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## **Drug-Free Zone: Court of Appeal Confirms that Voluntary Intoxication is not Relevant in Cases of Diminished Responsibility**

***R v Kay [2017] EWCA Crim 647, Court of Appeal***

***Manslaughter; Diminished responsibility; Recognised medical condition; Intoxication***

Robert Kay (K) was a paranoid schizophrenic (although this condition was not formally diagnosed until after his arrest). He had long-standing mental health problems and had been in 'contact with mental health services' over the years but had not 'responded meaningfully to any of the many offers of help made to him' (at [4]). He was also a habitual drug-user, having started glue-sniffing at 13, drinking alcohol at 15 and taking drugs at 18. His usual drug was heroin but he also regularly injected amphetamine. K, who was 48 on the day of the killing, had therefore been using drugs for his entire adult life, over 30 years. He knew that drug use (particularly amphetamines) triggered and exacerbated his symptoms (such as such as hallucinations and hearing voices), and he recognised this by abstaining from taking amphetamines 'on a number of occasions and for substantial periods' over the years because of their 'markedly deleterious effect on his behaviour' (at [5]).

Nevertheless, in June 2015 he spent three days on a 'bender' consuming 'copious' amounts of alcohol (including) and taking 'multiple' drugs including heroin, cocaine, amphetamine and ecstasy in Lytham St Annes in Lancashire. This triggered a psychotic episode. On the morning of 18 June, K had visited a friend where they shared a few cans of Tennents super strength lager. He told her that he was the son of Satan who could communicate with the devil via a TV transmission box in a carrier bag. Around lunchtime she asked him to leave. He later spent time drinking with another friend in a flat. He claimed to have a list of instructions from Satan, and armed himself with a 'large kitchen knife' before leaving. The friend was later to tell the Crown Court that 'He was looking through me, like I wasn't there. It was very, very weird. I could sense something terrible was going to happen'. Soon afterwards, as K walked down an alleyway, he spotted Ian Dollery (D), a complete stranger, working in his garage. K entered the garage and stabbed D 35 times in the face, chest, abdomen, arms and legs in a 'frenzied and brutal' attack. D's wife and daughter witnessed part of the attack. They managed to get K out of the garage using a broomstick, but it was too late to save D, who died in hospital the next day.

K was charged with murder and appeared before HHJ Brown and a jury at Preston Crown Court in July 2016. There, he admitted killing D but denied murder. Instead, he pleaded guilty to manslaughter on grounds of diminished responsibility (DR) under s 2(1) of the Homicide Act 1957 (as amended). The defence case was that on 18 June 2015 K had suffered an 'abnormality of mental functioning' (the psychotic episode), caused by schizophrenia combined with drug dependency syndrome (both 'recognised medical conditions') which 'substantially impaired' his ability to form a rational judgment and/or exercise self-control and which provided an 'explanation' for killing D.

Three psychiatrists produced reports for the court. All three agreed that K suffered from schizophrenia and was dependent on drugs, whether heroin or amphetamines or both. However, they disagreed whether K's abnormality of mental functioning on the day of the

killing was caused by those conditions. Two of the doctors agreed that K's schizophrenia, combined with drug dependency, was the source of his abnormality and, moreover, substantially impaired K's responsibility at the time of the killing. However, the third doctor disagreed, opining that K's schizophrenia was stable and insufficient to support a plea of DR; rather, K's psychotic episode on 18 June arose from voluntarily induced intoxication through alcohol and drugs.

HHJ Brown directed the jury that they had to decide whether K's psychotic episode was caused (1) either entirely or at least 'significantly' by his schizophrenia exacerbated by intoxication 'against a background of a dependency syndrome', or (2) by 'the voluntary consumption of drink and drugs'. In the event, the jury rejected K's defence and he was convicted of murder and sentenced to life imprisonment with a minimum term of 23 years. He appealed his conviction (and sentence).

The appeal against conviction was based on a contention that the courts 'should be prepared to adopt a more nuanced approach' to mental illness and that someone who killed whilst suffering from a recognised medical condition, like K, 'should not be debarred' from relying upon DR on the basis of their voluntary intoxication. It was contended that the trial judge misdirected the jury by excluding the possibility that K could invoke DR even where the abnormality of mental functioning (his psychotic episode) arose from a combination of schizophrenia and voluntary intoxication. Rather, the jury had been presented with a 'stark binary choice: schizophrenia and dependency syndrome equals guilty of manslaughter; schizophrenia and voluntary intoxication equals guilty of murder' (at [14]).

**HELD, DISMISSING THE APPEAL**, the law did not 'debar' someone suffering from a recognised medical condition (such as schizophrenia) from relying on DR where voluntary intoxication had triggered the abnormality of mental functioning, but he had to 'meet the criteria' in s 2(1) of the Homicide Act 1957. In short, the accused had to establish that his abnormality of mental functioning 'arose from a recognised medical condition that substantially impaired his responsibility' (at [16]). The recognised medical condition might be a condition such as schizophrenia 'of such severity that, absent intoxication, it substantially impaired his responsibility' or it might be a condition 'coupled with drink/drugs dependence syndrome which together substantially impaired responsibility' (at [16]).

However, where an abnormality of mental functioning 'arose from voluntary intoxication and not from a recognised medical condition an accused cannot avail himself of the partial defence' (at [16]). That was for 'good reason' and the law was 'clear and well established: as a general rule, voluntary intoxication cannot relieve an offender of responsibility for murder, save where it was relevant to the question of intent' (at [16]).

On the facts, there was no medical evidence that K's schizophrenia was 'of such a degree that, independent of drug or alcohol abuse, it substantially impaired his responsibility' (at [18]). On the contrary, K's condition was 'stable'. Therefore, 'once the jury had rejected his assertion that he was suffering from dependency syndrome, he no longer had a defence' (at [18]). The sentencing appeal was also dismissed (at [29]).

## **Commentary**

Hallett LJ, giving the single judgment in *Kay*, states that a defendant seeking to plead DR must 'meet the criteria' set out in s 2(1) of the Homicide Act 1957. The defendant has the burden of persuading the jury that the criteria are met (albeit on the balance of probabilities). In the present case, K was unable to persuade the jury that his 'abnormality of mental functioning' was caused by a 'recognised medical condition', because all of his (voluntary) intoxication had to be excluded.

The trial judge's direction to the jury on this point, and the Court of Appeal's decision to reject the appeal, confirm 'a long line of authority', including *Dietschmann* [2003] UKHL 10; [2003] 1 AC 1209 and *Stewart* [2009] EWCA Crim 593, [2009] 2 Cr. App. R. 30, to the effect that voluntary intoxication is irrelevant in a murder trial except when it might have a bearing on the question whether or not the accused formed malice aforethought. In *Dietschmann*, Lord Hutton said:

Drink cannot be taken into account as something which contributed to his mental abnormality... But [the jury] may take the view that both the defendant's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question to decide is this: has the defendant satisfied [the jury] that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or [not]? If he has satisfied [the jury] of that, [they] will find him not guilty of murder. If he has not satisfied [them] of that, the defence of diminished responsibility is not available. (*Dietschmann* at [41].)

This case was decided before the Homicide Act was amended by the Coroners and Justice Act 2009, with effect from October 2010, but in *Dowds* [2012] EWCA Crim 281, [2012] 1 WLR 2576, the Court of Appeal confirmed that the statutory intervention had not changed the law on this point. Hughes LJ said:

The exception which prevents a defendant from relying on his voluntary intoxication... is well entrenched and formed the unspoken backdrop for the new statutory formula. There had been no hint of any dissatisfaction with that rule of law. If Parliament had meant to alter it, or to depart from it, it would undoubtedly have made its intention explicit... It is quite clear that the re-formulation of the statutory conditions for [DR] was not intended to reverse the well-established rule that voluntary acute intoxication is not capable of being relied upon to found [DR]. That remains the law. The presence of a 'recognised medical condition' is a necessary, but not always a sufficient, condition to raise the issue of [DR]... Voluntary acute intoxication, whether from alcohol or other substance, is not capable of founding [DR]. (*Dowds* at [35], [40] and [41].)

The law therefore requires the jury in murder trials where the accused has an underlying medical condition(s), and was also voluntarily intoxicated at the time of the killing, to discount the effects of that intoxication, to envisage instead a sober version of the defendant, and to decide whether, in that situation, the statutory criteria are met. The strength (or lack thereof) of the psychiatric evidence in support of the underlying medical condition(s) is very likely to be determinative of the outcome. In some cases, such as *Dietschmann*, *Dowds* and *Kay*, the criteria are not met and the verdict is murder.

However, in other cases the criteria may be met in which case the verdict is manslaughter. Examples include *Jenkin* [2014] EWCA Crim 1394 and *Joyce*, a case which was dealt with by the Court of Appeal alongside *Kay*. In the former case, John Jenkin killed his mother, Alice McMeekin, and younger sister Kathryn with an axe at Alice's house in Cumbria in June 2013. Although charged with two counts of murder, Jenkin successfully pleaded guilty to manslaughter on the grounds of DR, based on schizoid-affective disorder / schizophrenia, to both killings. This outcome was achieved notwithstanding the fact that he was also under the influence of drugs, including LSD, at the time of the killings. In *Joyce*, the accused, Trevor Joyce, had been diagnosed with paranoid schizophrenia in 2003 and had been treated with anti-psychotic drugs. However, in December 2015, he stabbed Justin Skrebowski, a complete stranger, to death in a Poundland shop in Abingdon. Joyce successfully pleaded guilty to manslaughter on the grounds of DR, notwithstanding the fact that he had taken drugs the previous night and had been drinking alcohol on the morning of the killing, and that he knew that taking drugs exacerbated his symptoms. Crucially, Joyce's paranoid schizophrenia was described by psychiatrists who examined him as 'sufficiently severe to impair his responsibility for the killing', as the 'main' or a 'significant' contributory factor in the killing, even without the effects of the intoxication.

In *Kay*, Hallett LJ, stated that the law (as set out in cases such as *Dietschmann* and *Dowds*) was 'clear and sensible'. She went on:

The approach is neither binary nor simplistic but is flexible enough to encompass a wide variety of factual circumstances in a manner that is fair to all. It takes full account of the kind of mental health issues under consideration and our increased understanding of them... It rightly does not necessarily provide even a partial defence to everyone diagnosed with schizophrenia who, well aware of the possible consequences, chooses to abuse drink and/or drugs to excess and then kills. (*Kay* at [20].)