More than Merely More than Minimal: The Meaning of the Term 'Substantial' in the Context of Diminished Responsibility

R v *Golds* [2014] EWCA Crim 748

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On 11 June 2013, G killed his partner, CP. G was charged with murder and pleaded diminished responsibility. The defence called three medical experts, each of whom testified that, in their opinion, the elements of the partial defence were satisfied. The jury nevertheless convicted G of murder. G appealed against that conviction.

On the day of the killing, CP and G attended a family barbecue. CP had been drinking. She had a mark on her face and she told a number of witnesses that G had been hitting her. At the party G and CP argued because G wanted to leave, but CP wanted to stay. They returned home separately and the argument continued. A neighbour heard the commotion and saw G grab CP and slap her across the face.

CP's 13-year-old son, R, gave evidence that CP wanted G to leave. R and his brother, A, were temporarily locked in their bedroom. There was then a further argument about a bank card, and G went to the kitchen and returned with a knife. R took the knife from G, but G produced a second knife and began to attack CP with it. R and A left the house to get help.

The police arrived to find CP's body in the bedroom. G was lying on the floor with his hand over his face. His thumb had been sliced in two. When arrested, G was extremely violent and aggressive. He admitted killing CP, but said that CP was 'evil' adding: '[t]he demon's gone. I've killed her. The devil's gone. She had Satan in her eyes' (at [10]). A post-mortem examination revealed that G had inflicted 22 separate knife wounds upon CP. The main cause of death was the tearing of a blood vessel in her liver.

In interview, G said that CP had taken the knife from him and cut his hand. He recalled taking the knife from her. He said that they had been hurting each other, but he could not remember much more.

At trial, a number of witnesses gave evidence for the prosecution about what had happened at the barbecue. R and A gave evidence about events at the house leading up to the fatal attack. The prosecution also applied to adduce bad character evidence from CP's adult daughter, SA. SA claimed that on a previous occasion she had spoken to G and he had admitted slapping CP 'a few times' (at [15]). The judge ruled that SA's evidence was important explanatory evidence and was admissible under s. 101(1)(c) of the Criminal Justice Act 2003 (CJA 2003).

The defence called evidence from three expert witnesses as to G's mental state at the time of the killing. G had a history of mental disorder, having been diagnosed with psychosis and depression. He had stopped taking his medication approximately three or four weeks before the incident. A psychiatrist and a psychologist instructed by the defence both testified that G had a personality disorder, which constituted an abnormality of mental functioning. Each stated that, in their opinion, this condition had substantially impaired G's ability to exercise self-control and to form a

rational judgement in accordance with s. 2 of the Homicide Act 1957 (as amended). The defence also called a psychiatrist who had originally been instructed by the prosecution. Her evidence was that G was delusional and suffered from schizophrenia. She also opined that the criteria for diminished responsibility were met.

G did not give evidence. After hearing evidence from the psychologist on a *voir dire*, the trial judge agreed that G's mental condition made it undesirable for him to give evidence. In accordance with s. 35(1)(b) of the Criminal Justice and Public Order Act 1994, the judge directed the jury that no adverse inference could be drawn from G's failure to testify.

In directing the jury as to the elements of diminished responsibility, the judge refused to elaborate on the meaning of the term 'substantial' in the context of the phrase 'substantial impairment':

> I am not going to give you any help on the meaning of the word substantially, because unless it creates real difficulty and you require further elucidation, the general principle of English law is that where an everyday word is used, don't tell juries what it means. They are bright enough and sensible enough to work it out for themselves, so I am not going to paraphrase substantially. Substantially is the word that is in the Act of Parliament and that's the word that you have to work with. (at [53])

G was convicted of murder. The two main issues on appeal were the admission of the bad character evidence and the judge's failure to define the term 'substantial impairment'.

Held, dismissing the appeal, the evidence of CP's daughter had been properly admitted. The trial judge had been incorrect to rule that it was important explanatory evidence under s. 101(1)(c) of the CJA 2003. However, the evidence that G had admitted hitting CP in the past was admissible under gateway (d) because it was relevant to an important matter in issue between the prosecution and the defence, 'namely whether there was a background of violence in this relationship' (at [43]).

The judge had not erred in failing to define the term 'substantial impairment'. There are two possible meanings attributable to the term 'substantial'. The first possible meaning is that a defendant's mental condition substantially impairs his ability to do one of the things specified in s. 2(1A) 'if it does so to more than a trivial or minimal extent' (at [55]). A second possibility is that an abnormality of mental functioning substantially impairs a defendant's ability to do one of the specified things if 'it significantly or appreciably impairs that ability, beyond something that is merely more than trivial or minimal' (at [55]). The second meaning was to be preferred (at [72]). Accordingly, the judge could not be criticised for failing to direct the jury that substantial meant 'more than minimal', nor was the judge obliged to elaborate on the meaning of the term 'substantial' (at [73]).

Commentary

Bad character evidence

The defence contended on appeal that the judge erred in admitting SA's evidence under s. 101(1)(c) of the CJA 2003. Alternatively, the judge ought to have directed the jury to treat SA's evidence with caution because G was unable to give evidence and was, therefore, unable to

challenge SA's account or give his own version of the conversation that had taken place between them.

The Court of Appeal agreed that the evidence was not admissible under gateway (c), but held that it was admissible under gateway (d) of the CJA 2003.

In relation to gateway (c), s. 102 of the CJA 2003 provides:

> … evidence is important explanatory evidence if—
>
> a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
> b) its value for understanding the case as a whole is substantial.

Gateway (d) provides that bad character evidence is admissible if it is relevant to an important matter in issue between the defendant and the prosecution. Matters in issue between the defendant and the prosecution include:

a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect. (s. 103(1))

The trial judge ruled that the evidence was admissible as important explanatory evidence under gateway (c) because it was potentially relevant to the issue of whether G was suffering from diminished responsibility at the time of the killing. SA's evidence showed that G was able to exercise a degree of self-control and to limit his violent behaviour towards CP, even though he suffered from a mental condition. The trial judge also thought that SA's evidence was potentially relevant because G had told the medical experts that it was CP, not G, who had used violence during their relationship.

Applying s. 102(a), the Court of Appeal doubted that it would be 'impossible' or 'difficult' for the jury to understand the other evidence in the case without hearing from SA. The court also doubted that the value of the evidence could be regarded as 'substantial' in accordance with s. 102(b) (at [43]).

The trial judge ruled that SA's evidence was not admissible under gateway (d) because it did not establish a propensity to commit the kind of attack that led to CP's death. The Court of Appeal agreed that the evidence did not establish a propensity to commit offences of the kind with which G was charged. However, the court held that the evidence was relevant to a different 'important matter in issue between the prosecution and the defence, namely whether there was a background of violence in this relationship' (at [43]).

The Court of Appeal has said before that the key to gateway (d) lies in identifying the real matters in issue between the defence and the prosecution (see, for example, *R* v *Freeman* [2008] EWCA Crim 1863; *R* v *O* [2009] EWCA Crim 2235; *R* v *Suleman* [2012] EWCA Crim 1569). Propensity is merely an example of a matter that may be in issue between the parties. What precisely the issues are between the defence and the prosecution will be case specific. The judgment in the

instant case is a useful reminder that gateway (d) is not confined to evidence of propensity to commit offences of the relevant kind.

Diminished responsibility

Section 2 of the Homicide Act 1957, as amended, provides that a diminished responsibility plea will succeed if the defendant proves on the balance of probabilities that he:

(1) … 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.

In his closing speech, defence counsel told the jury that the trial judge would direct them that the defendant's abnormality of mental functioning 'substantially' impaired the defendant's ability to do the things specified in s. 2(1A) if the impairment was 'more than trivial'. When summing up the case, the trial judge told the jury that he would not help them with the meaning of the term 'substantial': '[U]nless it creates real difficulty and you require further elucidation, the general principle of English law is that where an everyday word is used, don't tell juries what it means' (at [53]). The jury did not ask the judge for assistance on this point.

In the context of establishing causation, the term 'substantial' means 'more than minimal'. In a homicide case, injuries inflicted by the defendant are a legal cause of death if they are an 'operating cause and a substantial cause' of death (*R* v *Smith* [1959] 2 QB 35 at 42), or if they 'contributed significantly' to the victim's death (*R* v *Pagett* (1983) 76 Cr App R 279 at 288). In this context, the terms 'substantial' and 'significant' mean 'more than de minimis' (*R* v *Hennigan* (1971) 55 Cr App R 262 at 265) or 'more than minimal' (*R* v *Hughes* [2013] UKSC 56, [2013] 1 WLR 2461 at [14], [18], [22], [28], [32], [33] and [36]).

Prior to the Coroners and Justice Act 2009, s. 2 of the Homicide Act 1957 provided that a jury had to be satisfied that the defendant's mental responsibility for the killing was substantially impaired by an abnormality of mental functioning. In *R* v *Lloyd* [1967] 1 QB 175, the Court of Appeal upheld the trial judge's direction to the jury that '[s]ubstantial need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between …' (*Lloyd* at 176). More recently, but still prior to the 2009 Act, the Court of Appeal in *R* v *Ramchurn* [2010] EWCA Crim 194 had held that 'substantially' was 'an ordinary English word' which was designed to exclude defendants with 'trivial and

insignificant' impairments from the scope of s.2 (*Ramchurn* at [15]) (see also *R* v *Ramchurn* (2011) 75 JCL 12, case note by N. Wake).

In *R* v *Brown* [2011] EWCA Crim 2796, a case decided after the amendments to s. 2 came into force, the trial judge had directed the jury that they should find that the defendant's ability to do one of the things specified in s. 2(1A) was 'substantially impaired' if the impairment was 'more than minimal'. The Court of Appeal did not suggest that this direction was wrong, and held that the amendments to s. 2 were not intended to change the meaning that the courts had given to the word 'substantial' in cases such as *Ramchurn* (*Brown* at [23]). However, that proposition (in *Brown*) rather presupposed that the courts had reached a consensus on the meaning of 'substantial' prior to the 2009 Act coming into force. As the Court of Appeal has now observed in the present case, that proposition was not, in fact, correct.

The real difficulty is that, although in the criminal law the term 'substantial' has been said to mean 'more than minimal', this is not the ordinary meaning of the term 'substantial'. If a person says that his salary is 'substantial', this suggests that he is paid 'significantly more' than merely 'more than minimal' (at [55]). In the instant case the Court of Appeal observed that the term 'substantial' can be interpreted in two different ways:

> One possible meaning is that the abnormality of mental functioning substantially impairs if it does so to more than a trivial or minimal extent; it then has substance and the impairment is substantial. A second meaning is that the abnormality of mental functioning only substantially impairs where, whilst not wholly impairing the defendant's ability to do the things specified in section 2(1A), it significantly or appreciably impairs that ability, beyond something that is merely more than trivial or minimal. (at [55])

In the context of the defence of diminished responsibility, the court preferred the second interpretation. The court did not go so far as to criticise the trial judge for declining to explain the term 'substantial' to the jury, although it did regard the premise that the meaning of the term is obvious as 'arguably optimistic' (at [72]). The court favoured a direction akin to the direction that was given by the trial judge in *R* v *Simcox* [1964] Crim LR 402:

> Do we think, looking at it broadly as common-sense people, there was a substantial impairment of his mental responsibility in what he did? If the answer is 'no', there may be some impairment, but we do not think it was substantial, we do not think it was something that really made any great difference, although it may have made it harder to control himself, to refrain from crime, then you would find him guilty … (at [58])

The Court of Appeal in *Golds* acknowledged that there was a 'respectable case' for saying that Parliament, in enacting the 2009 Act, meant 'substantial' to mean 'more than trivial' (at [71]). However, the court went on to hold that judges ought not to adopt this 'narrower meaning' (at [72]). An impairment that has 'some modest impact' and is, therefore, more than merely minimal or trivial (at [55]) can no longer be regarded as 'substantial'. For impairment to be regarded as 'substantial', it must be 'significant or appreciable' (at [55]), or 'appreciable or real' (at [64]).

The justification for preferring the *Simcox* definition in preference to the *Lloyd* definition was because:

> It more clearly communicates the possibility that the jury will find that an impairment does have some modest impact, and to that extent will be more than merely minimal or trivial, yet will not as a result properly be described as substantial. (at [59])

The Court of Appeal's approach is problematic for two reasons. First, it supports a disparate approach to the meaning of the term 'substantial' depending on which party bears the burden of proving an issue. In the context of causation, where the prosecution must prove that the defendant made a 'substantial' contribution to the victim's death, the Supreme Court has ruled that 'substantial' means 'more than minimal' (*Hughes* above). In the context of diminished responsibility, where the defendant bears the proof burden, the Court of Appeal has now held that 'substantial' means something more than merely more than minimal.

Secondly, it is entirely possible that, in a homicide case, both causation and diminished responsibility will be in issue. In such a case, a trial judge will be in the unhappy position of having to direct the jury that the defendant was a substantial cause of the victim's death if he was a 'more than minimal' cause (*per Hughes*). The judge must then tell the jury that if they are satisfied that the prosecution has established causation applying this test, they must consider whether the defendant's abnormality of mental functioning substantially impaired his ability to do one of the things specified in s. 2(1A) of the 1957 Act (as amended). In this context, the term 'substantial' no longer means 'more than minimal' and the jury must be satisfied of something more.