# THE DEFENCE OF INSANITY AND THE BURDEN OF PROOF.

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"In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth on just the same foot that every other defendant doth: the matters tending to justify, excuse or alleviate must appear in evidence before he can avail himself of them." Thus Sir Michael Foster stated the law in his "Discourse on Homicide," published in 1762, and in an address to the 1935 Australian Legal Convention, "The Development of the Law of Homicide,"[1] Mr. Justice Dixon expresses the opinion that this passage accurately represented the law when it was written. In 1935, however, the House of Lords pronounced that "When dealing with a murder case the Crown must prove (a) death as a result of the voluntary act of the accused, and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of the voluntary act of the accused which is (i.) intentional and (ii.) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."[2] For, as Lord Sankey, L.C., had earlier observed with greater eloquence than historical accuracy, "Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."[3] Foster's statement of the law so far as it related to the defences of misadventure and self-defence is thus no longer sound; indeed, the speech of Lord Sankey is a gallant but unavailing attempt to show that it never had been. However unconvincing to the legalistic mind the manner of abolishing the old rule may be, there will be few who will disagree with Dixon J. that "it is well that it was done. The rule appeared to be an incongruity. Its removal tends to make the law symmetrical; and it completed a process of legal evolution."[4]

1. 9 A.L.J. (Supp.) 65.
2. *Woolmington v. Director ofPublic Prosecutions* (1935) A.C. 462 at p. 482.
3. Ibid. p. 481.
4. 9 A.L.J. (Supp.) 65.

The symmetry is marred, however, by the specific exception which Lord Sankey makes of the defence of insanity. In ancient times misadventure, self defence and insanity stood on the same basis when offered in exculpation of the accused. Originally they afforded no ground of acquittal, for the law was concerned with the objective fact of the slaying, and not with the state of the accused's mind when he did the act.

If accident, necessity or infirmity appeared it was recognised that the accused should be pardoned, but he needed a pardon to escape the legal consequences of his act.[5] By the 14th century however it would seem that insanity had become a defence,[6] for Hale's statement: "If a person during his insanity commits homicide or petit treason, and recovers his understanding, and being indicted and arraigned for same pleads not guilty he ought to be acquitted, for by reason of his incapacity he cannot act *felleo animo*"[7] is supported by citations 12 H. 3 Dower 183, Forfeiture 33, 21 H. 7 31 (b), and indicates that in his view by the 14th century insanity was a ground of acquittal and not merely of pardon. It would seem that the jury could either find a general verdict of not guilty, or a special verdict that the accused had done the act, but at the time of doing it he was not of sound mind, but either verdict resulted in an acquittal.[8] In the year 1800 came *Hadfield's* case,[9] where, as a result of the intervention of Lord Kenyon C.J., the jury returned as their verdict "we find the prisoner is Not Guilty, he being under the influence of insanity at the time the act was committed."[10] Lord Kenyon had been insistent that "the prisoner, for his own sake, and the sake of society at large must not be discharged," and consequently he was detained in custody, as Lord Campbell drily observes, "somewhat irregularly, there being then no law to authorise the detention."[11] In the same year the Act 39 & 40 *Geo. III* c. 94 was passed, and by it the jury were required specially to find whether the accused was insane at the time of the commission of the offence, and to declare whether such person was acquitted by them on account of such insanity, and on such a finding he was to be detained in strict custody during His Majesty's pleasure.[12] In England on the insistence of Queen Victoria the verdict was altered in 1883 to the verdict of "guilty but insane" which, however satisfying it may have been to the Queen, is from the point of view of legal theory completely illogical.[13] Despite its form, however, the altered verdict is still a verdict of acquittal, and the prisoner cannot appeal against it.[14]

On 19th June, 1843, all the judges (except Maule J.) gave to the House of Lords their famous answers which have come to be known

5. Pollock & Maitland, Vol. II., pp. 479-8, *Felstead v. Director of Public Prosecutions* (1914) A.C. 534.
6. Holdsworth, Hist. Eng. Law Vol. III., p. 372.
7. Pleas of the Crown, Vol. I., p. 36.
8. *Felstead's* case (supra) and see 10 A.L.J. 95. See also Crimes Act (Vic.) 1928, Sec. 6.
9. 27 St. Tr. 1281.
10. Ibid. 1356.
11. Lives of Chief Justices, Vol. IV., p. 109.
12. Cf. Victorian Crimes Act, 1928, Sec. 451.
13. Trial of Lunatics Act, 1883 (46 & 47 Vic. c. 28).
14. *Felstead's* case (supra).

to the profession as *McNaghten's* case.[15] For nearly ninety years these answers have been taken as the depository of the law relating to the defence of insanity. When one recalls the debates to which these answers have given rise and the vigorous criticism made of them both by lawyers and medical men,[16] one is disposed to feel that Maule J. spoke with accurate prevision when he answered the Lords that he felt great difficulty in answering the questions "from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials." All efforts to add to or widen the *McNaghten* formula has so far been in vain,[17] and even in *Woolmington's* case we find that Lord Sankey went out of his way to exclude *McNaghten's* case from his observations and to refer to it as deciding that "the onus is definitely and exceptionally placed on the accused to establish" the defence of insanity. Any proper examination of the question of insanity as a defence brings us perilously close to the investigation of the whole theory of criminal responsibility,[18] and as the present system of criminal law has the undoubted advantage that it works, it is to be protected from too destructive an investigation. The criminal courts are not the places where the innate, impenetrable, irrational complex of impulses and reactions we call the will[19] can be adequately enquired into. The assumption that every man is responsible for what should have appeared to him at the time he did a given act the natural consequences of his conduct lies at the root of the whole administration of the criminal law, and no attempt to whittle it down can be lightly permitted. It is this feeling coupled, perhaps, with "a mistrust of the tribunal of fact—the jury,"[20] that is at the bottom of the reluctance of the courts to embark on any examination of the subject of insanity as a defence, and whilst any lawyer who has given thought to the *McNaghten* rules must feel that they are a very inadequate and unsatisfactory statement of what the law should be, he can readily understand, even if he does not endorse, the unwillingness of the courts to embark on judicial adventuring in such uncharted seas, particularly when there are two bodies, the jury and the Executive, which may be comfortably assumed to be likely to ensure that too great injustices shall not flow from the limitations of the formula. It is certain that the dead hand of *McNaghten's* case will not always control this phase of the law, however, and it is likely that the aspect in connection with which advance will first be made is the burden of proof. The judges answered the second and third questions in *McNaghten's* case that "the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to

15. 10 Cl. & F. 200, Russell on Crime, 9th ed., Vol. I., p. 22. For a criticism of the authority of *McNaghten's* case, see Stephen History Crim. Law, Vol. II., pp. 153-4.
16. Cf. Stephen, Hist. Crim. Law, Vol. 11, p. 159.
17. See *Sodeman v. The King* (1936) 55 C.L.R. 192, 42 A.L.R. 156 (1936) 2 A.E.R. 1138 (P.C.).
18. Cf. Rolfe B. in R. *v.* Stokes (1843) 13 C. & K. 185, Parke B. in R. *v. Barton* (1848) 3 Cox. C.C. 275, Russell (op. cit.) pp. 27-28.
19. H. L. Mencken, Treatise on Right & Wrong (London, Kegan Paul) (1934), p. 71.
20. Cf. Dixon J., *Thomas v. The King* 59 C.L.R. 279 at p. 309.

establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing 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 he was doing what was wrong."

One may pause to wonder what answer the judges of 1843 would have returned had they been asked where the burden of establishing circumstances of necessity or accident lay when a homicide was proved. Would they have used similar terms, and have said that to establish such a defence, it must be clearly proved that at the time of committing the act, the party accused acted in self defence or caused the death by accident?[21]

It has now been established that clear proof of insanity is given if it is made to appear to the jury that on the balance of probabilities, the accused was insane at the time of committing the act charged as a crime.[22] What, then should be the direction to the jury? Ought the jury be told, in effect, that once the fact of killing by the prisoner is established beyond reasonable doubt, and no other circumstance of exculpation is urged by the prisoner except insanity at the time of the commission of the act, they are to find the accused guilty unless he has satisfied them on the balance of probabilities that the evidence (which need not be evidence tendered by him)[23] shows that he was insane at the relevant time? Or should the jury be directed, where insanity is the defence, that they should acquit unless they are satisfied on all the evidence that the Crown has established beyond reasonable doubt every element required by law to constitute the crime? Although until recently the direction has usually been in the first form, it is submitted that the direction should be that it lies on the Crown to establish every ingredient beyond reasonable doubt, for, as Harlan J. asked in *Davis v. U.S.A.*,[24] "How, upon principle or consistently with humanity, can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to a fact which is essential to guilt, namely the capacity in law of the accused to commit the crime?"[25] The assertions of Lord Sankey in *Woolmington's* case concerning the defence of insanity are *obiter dicta* only, and if it be remembered that in the development of the law insanity as a defence stood on the same footing as self-defence and misadventure it may well be doubted that the judges in *McNaghten's* case thought they were "definitely and exceptionally" placing on the accused the onus of establishing that defence. There is no conclusive authority which requires the jury to be directed in the first form, and those authorities which suggest that this direction should be given are by no means as impressive as those which the House of Lords disposed of successfully in order to reach the conclusion in *Woolmington's* case.

The criminal law usually develops slowly, and it is rarely that it yields an established position to a frontal attack, which makes *Wool-*

21. See Stephen, Digest Crim. Law, 1st Ed. (1877) Art. 230.
22. *Sodeman v. The King* (*Supra*).
23. *R. v. Dart* (1878) 14 Cox. C.C. 143.
24. 160 U.S. 469 at p. 488.
25. See also 3 A.L.J. p. 328, 10 A.L.J. p. 3.

*mington's* case the more remarkable. The tendency to mould the defence of insanity into the symmetry that *Woolmington's* case went near to achieving is clearly shown by a comparison of three charges delivered within the last two decades, and I shall quote extracts from them to enable that comparison to be made. The first does not contrast the nature of the burden resting on the prisoner with that imposed on the Crown; the second clearly enunciates the principle that the burden resting on the prisoner is satisfied by showing a balance of probability; and the third is obviously framed to bring the defence of insanity within the principle of *Woolmington's* case.

In 1922, in *The King v. Ronald True,*[26] McCardie J. directed the jury thus: "The charge against the prisoner is wilful murder. If a man takes the life of another without just cause he is *prima facie,* guilty of wilful murder. The burden, of course, rests upon the Crown of satisfying you that the man charged is the person who committed the murder alleged. On the other hand, if that man sets up the defence of insanity the burden, in law, rests upon him of satisfying you that he was insane at the time of the murder, so that he ought not to be found guilty of the offence charged."[27] "The law assumes a man is *prima facie* sane; he must satisfy you otherwise if he desires to escape the consequences of a serious crime."[28]

In *Rex v. Porter,*[29] Dixon J. sitting at Canberra in 1933, in the exercise of the original jurisdiction of the High Court in a trial on indictment for murder, told the jury that "the crime of murder is committed when, without any lawful justification, without any excuse, without any provocation, a person of sufficient soundness of mind to be criminally responsible for his act intentionally kills another. To begin with, every person is presumed to be of sufficient soundness of mind to be criminally responsible for his actions until the contrary is made to appear upon his trial. It is not for the Crown to prove that any man is of sound mind; it is for the defence to establish inferentially that he was not of sufficient soundness of mind, at the time that he did the acts charged, to be criminally responsible. On the other hand, every person is to be presumed to be innocent of the acts charged against him until it is proved to the satisfaction of the jury beyond any reasonable doubt that he committed them.

You will see, gentlemen, that the presumptions are not of equal strength. The criminal law requires that, when a crime is charged, the things which constitute that crime shall be proved to the complete satisfaction of the jury; that they shall be so satisfied that those things were done that they have no reasonable doubt about it. On the other hand, when that is proved, and the jury turn from the consideration of the question whether the things which constitute the crime were done to the question whether the man who did them was criminally responsible for his actions or was not, because of unsoundness of mind at the moment, it is necessary for the accused person to make out positively,

26. Central Criminal Court, London, May, 1922, Notable Brit. Trial Series.
27. *Ronald True,* Notable Brit. Trials, p. 243.
28. Ibid. p. 246.
29. 55 C.L.R. 182.

upon a balance of probability, that he was not criminally responsible, and that he was not of such a mental condition at that time as to be criminally responsible. He has not got to remove all doubt from your minds. He, or rather his counsel, has merely to make it appear to you as more probable on the whole that that was the state of his mind at the time he did the things charged, than otherwise."

In the Supreme Court at Ballarat on the 13th and 14th December, 1938, Thomas William Johnson was tried for the murder of two men and in the result, convicted and executed. His defence was that he was insane at the time of the killings. Mr. Justice Lowe presided at the trial, and in the course of his charge said:[30] "The question is, did the accused wilfully kill those two men that are now dead? In every criminal case the Crown has to establish the guilt of the accused to your satisfaction beyond reasonable doubt, and that burden, as we lawyers call it, has to be satisfied in regard to each element of the crime, both the killing and the wilfulness of it. You will probably have no doubt when you consider the evidence that the accused did kill both of these men who are now dead. The point upon which the debate turns in this case is wilfulness, and I am emphasising at the very outset that the onus is upon the Crown to satisfy you beyond reasonable doubt that the killing was wilful."

Later, his Honour observed: "You have been told quite rightly by counsel on both sides that what you have to consider is not the state of the mind of the accused now or at any time prior to the 3rd October, but his state of mind on the 3rd October when these men were killed. The law with regard to the defence of insanity, as I understand it, is this, that every man is presumed to be sane until the contrary is shown, and when a prisoner sets up, in answer to a charge of a crime, that he was insane, it is for him to satisfy you that he was insane at the time of the act charged. And what insanity means, as I understand it, is this, and I propose to give it to you in language which has been used time and time again during the last hundred years: "To establish 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 the quality of the act he was doing or, if he did know it, not to know that what he was doing was wrong." I am going to expand that just a little. What I understand by the nature and quality of the act is this: The nature of the act was the using of an axe here to attack these two men, to inflict wounds upon them, and what is necessary to be established as the first part of that defence is this, that the accused did not know that he was attacking these men with an axe—that he was inflicting wounds upon them. As to the quality of the act it is not necessary, as I understand it, to show that he knew that he would kill those men by what he was doing. If he was doing an act of the kind that he knew would inflct grievous bodily harm upon these men, that, I think, would be understanding the nature and the quality of the act he was doing. But there

30. Not reported. The extracts given are taken from the official transcript of the trial, as revised by the learned trial judge, a copy of which has been made available to me through the courtesy of Mr. Cyril Knight, Secretary to the Crown Law Department.

is a second branch to the requirement of the defence which I read to you and that is that if he did know the nature and quality of the act, then he did not know that in doing it he was doing wrong, and the accused must establish both those things. He must satisfy you that when he attacked, as I assume for this purpose you will find that he did attack, those men he did not know the nature of the act and the quality of the act he was doing or that if he did he did not know that in attacking them he was doing wrong. If he satisfies you of that, gentlemen, then that will be a defence to the charge which has been made against him. Counsel for the Defence has quite rightly told you that that burden upon the accused is not a burden to satisfy you beyond reasonable doubt; he has merely to satisfy you on the balance of probability, on the preponderance of the evidence you have heard, and I think that merely means this, that if that defence is established then you would not be satisfied with one of the elements of the crime I started out to describe to you, that is to say, a wilful killing by a sane person. Even if you are left in reasonable doubt as to the wilfulness of the act by reason of the defective mind of the accused, then that too I think would be a defence," and when concluding his summing up he returned to the question in these terms: "It seems to me you will have no difficulty in arriving at the first step, that the accused did kill these two men on the 3rd October as is charged. The whole burden of your investigation will come as to the question of whether he wilfully killed them, and that is wrapped up in this case with the question of insanity as I have explained it more than once to you. My last words to you are these:—that is is for the prisoner to satisfy you that he was insane at the time he did this deed, if you think he did it; but if you are left in reasonable doubt at the end of the case as to whether by reason of insanity he did wilfully kill these two men, then he is entitled to be acquitted. If you have no reasonable doubt, that, I suggest to you, is a verdict of guilty of murder. If you are left in reasonable doubt by reason of the defence of insanity which has been raised, I suggest to you that the verdict is not guilty on the ground of insanity."[31]

This charge is inspired by the modern view which impelled the decision in *Woolmington's* case, and which is well expressed in the words of Mr. Justice Dixon in the address to which earlier reference is made, that "it has become incredible that the ordinary presumption of innocence should not cast upon the Crown, from first to last, the burden of proving beyond reasonable doubt the guilty intent of the accused."[32]

In a striking passage Stephen has written "If it be asked why an accused person is presumed to be innocent, I think the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger that the individual, and is capable of inflicting

31. The learned trial judge evidently thought that the evidence of insanity, if believed, affected the intention of the accused. Consistently with this charge there may be a difference of emphasis where the unsoundness of mind does not necessarily affect the intention, e.g., in a case of delusional insanity where the prisoner, under the mistaken belief that deceased was an animal, intentionally killed him. Compare report of Lord Atkin's Committee, Cmd. 2005, Trial of Ronald True, Notable British Trial Series, p. 281.
32. 9 A.L.J. Supp. 65 at p. 67.

so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous."[33]

It is submitted that the time has come to lay aside, in respect of the defence of insanity, that fear of the consequences of innovation which the history of criminal law reform has shown so often to be unfounded, and to apply the principle of *Woolmington's* case generally, so that society may display in the administration of the criminal law at least an equal generosity to him who pleads insanity as to him who pleads misadventure or self-defence.

33. Hist. Crim. Law, Vol. 1, p. 354.