THE M'NAUGHTEN RULES

The High Court and Uncontrollable Impulse

The appeal taken by South Australia to the Privy Council against the High Court's ruling in *Brown* v. *R.*[1] has provided the first opportunity for this tribunal to analyse the High Court's decision in *Stapleton* v. *The Queen.*[2] It will be recalled that in *Stapleton* the High Court refused to follow *R.* v. *Windle*[3] and held that, if a person was suffering a disease, disorder, or defect of reason, he came within the M'Naughten rules if he was thereby incapable of reasoning with a moderate degree of sense and composure as to the rightness or wrongness of an act of killing or could not comprehend the significance of such an act. Brown was convicted of the murder of a station manager. His defence was that at the time he shot the deceased he was insane. Expert evidence was given as to the state of Brown's mind, and opinions differed as to whether Brown was able at the critical time to know that what he was doing was wrong. A police officer deposed that he asked Brown the question: "Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them?" and that Brown replied: "Yes. But I could not help myself." After being convicted and sentenced to death, Brown immediately appealed to the Court of Criminal Appeal on the grounds of misdirection and non-direction (amounting to misdirection) by the learned trial judge in the Supreme Court (Abbott J.), in that he, *inter alia,*

(a) failed to instruct the jury adequately as to the test in law to be applied by them in determining the issue of insanity as raised by the defence,

(b) failed to put the case for the defence to the jury,

(c) in directing the jury that the penalty was not their concern instructed them in such terms as were likely to deflect the jury from a calm and dispassionate determination of the issue of insanity.

It will be noticed that all of these grounds raised questions of interpretation of the trial judge's direction; there was no attempt to point out any erroneous statement of the law contained in the direction.

---

1. 33 A.L.J.R. 89; [1959] Argus L.R. 808. It is interesting to note that in seeking leave to appeal to the Privy Council the South Australian Government did not follow the practice begun in England in the case of *Beard,* [1920] A.C. 479. In Beard's case the Crown appealed on a point of law against the quashing of the prisoner's conviction by the Court of Criminal Appeal. It was announced that whatever the result of the appeal for the re-instatement of the murder conviction, the sentence of execution passed on Beard would not be carried out. This practice has since been followed in England in such circumstances. On the other hand, in Victoria, no such action was taken in the case of *The King* v. *Lee and Others,* 82 C.L.R. 133. There the three accused, who had been convicted of murder, appealed to the Full Court of the Supreme Court of Victoria. This Court by a 2-1 majority quashed the conviction and ordered a re-trial. The Crown appealed against the Supreme Court's decision and the High Court discharged the order and restored the convictions and sentences of the prisoners. They were hanged.
2. (1952) 86 C.L.R. 358.
3. [1952] 2 Q.B. 826.

With regard to ground (a), the Court of Criminal Appeal saw nothing in the case calling for a special direction that the issue of insanity involved an enquiry as to how far Brown was capable of reasoning when the act was committed. (*R.* v. *Porter*[4]; *Stapleton* v. *R.*[5]) "It seems to us," the Court said, "that if the special direction were called for in this case, it would be required in every case, and in *Stapleton's Case* it is expressly stated that this is not so." The Court disposed of ground (b) by pointing to the rule in *Immer and Davis*[6] viz. "a summing-up is sufficient if it is not unfair to the accused and if points are not withheld which it is reasonable to suppose are not already properly before the jury."[7] They found that Brown's defence was "before the jury from first to last through the whole hearing", and that, although Abbott J. had been "less helpful to the defence . . . than another Judge might, perhaps, have been", the summing-up was sufficient. They found, moreover, nothing in what Abbott J. said that would be likely to have the effect of deflecting the jury from a calm and dispassionate determination of the issue of insanity.

Brown now sought special leave to appeal to the High Court. As interpreted by the High Court, s. 35 (i) (b) of the Commonwealth Judiciary Act confers on the High Court an unfettered discretion to grant or refuse special leave in every criminal appeal, though the term "special leave" connotes the necessity for making a *prima facie* case showing special circumstances. (*In re Eather* v. *R.*[8]) But it is not easy to see any special circumstances in *Brown's Case,* and the High Court's judgment, which granted leave to appeal and upheld the appeal *instanter,* discloses on its face no such special circumstances.

It is submitted that the High Court's failure explicitly to justify its hearing the appeal was in this case particularly unfortunate. The grounds of appeal were those rejected by the Court of Criminal Appeal, and, as has been remarked, were concerned with the interpretation of the trial judge's direction and with speculation as to the possible effect of such direction on the jury. In such a case, the words of Evatt J. in *Packett* v. *R.*[9] would seem to be applicable:

> "As to whether the summing-up gave a fair presentation of the prisoner's defence, I am not disposed to dissent from Clark J's conclusion that it was too one-sided. But ordinarily such matters should be remedied by the Supreme Court sitting as the Criminal Appeal Court. In criminal appeals the responsibilities and duties of the Supreme Court are even greater and more onerous than in the case of ordinary civil matters; and it will be an evil thing if the administration of appellate criminal justice ever comes to be regarded as of relatively minor importance. While this court must reserve to itself an unfettered discretion to intervene in any given case which it regards as 'special', on the whole I think that this is not such a case."

---

4. (1933) 55 C.L.R. 183.
5. (1952) 86 C.L.R. 358.
6. (1917) 13 Cr.App.R. 22.
7. Id. at 24.
8. (1915) 20 C.L.R. 147.
9. (1937) 58 C.L.R. at 218.

Since State Courts of Criminal Appeal consist of experienced trial judges, there seems no good reason for the High Court to depart from the self-denying rule it pronounced in *Kelly* v. *R.*[10]

> "Where on an application for special leave to appeal to the High Court against a conviction, on grounds of misdirection, no question of general importance is involved, the only question being the meaning to be put upon the precise words used by the trial judge in the summing-up, special leave should be refused."

To what extent the High Court's judgment in *Brown's Case* is concerned simply with the meaning and effect on the jury of the words of the trial judge's direction may be established by a brief examination of that direction and the comments on it of the High Court.

Having given an unexceptionable direction as to the crime of murder, the general nature of a defence of insanity, the burden of proof, and that part of the M'Naughten Rules dealing with the "nature and quality of the act", Abbott J. turned to the defence that owing to a defect of reason from disease of the mind Brown did not know that he was doing wrong. A portion of the charge on this matter the High Court found "very much open to objection", as being "clearly erroneous in point of law". Abbott J. had said,

> "You may, perhaps, think that . . . the accused . . . was acting on an uncontrollable impulse. . . . If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law, and if that, in your considered view, is the only explanation of the death caused by the accused on 23rd November [1958], it is your duty to bring a verdict of guilty of murder."

At a later point Abbott J. returned to the answer that Brown had given to a question whether he knew at the time that it was wrong to point a loaded rifle at a person and shoot him; namely, the answer, "Yes. But I could not help myself." His Honour said,

> "These words may suggest to you that the accused was thereby setting up the defence of 'uncontrollable impulse' which you may think is the true explanation of what he did. But, as you will remember gentlemen, I have directed you, if that be the true explanation of what the accused did, that is no defence, and he is guilty in law of the crime charged."

The High Court said of this direction,[11]

> "It is a misdirection to say that if the jury think that the true explanation of what the accused did was that he acted under uncontrollable impulse, that is no defence. . . . Whatever the learned judge may have had in mind in using the word 'only' when he first gave the direction about uncontrollable impulse, the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder. . . ."

It is submitted with great respect that this is a strained and unreal interpretation of the trial judge's words. The learned judge's second

10. [1942] Q.W.N. 43.
11. [1959] A.L.R. at 814.

statement, above, was in terms referred back to his first statement, above; namely, that if uncontrollable impulse were the *only* explanation, it would be no defence. It seems plain that "true explanation" is therefore of the same force as "only explanation"; that is to say, an explanation to the exclusion of any other explanation. In the context of the direction, the only other explanation before the jury was that Brown did not know that he was doing wrong. Thus the reasonable interpretation of the judge's words is that if the jury considered that Brown did know that he was doing wrong, but considered further that he acted under uncontrollable impulse, they must nevertheless find him guilty. That this would be a good direction the High Court conceded:

> "It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him."

The High Court's interpretation gains whatever plausibility it may have from the ambiguity of "true": this is merely the ambiguity of isolation. But the High Court, pursuing their interpretation of Abbott J's direction, went on to hold that—

> "[a prisoner's domination by uncontrollable impulse] may afford strong ground for the inference that [he] was labouring under such a defect of reason from disease of the mind as not to know that he was doing wrong. The law has nothing to say against the view that mind is indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. . . . For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree."

Although the High Court quoted no authority for this proposition apart from an ambiguous *dictum* by Greer J. during the argument in *Ronald True*[12] it seems clear that this is not new doctrine in Australia. It appears to have been first formulated by Latham C.J. in *Sodeman* v. *R.*[13]:

> "Uncontrollable impulse in itself is not a defence, but uncontrollable impulse resulting from mental disease which brings about or is associated with an incapacity to know the nature and quality of an act or to know that it is wrong amounts to insanity which constitutes a defence. . . . Such an impulse may be one manisfestation of mental disease. It may have the effect of destroying or preventing knowledge that the act is wrong."

It is submitted that this whole doctrine is, if not unsound, unsafe. It may tend in practice to confuse the issue before the jury by putting before the jury what appears to be evidence but is in reality a mere label.

---

12. (1922) 16 Cr.App.R. at 167.
13. (1936) 55 C.L.R. at 203.

Uncontrollable impulse, it is said, may amount to evidence of the accused's inability to know that he was doing wrong. But the jury have before them, not a given state of uncontrollable impulse, but rather evidence of a state of mind which they may care to label uncontrollable impulse. The doctrine may therefore be accurately expanded to assert that evidence of a state of mind amounting to uncontrollable impulse may also amount to evidence of the accused's inability to know that he was doing wrong. While this seems, with respect, to be scientifically and legally accurate, as formulated by the High Court it appears to suggest that the mere application of the label "uncontrollable impulse" adds evidential force to the evidence to which the label is applied. The High Court's views may promote the fallacy that the state of mind labelled "uncontrollable impulse" can be evidence of M'Naughten insanity when the evidence deemed to be of that state of mind does not in itself indicate such insanity. Thus, in a case where the only evidence of the accused's insanity was, as in *Brown's Case,* the motiveless character of his act, the High Court's formula might well lead a jury to suppose that even if this motiveless character did not in itself establish M'Naughten insanity, nevertheless it might establish uncontrollable impulse, and that uncontrollable impulse "may afford the strongest reason for supposing that he is incapable of forming a judgment that his acts were wrong or even of understanding their nature." (Per Dixon J., *Sodeman* v. *R.*[14]) If the trial judge in such a case had adequately directed the jury that the *lack of motive* (as distinct from the hypothetical *uncontrollable impulse*) could be evidence of M'Naughten insanity—and there is nothing in the judgment of the High Court or in the judge's direction that suggests that in *Brown's Case* the judge failed in this respect—then he should be said to have given a sufficient direction. To direct the jury, further, that mere irresistible impulse is no defence can in no way affect the issue, unless of course the judge goes so far as to suggest that evidence of uncontrollable impulse overrules and invalidates evidence of the accused's inability to know that he was doing wrong. This suggestion may seem to be a radical departure from hitherto accepted views on the M'Naughten Rules, but it is submitted that the High Court's judgment in the *Brown Case* appears to stand or fall with their premise that Abbott J. *did in fact so charge* the jury.

To use the terminology of Evatt J. in *Sodeman* v. *R.*[15], Abbott J's charge was bad if he directed (as it is submitted, *contra* the High Court, that he did *not*) that evidence as to conation overrides evidence as to cognition. It is clearly correct to say, with Evatt J., that there is no absolute gap between cognition and conation, but it is submitted that the High Court in *Sodeman* and *Brown,* has tended to hold that evidence as to conation may be evidence as to cognition, compelling even in the absence of any further evidence as to cognition. In effect the High Court has gone a long way towards evading the ostensible prohibition against the defence of irresistible impulse by allowing evidence of abnormal states of mind to be considered by a jury under two categories, the first raising the question whether the evidence establishes lack of cognition in accordance with the M'Naugh-

14. *Id.* at 10.
15. *Id.* at 227.

ten Rules, and the second raising the question whether the *same* evidence, having failed to satisfy the jury under the first category, establishes lack of conation, which in turn by an ambiguous train of reasoning establishes the lack of cognition previously rejected on precisely the same evidence. Such an evasion seems worthy of an appeal to the ultimate tribunal.

If it can be said that the High Court's judgment up to this point in *Brown's Case* depends wholly on a confessedly "literal" interpretation of the trial judge's words in two isolated passages of his summing-up, much the same can certainly be said for the rest of the judgment. This has to do with ground (c) of the appeal, that dealing with Abbott J's direction to the jury that the consequences of their verdict did not concern them. The comments of the High Court on various other portions of the charge to the jury may be studied with profit: for example—

> "It is difficult to resist the impression that the position taken up by [the expert witness for the defence] was not placed before the jury by the summing-up in a way which could be understood or appreciated."

The Court of Criminal Appeal had met the same objection by pointing to the rule in *Immer and Davis*, which it considered to be the rule in England and South Australia, and, apparently, in N.S.W. and Victoria. They expressed some very slight doubt as to whether the High Court had had any intention of overruling the rule in the recent High Court decision in the case of *Athanasiadis* v. *R.*16. They decided that the High Court had, in fact, no such intention. But the High Court, by their complete failure in *Brown's Case* to consider or even mention this whole matter — or, indeed, any other question or opinion in the judgment of the Court of Criminal Appeal—have left the situation more uncertain and unsatisfactory than before.

The High Court's approach in the *Brown Case* highlights the difficulties of trying to put the ruling in *Stapleton* to practical effect in the trial court. Oliver Wendell Homes, Jr., in his letter to Harold Laski on December 17th, 1925, could perhaps be said to have pointed out a fallacy in the High Court's approach in these cases when he wrote:

> ". . . As to your doctors and judges on uncontrollable impulse I think the short answer is that the law established certain minima of social conduct that a man must conform to it at his peril. Of course as I said in my book it bears most hardly on those least prepared for it, but that is what it is for. I am entirely impatient of any but broad distinctions. Otherwise we are lost in the maze of determinism."

Without broad distinctions to put to a jury, there is little doubt that our trial courts, faced with insanity pleas, will continue to be lost in a maze which can only tend to hamper rather than aid the processes of the criminal law.

---

16. March, 1958. Unreported.