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'RATIONAL' RECONSTRUCTION: SUBSTANTIALLY IMPAIRED ABILITY TO FORM A RATIONAL JUDGMENT

R v Conroy [2017] EWCA Crim 81 and R v Snelch [2017] EWCA Crim 204

Manslaughter; Diminished responsibility; Recognised medical conditions; Substantial impairment; Rational judgment

This note examines two cases, *Conroy* and *Snelch*, which were decided by the Court of Appeal in the first week of February 2017. Both cases raised a number of issues relating to the special and partial defence to murder of diminished responsibility, in particular the meaning and scope of s. 2 of the Homicide Act 1957 ('the 1957 Act'), as amended by s 52 of the Coroners and Justice Act 2009 ('the 2009 Act'). Section 2 (as amended) requires the accused to prove, on the balance of probabilities, that at the time of the killing the accused had an 'abnormality of mental functioning'; arising from a 'recognised medical condition'; which 'substantially' impaired the accused's ability to understand the nature of their own conduct, form a rational judgment and/or exercise self-control; and which provided an explanation for the killing.

R v Conroy

Jason Conroy (C) appealed against his conviction for the murder of Melissa Mathieson (M). It was not disputed that C had killed M by strangling her. What was disputed was whether he should be convicted of murder or manslaughter on the ground of diminished responsibility. C had an autistic spectrum disorder (ASD) and mild learning difficulties. From a relatively young age his behaviour had been marked by violent incidents and 'inappropriate and highly sexualised behaviour' (at [8]). He had been taken into care as a child and by his late teens he lived in a special residential home in Bristol for young people with Asperger's Syndrome. M was a resident living on another floor of the home. A number of specialist staff also lived at the home. In October 2014, M complained to the staff that C appeared preoccupied with her and that she felt intimidated and afraid of him. On 12th October, late in the evening, C went upstairs to M's room, which was unlocked, whilst she slept. There, he strangled M to subdue her, then tried to drag her to his room. However, he dropped her, attracting the staff's attention. M was found lying unconscious on the landing outside her room at around 11.30pm. She could not be resuscitated and died four days later. C explained to the home's general manager that he had intended to have sex with M once she was in his room, but did not want her to remember and that it would 'all be forgotten about'. C was charged with murder and appeared before His Honour Judge Cottle and a jury at Bristol Crown Court in October 2015.

At the trial, although C did not give evidence, it was accepted that he had killed M. The sole issue for the jury was diminished responsibility. Three psychiatrists for the defence (Dr Rooprai, Dr Amos, and Professor Fazel) and one for the Crown (Dr Sandford), agreed that C suffered from an 'abnormality of mental functioning', arising from a 'recognised medical condition', namely ASD. However, they disagreed whether it substantially impaired his ability 'to form a rational judgment'. Dr Rooprai, Dr Amos, and Professor Fazel agreed that it did; Dr Sandford said it did not. C was convicted of murder. He appealed, submitting that, during his summing up, HHJ Cottle had misdirected the jury by

- (1) asking them (in effect) to decide whether C's ability 'to rationally form a judgment' was substantially impaired, whereas s. 2 of the 1957 Act referred to the ability 'to form a rational judgment'; and
- (2) drawing a distinction between C's thought processes (on one hand) and 'the outcome of that process' (on the other).

HELD, DISMISSING THE APPEAL, that much of C's argument on appeal was 'over-refined' (at [28] and [37]). The jury were 'fully entitled' to convict C of murder (at [41]). The jury had not been 'materially misdirected in any sense' (at [41]). If anything, the trial judge's direction was 'positively helpful' to the defence, rather than adverse to it (at [39]). At one point, HHJ Cottle had said that 'on any view' C's killing of M in order to have sex with her was 'irrational' – such an instruction 'could only have favoured the defence who, after all, were seeking to demonstrate irrationality' (at [39]).

In assessing whether or not an abnormality of mental functioning had impaired the accused's 'ability to form a rational judgment', it was not always possible to 'neatly separate the decision-making process from the actual ultimate decision' (at [30]), to 'divorce that consideration relating to a defendant's thinking processes from the actual outcome' (at [37]). In some cases it may be 'extremely difficult' to separate out the defendant's thought processes and the outcome of those processes; indeed in some cases 'the two may be entirely enmeshed' (at [37]).

The jury were 'by no means necessarily confined' to 'the mental functioning of the defendant at the time of the killing'; rather, the jury 'may properly assess all relevant circumstances preceding... the killing as well as relevant circumstances following the killing' (at [32]). The jury's assessment was 'likely' to 'involve an appraisal of the impact of any abnormality of mental functioning both on a defendant's decision-making generally and also on the particular decision to kill the victim specifically' (at [32]).

An 'ability to form a rational judgment' should not be conflated with the ability to differentiate right and wrong. The wording of s. 2 was 'altogether more open-ended' than that (at [33]). A killing could simultaneously be both 'rational' (for the purposes of the 1957 Act) and 'wrong', in the general sense of that word; it was 'simply not sustainable' to suggest that an unlawful killing could never be rational (at [34]).

There was 'a potential danger' in 'straying beyond what is actually stated' in s. 2 of the 1957 Act. The elements of s. 2 should 'so far as possible not be glossed in a summing up to the jury' (at [37]). Indeed, 'the aim in a summing up in cases of this kind should... be to focus on the actual provisions of the section without undue elaboration' (at [38]).

R v Squelch

David Squelch (S) appealed against his conviction for the murder of James Wallington (W). It was not disputed that S had killed W, nor that he had done so intending to do at least serious injury (W had been stabbed 14 times). What was disputed was whether he should be convicted of murder or manslaughter on the ground of diminished responsibility. On the morning of 9th March 2015, S had stabbed W with a Bear Grylls hunting knife at the Cory Environmental Recycling Centre in Tunbridge Wells where they both worked. S threw the knife into some bushes but then walked to the site supervisor's office to tell him that he had stabbed W, apparently because W kept 'going

on about S's mother, who had died some 13 months' previously. S was charged with murder and appeared before Her Honour Judge Williams and a jury at Canterbury Crown Court in March 2016. (This was a retrial, S having first appeared before a jury in October 2015; however, that jury had failed to reach a verdict and was discharged.)

At the retrial, S relied on diminished responsibility. Two psychiatrists for the defence (Dr Bott and Dr Lockhart) and one for the Crown (Dr Tripathi) agreed that S had an abnormality of mental functioning, based on a recognised medical condition, namely paranoid personality disorder. However, they disagreed whether it 'substantially' impaired his ability to form a rational judgment. Dr Bott and Dr Lockhart agreed that it did; Dr Tripathi said it did not. S was convicted of murder. He appealed, contending *inter alia* that the trial judge had failed to give the jury appropriate directions concerning the meaning of the word 'substantially'. HHJ Williams had told the jury that 'substantial' was an 'ordinary English word... it means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment' (at [47]). S argued that the trial judge should have elaborated by telling the jury that 'as a matter of law a partial impairment may be capable of coming within the ambit of section 2' (at [37]).

HELD, DISMISSING THE APPEAL, that the conviction was safe (at [54]). The issues raised during the trial 'were properly and clearly identified and the evidence was appropriately marshalled by reference to those issues' (at [51]). With specific reference to causation, S's argument on appeal 'perhaps is correct: in the sense that the impairment does not have to be total'. However, 'the fact remains that the relevant word as used in the section is "substantially" [and] it simply is not right to state as a bald proposition of law that partial impairment equates with substantial impairment' (at [48]). Consequently, 'it was actually desirable that the judge confined her direction on the word "substantially" as she did' (at [48]).

Commentary

A 'recognised medical condition'

The phrase 'recognised medical condition' was introduced into s. 2 of the 1957 Act by the 2009 Act; previously, any 'inherent cause' sufficed. Conditions accepted prior to the amendment of s. 2 therefore have to be approached with caution, as an 'inherent cause' may not necessarily qualify as a 'recognised medical condition'. Nevertheless, the case law which developed under the original s. 2 and that which continues to develop under the amended s. 2 shows a high degree of consistency.

In *Conroy*, all four psychiatrists agreed that Autism Spectrum Disorder is a 'recognised medical condition' for the purposes of s. 2 of the 1957 Act and the Court of Appeal saw no reason to disagree with that. This aspect of *Conroy* echoes two cases decided under the original s. 2, namely *Jama* [2004] EWCA Crim 960 and *Spencer* [2013] EWCA Crim 238. In the former case, the Court of Appeal quashed a murder conviction and substituted a manslaughter conviction on the ground of diminished responsibility, based on evidence that the accused had Asperger's Syndrome. Hooper LJ said that 'one of the Autistic Spectrum Disorders is Asperger's Syndrome... There was no dispute that Asperger's Syndrome is an abnormality of the mind for the purposes of the defence of diminished responsibility' (*Jama* at [14] and [18]). The case of *Spencer*, an unsuccessful sentencing appeal, was heard in the Court of Appeal in February 2013, more than two years after s. 2 was amended, but the killing occurred in October 2008, and hence the original s. 2 applied. The accused

offered a plea of guilty to manslaughter. Psychiatrists called for both the Crown and the defence agreed that the accused had Asperger's Syndrome, and the plea was accepted.

In *Squelch*, all three psychiatrists agreed that paranoid personality disorder was a 'recognised medical condition' for the purposes of s. 2; again, the Court of Appeal saw no reason to question that. This aspect of *Squelch* is redolent of the pre-reform case of *Martin* [2001] EWCA Crim 2245, [2003] QB 1, where a murder conviction was quashed and one of manslaughter, on the ground of diminished responsibility, was substituted. This decision was based on 'credible' evidence of the accused's paranoid personality disorder (*Martin* at [56], [58] and [60]).

'Substantial' impairment

In *Squelch*, HHJ Williams directed the jury (in March 2016) that 'substantially' meant 'less than total and more than trivial'. That direction was clearly based on the well-known judgment of Edmund Davies J (as he then was) in the Court of Criminal Appeal in *Lloyd* [1967] 1 QB 175. In that case, Edmund Davies J approved the trial judge's direction to the jury that 'substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal' (*Lloyd* at pp.178-179).

HHJ Williams' direction, to the effect that any impairment which was 'more than trivial' constituted a 'substantial' impairment, was – if anything – favourable to the accused. In *Golds* [2016] UKSC 61, [2016] 1 WLR 5231, decided in November 2016, Lord Hughes (with whom the rest of the Supreme Court agreed) said that 'in the context of diminished responsibility an *impairment of consequence or weight* is what is required to reduce murder to manslaughter, and not any impairment which is greater than merely trivial' (*Golds* at [29]; emphasis added).

In *Squelch*, Davis LJ's description of the appellant's suggestion that a 'partial' impairment is one which is necessarily 'substantial' as one which 'simply is not right' (at [48]) is consistent with the Supreme Court's ruling in *Golds*. Similarly, Davis LJ's assertion that it would be 'normally much better for a trial judge to try to confine the instruction to the actual words of [s. 2] without any undue elaboration or gloss' (*Squelch* at [35]) is consistent with the Supreme Court's approach. On this point, Lord Hughes said that whilst words like 'significant' and 'serious' were 'acceptable ways of elucidating the sense of the statutory requirement', it was 'neither necessary nor appropriate for this court to mandate a particular form of words in substitution for the language used by Parliament' (*Golds* at [40]).

'Ability to form a rational judgment'

Both *Squelch* and *Conroy* provide useful guidance on the meaning of the phrase 'ability to form a rational judgment', in particular the word 'rational'. This concept of the 'rational judgment' was introduced into s. 2 by the 2009 Act but is not defined there and has hitherto received little in the way of judicial analysis, so the present cases are important in that respect. The Court of Appeal's categorisation in *Conroy* of the appellant's contention as 'over-refined', and its pragmatic assertion that 'one cannot always neatly separate the "decision-making process" from the actual ultimate decision' (*Conroy* at [28] and [30]), are to be welcomed. Ultimately, a 'judgment' is often the end product of a series of decisions and the Court is surely right to say that in at least some, if not most, diminished responsibility cases it will be 'extremely difficult to separate out' (*Conroy* at [37]) one from the other.

This is especially important given the express acknowledgement by the Court of Appeal that, in determining the accused's 'ability to form a rational judgment' for the purposes of s. 2, 'the jury's consideration is by no means necessarily confined' to the time of the killing (*Conroy* at [32]). Instead, the jury 'may properly assess all relevant circumstances preceding, and perhaps preceding over a very long period, the killing as well as any relevant circumstances following the killing' (*Conroy* at [32]). As Davis LJ explained in *Squelch* (at [44]):

That consideration may very well, and indeed usually will, involve a consideration of aspects of the evidence relating to a period of time preceding the killing. In some cases, in fact, it may relate to a period of time going back over many years and even sometimes to a particular defendant's childhood. Likewise, there may also be evidence of subsequent events or subsequent actions or subsequent statements on the part of a defendant which may need to be part of a jury's overall evaluation of the position.

Finally, on the meaning of the word 'rational', although the Court of Appeal resisted a definition of the word, it firmly rejected any suggestion that it should be conflated with 'right'. The word 'rational' was 'altogether more open-ended' (*Conroy* at [33]). According to Davis LJ, 'it is regrettably the case that many killings as an outcome, although obviously "wrong", are all too "rational": whether it be, for instance, in the form of a killing of a disliked wife in order to inherit her money or the gangland execution of a rival whose competition has proved unwelcome, and so on' (*Conroy* at [34]).

Interestingly, when the Law Commission first proposed reforming the law of diminished responsibility, they put forward a definition which referred to the accused's capacity to, *inter alia*, 'judge whether his actions were right or wrong' (*Partial Defences to Murder*, Law Com No 290, 2004, para 5.97). However, two years later, this had changed and the Law Commission instead recommended the reform which was eventually implemented by the 2009 Act (*Murder, Manslaughter and Infanticide*, Law Com No 304, 2006, para 5.112). The change of heart was apparently prompted by a response from the Royal College of Psychiatrists who thought that the phrase 'form a rational judgment' was 'apt' to cover cases that the phrase 'judge whether his actions were right or wrong' was not. The Law Commission gave an example of a 'deluded' accused killing someone that he 'believed to be the reincarnation of Napoleon'. Although the accused 'might realise that it is morally and legally wrong to take the law into one's own hands by killing', he may nevertheless be 'suffering from a substantially impaired capacity to form a rational judgment'. Eleven years' later, the Court of Appeal has confirmed that there is indeed a difference between what is 'right' and what is 'rational'.