MURDER AND MENTAL HEALTH

Diminished responsibility, insanity and hybrid sentences: practical and tactical issues

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Homicide Act 1957 (as amended)

2.— Persons suffering from diminished responsibility.

(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

(a) arose from a recognised medical condition,
(b) **substantially** impaired D's ability to do one or more of the things mentioned in subsection (1A), and
(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are—

(a) to understand the nature of D's conduct;
(b) to form a rational judgment;
(c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

R v Mark Golds [2016] UKSC 61

- "Substantial" is capable of meaning either:

  (1) "*present rather than illusory or fanciful, thus having some substance*", or "*more than merely trivial*", or

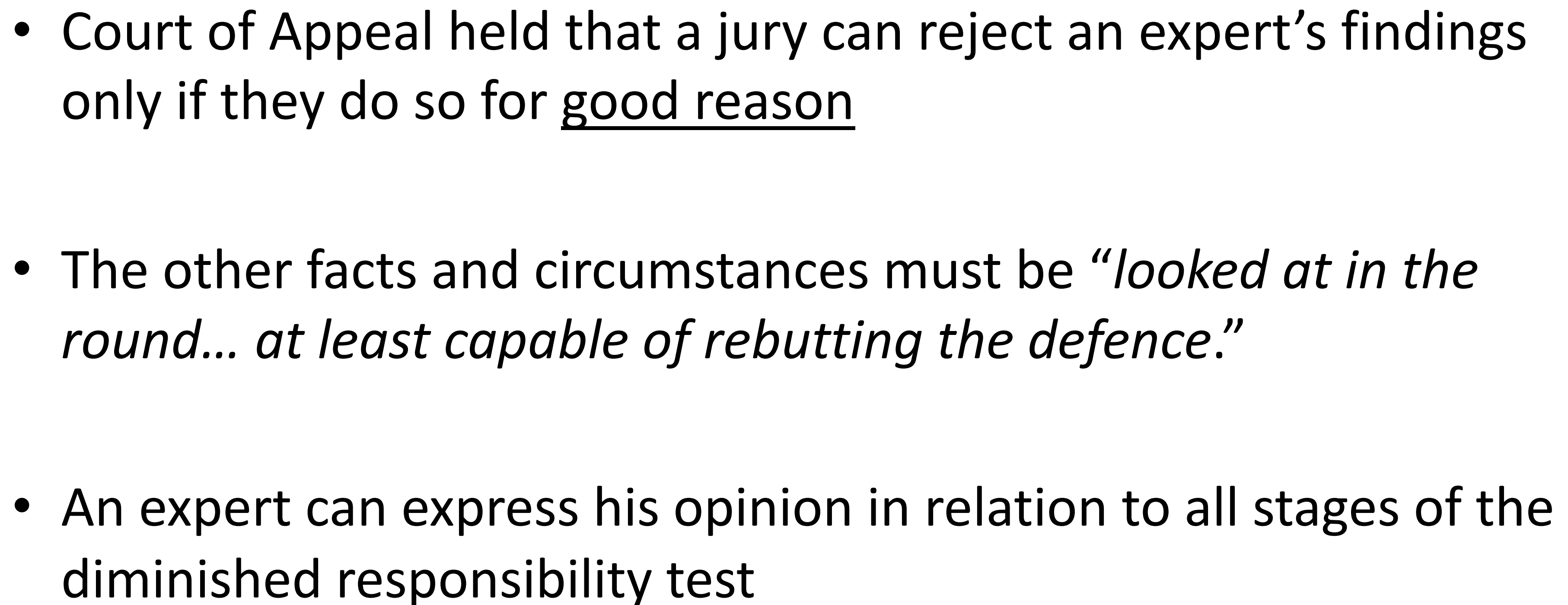
  (2) "*important or weighty*", as in "*a substantial meal*" or "*a substantial salary*"

- Supreme Court approved second version

Withdrawing murder from the jury

R v Brennan [2015] 1 WLR 2060:

- Bizarre killing with Satanic influences; defendant with a clear background of mental illness
- No comment interview; no evidence at trial; no dispute that D committed the killing
- Defence expert said D suffering from Schizotypal Disorder and Emotionally Unstable Personality Disorder, substantially impairing ability to a) form a rational judgment and b) self-control
- Prosecution expert agreed and not called at trial



- Court of Appeal held that a jury can reject an expert's findings only if they do so for good reason

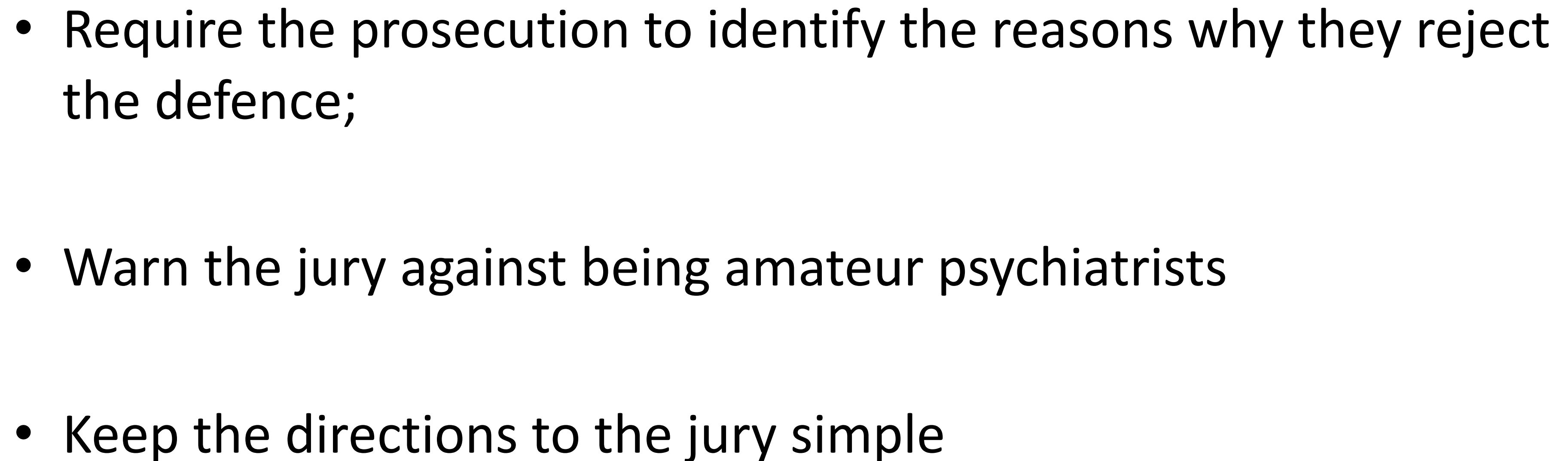
- The other facts and circumstances must be "*looked at in the round… at least capable of rebutting the defence*."

- An expert can express his opinion in relation to all stages of the diminished responsibility test

Supreme Court in *Golds*: judges should be cautious about removing murder from the jury because:

- The prosecution will probably have already proved killing with murderous intent, so there is bound to be a heightened public interest in a sensitive case
- The burden in diminished responsibility cases remains on the defence
- The new statutory test with several different questions includes some questions (e.g. “substantially” or causation) which are likely to be jury issues

Supreme Court in *Golds*: trial judges must:



- Require the prosecution to identify the reasons why they reject the defence;
- Warn the jury against being amateur psychiatrists
- Keep the directions to the jury simple

Blackman [2017] EWCA Crim 190 (Court Martial re Helmand killing):

"it will be a rare case where a judge will exercise a power to withdraw a charge of murder from a jury when the prosecution do not accept that the evidence gives rise to a defence of diminished responsibility."

Practical illustrations: “good reasons”

- *R v Eifinger [2001] EWCA Crim 1855* – facts relied upon by the psychiatrist all self-reported and uncorroborated
- Where the defence expert evidence is “*tentative or qualified*”, or the prosecution makes “*substantial inroads*” into it
- Where drink and drugs played a part
- Where other evidence at the time of the killing goes the other way e.g. meticulous advanced preparation, cover-up, etc
- Historic evidence as far back as childhood, or evidence subsequent to the killing, may be relevant: *Squelch [2017] EWCA Crim 204*
- It may be relevant if D continues at trial to deny that he was unwell or committed the killing: *Khan (Dawood) [2010] 1 Cr App R 4*

Arguments which may not be "good reasons"

- Where the killing was violent or sadistic – brutality can cut both ways
- Where the prosecution decline to call their own expert evidence
- Where the prosecution rely on matters already taken into account by the experts

Sentencing options

- Lord Thomas CJ in *Vowles [2015] 1 WLR 5131*:

"Where an offender who is to be sentenced suffers from a mental disorder the court has a number of alternatives:

(i) a ***hospital order under s.37*** *with or without a* ***restriction under s.41****—see [12] and following;*

(ii) a determinate or indeterminate sentence of ***imprisonment and direction for admission to hospital under s.45A****—see [17] and following;*

(iii) an ***interim order under s.38****—see [22] and following; and*

(iv) a ***determinate or indeterminate sentence*** *allowing the secretary of state to exercise his powers of transfer to a hospital under s.47 with or without a limitation order under s.49—see [24] and following".*

- The Court noted that hybrid sentences under s 45A had until then been under-used

- “*More recently this court has emphasised the need to examine the issues with great care and to take into account not merely the psychiatric evidence but also broader issues such as the extent of the culpability attributable to the mental disorder, the need to protect the public and the regime on release*” (paragraph 48).

Matters to which sentencing judges must have regard:

(1) the extent to which the offender needs treatment for the mental disorder from which the offender suffers,

(2) the extent to which the offending is attributable to the mental disorder,

(3) the extent to which punishment is required and

(4) the protection of the public including the regime for deciding release and the regime after release.

"There must always be sound reasons for departing from the usual course of imposing a penal sentence and the judge must set these out."

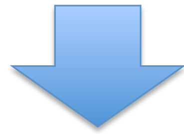
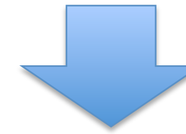
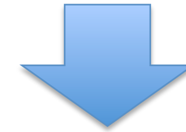
R v Edwards [2018] 4 WLR 64:

- "*Erroneous impression*" that s 45A hybrid sentences are the "*default position*"

- Can depart from a penal sentence, depending on nature of offence, culpability of D and the extent to which the offence was caused by D's illness

- Must consider release conditions carefully

Release and supervision conditions

Prison sentence / Hybrid order (s 45A)	Hospital order (s 37) + Restriction (s 41)
	
Parole Board	Mental Health Tribunal
	
Licence regime Supervision by Probation	Supervision by health services

Issues to keep in mind

- **Culpability** (if the mental illness is removed from the equation)
- Role of **drink, drugs, previous offending**, etc
- D's **insight** into his condition
- **Enforcement** of treatment / medication

- “(i) The first step is to consider whether a hospital order may be appropriate.
- (ii) If so, the judge should then consider all his sentencing options including a section 45A order.
- (iii) In deciding on the most suitable disposal the judge should remind him or herself of the importance of the penal element in a sentence.
- (iv) To decide whether a penal element to the sentence is necessary the judge should assess (as best he or she can) the offender’s culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions.”

- “(v) A failure to take prescribed medication is not necessarily a culpable omission; it may be attributable in whole or in part to the offender’s mental illness.

- (vi) If the judge decides to impose a hospital order under section 37/41, he or she must explain why a penal element is not appropriate.

- (vii) The regimes on release of an offender on licence from a section 45A order and for an offender subject to section 37/41 orders are different but the latter do not necessarily offer a greater protection to the public, as may have been assumed in *R v Ahmed* and/or or by the parties in the cases before us. Each case turns on its own facts…”

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