intent to do grievous bodily harm. Sentence was adjourned for the preparation of reports; and on 16th February 2007 he was made subject to a hospital order without limit of time under sections 37 and 41 of the Mental Health Act 1983.

2. He appeals to this court against conviction, his application for leave having been referred to this court by the Registrar. The issue is one of some importance, but for reasons that we shall give is not a matter which we consider enables this court to do other than follow the current authorities in relation to the application of the M'Naghten Rules, as they are described, in relation to verdicts of not guilty by reason of insanity.

3. The way the issue has arisen is as follows. The appellant in June 2006 was leading an independent life at a block of flats in Barnes. It is plain that he was subject at the time to delusions and to clear auditory hallucinations, which the psychiatrists, who have seen him as a result of the events which we shall describe, had no difficulty in diagnosing as amounting to paranoid schizophrenia.

4. In another flat in the block in which he lived was a man called Alan Taylor. It is plain that he was somewhat uneasy about the behaviour of the appellant and rightly so as it transpired. For on 20th June 2006 at about 3 o'clock in the afternoon the appellant forced his way into Alan Taylor's sitting room while Alan Taylor was watching television. The appellant shouted very aggressively, although it was difficult to make sense of what he was saying. He was holding a large kitchen knife with which he stabbed Alan Taylor firstly in the left shoulder. When Alan Taylor tried to protect himself he suffered four deep stab wounds and many small lacerations to his fingers. The applicant then, fortunately having not caused fatal injuries, left the flat and Alan Taylor was able to call the emergency services. He was found in a serious condition, having lost a great deal of blood. After two weeks in hospital, he was happily released and it would appear, again fortunately, that he has made a good recovery.

5. The story of that afternoon did not end at Alan Taylor's flat, because the appellant turned up at the home of a person who considered himself to be a friend, called Russell Pibworth, at Mortlake Cemetery. Russell Pidworth was not there but his father was. There was a serious incident in the doorway of that house, when it would appear as though the appellant was seeking to obtain entry, asking for Russell. He was carrying a knife, which was clearly the knife with which he had injured Alan Taylor. He was shouting and swearing and accused Russel of "noncing my sister". He threatened Russell Pidworth's father, who was there at the time, but bravely, it would appear, was able to at least calm him to the extent that eventually the appellant left. It subsequently transpired that Russell had two days earlier seen the appellant in the cemetery holding a knife and thrashing out at shrubs; and when he, Russell, asked what he was doing the appellant complained at that stage about an Indian man in a shop "who has been noncing my sister".

6. The police eventually were able to find the appellant. He was arrested and cautioned. He was ultimately interviewed in the presence of a solicitor and an appropriate adult. He said nothing when he was questioned.

7. In view of the obvious mental state of the appellant he was examined, in particular by two psychiatrists who were eventually called at his trial. The two doctors were Dr Barratt and Dr Craig.

Their reports made it plain that they agreed that the appellant, as we have indicated, was suffering from paranoid schizophrenia. They also agreed that, although that disease had not apparently been diagnosed at the time of the events which we have described, he had been suffering from that disease of mind at the time in question. They were also agreed that he knew the nature and quality of his acts. There was also the important agreement between the doctors that at the time he knew that what he was doing was against the law. Dr Barratt, however, was of the view that he did not consider that what he had done was wrong in the moral sense.

8. It is not necessary for the purposes of this judgment to go into detail about the accounts of the illness as described by Dr Barratt and Dr Craig; suffice it to say that they were both agreed that he suffered from delusions which involved him describing people being surrounded by "firewalls" which caused him disturbance. That was the context in which, apparently, he believed that the Indian man had been "noncing" his sister, and, secondly, that Russell Pidworth had been "noncing" his sister. He further described how those "firewalls" affected both his sister and his mother. Those delusions are difficult, clearly, for us to understand. But both psychiatrists were clear in their views that they were real to the appellant.

9. The trial commenced with a preliminary hearing to determine whether or not on that material the jury could properly be asked to consider a special verdict of not guilty by reason of insanity. The Recorder having heard the evidence of the psychiatrists, that is that he both considered their reports and he heard both of them cross-examined, concluded that there was no proper basis upon which the jury could consider the verdict of not guilty by reason of insanity in that the appellant knew that what he had done was against the law.

10. It is as a result of the judge's ruling in that respect that the trial proceeded as a straight forward issue as to the intent of the appellant in relation to the events as far as Alan Taylor was concerned. As far as the events at Russell Pidworth's home were concerned, there was a count which charged him with aggravated burglary. The main issue in relation to that count was a factual dispute as to whether the appellant had indeed entered the home. The jury acquitted of that count. The jury ultimately convicted the appellant of the offence of wounding with intent to do grievous bodily harm and was sentenced as we have indicated.

11. The sole ground of appeal with which we are concerned relates to the ruling made by the judge as to the evidence in relation to the appellant's mental condition on the application that he be entitled to ask the jury to enter a verdict of not guilty by reason of insanity.

12. The basis of the application on his behalf to that effect is that on a proper reading of the M'Naghten Rules he was entitled to that verdict if the jury concluded that, even though he knew that what he did was wrong as a matter of law, nonetheless, he did not consider that what he did was morally wrong. In other words, that on the basis of his mental condition at the time he felt that there was a moral justification for doing what he did.

13. It was accepted on behalf of the appellant, and is accepted before us today, that a defendant can only put forward the defence on the basis that there is material which could satisfy the jury on the balance of probabilities that the defence is available in accordance with the Rules as understood.

14. The Recorder directed himself as to the M'Naghten Rules in accordance with the passages in Archbold (set out at 17-78 and following). For the moment the most relevant part of the M'Naghten Rules with which we are concerned is the answer given to questions 2 and 3. It is to be remembered that the whole basis of what are described as the M'Naghten Rules in the answers given by the judges to a series of questions from the House of Lords which they dealt with without, it would appear, any argument by counsel. It has always been recognised that the M'Naghten Rules, accordingly, are rules which have to be approached with some caution.

15. The relevant words for our purposes are contained in the answers, as we have said, to the second

and third questions, as follows:

> "... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong."

16. It is the last phrase which causes the difficulty in the present case. What is meant by "wrong" in this context?

17. The present position in the textbooks in the United Kingdom is set out in Archbold at paragraph 17-83B in the following terms:

> "The defence must establish that the defendant did not know that his act was unlawful: see the answer to the second and third questions and R v Windle [1952] 2QB 826, 36 Cr App R 85, CCA. The judgment in Windle is in terms which suggest that knowledge of illegality is the sole criteria. This would mean that a defendant who proved that he did not know that his act was unlawful, but who knew that his act was regarded as morally wrong by the bulk of mankind was entitled to succeed in his defence. This was not the point that fell for decision in Windle, and it is submitted that such conclusion is inconsistent with the tenor of the answer to the second and third questions and with observations of the court in Codere, ante. It is submitted that the defence should fail if the defendant knew either that his act was unlawful or that it was morally wrong according to the standards of ordinary people."

18. In Blackstone's Criminal Practice it is put in the following terms at A3-18. After citing the phrase with which we are concerned, it continues:

> "This is an alternative to not knowing the nature and quality of the act and is the only sense in which an insane person is given a defence when none would be available to the sane (knowledge of moral or legal wrongness as opposed to knowledge of the facts which render it wrong, being generally irrelevant to criminal responsibility). The major question debated here is whether 'wrong' means legally wrong or morally wrong. It is suggested that the key to a proper understanding of this question is to recognise that the question is a negative one. If the accused *does* know *either* that his act is *morally* wrong (according to the ordinary standard adopted by reasonable men, per Lord Reading in Codere (1916) 12 Cr App R 21) *or* that it is *legally* wrong then it cannot be said that he does *not* know he was doing what was wrong. In the only two English decisions on the matter (Codere (1916) 12 Cr App R 21 and Windle [1952] 2QB 826), it was only necessary to hold that it was correct to tell the jury that the accused could not rely on the defence if he knew that his act was legally wrong. Both were murder cases and it was not seriously suggested in either that the accused did not know his act was legally wrong and yet knew that it was morally wrong. (On the contrary, Windle thought he was morally right to kill his suicidal wife and yet knew it was legally wrong since he said, 'I suppose they will hang me for this'.) Despite the blunt *obiter dictum* in Windle (at page 834) that "wrong' means contrary to law', it seems to me the better view that in the case of an accused who does not appreciate that his act is legally wrong but who does realise that it is morally wrong, the defence would not be made out."

19. The Recorder himself relied upon a passage in Smith and Hogan on Criminal Law. In that the editors referred to a decision of the High Court of Australia, R v Stapleton (1952) 86 CLR 358, which had refused to follow Windle. After making a detailed examination of the English law both before and after M'Naghten, it came to the conclusion that Windle was wrongly decided.

20. Smith and Hogan's comment is as follows:

> "Their view was that if [the defendant] believed his act to be right according to the ordinary standard of reasonable men he was entitled to be acquitted even if he knew it to be legally wrong. This would extend the scope of the defence, not only beyond what was laid down in Windle, but beyond what the law was believed to be before that case. While such an extension of the law may be desirable, it is difficult to reconcile with the M'Naghten Rules and to justify on the authorities. It is unlikely to be followed by the courts in England."

21. It seems to us that the point made in Smith and Hogan is well made. The decision of the High Court in Australia is, undoubtedly, a highly persuasive judgment as one would expect. It contains illuminating passages indicating the difficulties and internal inconsistencies which can arise from the application of the M'Naghten Rules, particularly if the decision in Windle is correct. But we return to the case of Windle in order to indicate the clear terms in which the court there construed the proper application of the answer to the second and third question to which we have referred. The Lord Chief Justice at the end of his judgment in that case stated in clear terms the following:

> "In the opinion of the court, there is no doubt that the word 'wrong' in the M'Naghten Rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified."

22. This statement of the law is unequivocal and has been, so far as we are aware, been doubted since then in this court.

23. The fact, however, remains that, although that has been the basis upon which the textbooks have set out the rule and its proper meaning, there is some evidence which is contained in material in articles, in particular, by Professor MacKay, for example, "Yet more facts about the Insanity Defence" [1999] Crim LR 714, that courts may have on occasions been prepared to approach the issue on a more relaxed basis. Nonetheless, in our view, the strict position at the moment remains as stated in Windle and in the passages in Archbold, Blackstone and Smith and Hogan to which we have referred.

24. This area, however, is a notorious area for debate and quite rightly so. There is room for reconsideration of rules and, in particular, rules which have their genesis in the early years of the 19th century. But it does not seem to us that that debate is a debate which can properly take place before us at this level in this case. For those reasons we dismiss the appeal.

25. THE VICE PRESIDENT: Yes, Miss Lowry. Miss Lowry, what you may wish to consider is asking us to certify a question of public importance for consideration by the House of Lords. I suggest you don't do it on the hoof. What I suggest you do, together with your colleague, is to see if you can encapsulate a sensible question, or questions, which can enable an agenda, so to speak, to be put to the House of Lords to determine whether it wants to take on board the task of revisiting the M'Naghten Rules.

26. MISS LOWRY: My Lord, that is what I will do.

27. THE VICE PRESIDENT: I would ask you to do it within 14 days.

28. MISS LOWRY: Yes.

29. THE VICE PRESIDENT: I am not going to indicate to you that we will give leave to appeal, I doubt if we will, because, in the usual way, we prefer to leave to the House of Lords to decide whether it wants to take up the issue, but we can at least help you, I am sure, to the extent we have indicated.

30. MISS LOWRY: My Lord, thank you.

31. THE VICE PRESIDENT: Thank you very much indeed both of you for your help.
