The meaning of "attributable to intoxication": Self-defence and mistaken belief.

R v Taj [2018] EWCA Crim 1743, Court of Appeal

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In the early afternoon of Sunday 31 January 2016, Simon Taj (T) was driving along the Albert Embankment in central London. He came across Mohammed Awan (M), an electrician, whose van had broken down. M was standing next to the vehicle which had a plume of smoke emanating from it. T parked alongside M's car and asked if he could do anything to help. At that point M was using his phone to try to arrange a recovery vehicle but he asked T if he had any jump leads. At this, T became suspicious and began asking M questions. T then walked off, out of M's hearing, and rang 999 to report a 'possible bomb scare threat'.

T returned to M's van and asked to look inside. M allowed T to look inside where (unsurprisingly, given M's occupation) T noticed electrical equipment and wires. However, T concluded that M was involved in terrorist activities. Responding to the 999 call, the police soon arrived and quickly decided that M was not a terrorist but simply an electrician whose vehicle had broken down. They attempted to jump-start his van but this only generated more smoke. They abandoned attempts to re-start the vehicle, advised M to get it towed to a garage, and left. T also left but, as he drove away, he continued to be troubled by what he had seen.

He returned to the scene to find M still standing next to his van and talking on his phone. T formed the view that M was inquiring how to detonate a bomb. T armed himself with a tyre lever from his own van, approached M and began to attack him with it, striking him over the head, inflicting a number of serious injuries including a fractured skull and eye socket. Witnesses later described the attack as 'vicious', 'the worst that they had ever witnessed', and 'quite horrific'. M tried to escape while witnesses called the police. When they arrived

and instructed T to desist he expressed surprise saying “why are you arresting me he’s the terrorist”. He initially resisted arrest and tried to flee the scene but was arrested soon afterwards.

T was charged with attempted murder and appeared before HHJ Dodgson and a jury at Kingston-upon-Thames Crown Court in October 2016. He pleaded not guilty on the basis of self-defence and defence of others in that he had genuinely believed that M was a terrorist. However, HHJ Dodgson ruled that the defence was unavailable to T because of s.76 of the Criminal Justice and Immigration Act 2008 (the 2008 Act). This provides at s.76(4) that an accused (D) is entitled to plead either self-defence and/or defence or another, based on their genuine belief as to the facts, including a mistaken belief, whether or not that belief was reasonably held. However, s.76(5) then provides that ‘subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced’ (emphasis added).

Evidence presented to the Crown Court revealed that T had a long-standing problem with alcohol and drug use and that his consumption of intoxicating substances had brought on ‘feelings of paranoia’. These feelings could come ‘in the form of voices, and feelings of aggression and vulnerability, as if he were under threat’ (at [16]). He admitted to the jury that in the weeks leading up to the incident he had been habitually drinking to excess and had used cocaine. Starting on the evening of Friday 29 January 2016 and continuing into the early hours of the following morning, he had consumed a large amount of alcohol. He had also consumed more alcohol on the evening of Saturday 30 January. i.e. the evening before his attack on M, although there was no evidence to suggest that he was intoxicated on the Sunday afternoon. T accepted that he was feeling paranoid on that afternoon when he attacked M.

HHJ Dodgson ruled that T’s genuine, albeit mistaken, belief that M was somehow involved in terrorist activities was excluded by s. 76(5) on the bass that it was a ‘mistaken belief attributable to intoxication that was voluntarily induced’. He reached that conclusion after consulting the Oxford English Dictionary which defined intoxication as: ‘The action of rendering stupid, insensible, or disordered in intellect, with a drug or alcoholic liquor’. The trial judge ruled that T was ‘disordered in intellect’ at the time of the attack and this condition was ‘attributable’ to his earlier voluntary intoxication. HHJ Dodgson left to the jury the

question of whether T acted with the requisite *mens rea* of attempted murder (intention to kill). The jury unanimously convicted. T appealed to the Court of Appeal, arguing that HHJ Dodgson has misinterpreted s.76(5). T contended that the phrase 'attributable to intoxication' should be taken to only refer to the present state, i.e. where someone was actually intoxicated at the time when they formed the mistaken belief.

HELD, dismissing the appeal, that the words 'attributable to intoxication' in s. 76(5) of the 2008 Act were

> 'broad enough to encompass both (a) a mistaken state of mind as a result of being drunk or intoxicated at the time and (b) a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned is not drunk or intoxicated at the time, the short-term effects can be shown to have triggered subsequent episodes of e.g. paranoia' (at [60]).

Brian Leveson P, giving the unanimous decision of a five-judge Court of Appeal, said that there was therefore no misdirection: 'In the circumstances, we agree with Judge Dodgson, that the phrase "attributable to intoxication" is not confined to cases in which alcohol or drugs are still present in a defendant's system' (at [60]).

Alternatively, even if that interpretation of the 2008 Act was wrong, the trial judge was nevertheless correct to withdraw self-defence from the jury because T's belief as to the facts was unreasonable. Reliance was placed on a passage from *Oye* [2013] EWCA Crim 1725, [2014] 1 Cr App R 11, in which Davis LJ said that 'An insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity' (at [47]). Although the two cases were distinguishable in that, whilst the accused in *Oye* was found not guilty by reason of insanity, whereas there was no suggestion that T's mental condition satisfied the *M'Naghten* test for insanity, Leveson P said that Davis LJ's 'observation is equally apposite in this case. Any objective consideration of the facts revealed no reasonable basis for the response of Taj… There is no basis upon which the jury could have concluded that the extent of force used was reasonable' (at [64]).

Commentary

'Attributable to intoxication' in s. 76(5) of the 2008 Act

The present case is primarily one of statutory interpretation: what does 'attributable to intoxication' mean? The Court of Appeal had a choice of two meanings, a broad view advocated by the Crown and a narrow view contended for by the appellant. In the event the Court preferred the Crown's broader view. Reliance was placed on the Oxford English Dictionary definition of 'attributable', i.e. 'ascribe to; regard as the effect of a stated cause'.

In previous cases involving the combination of self-defence and intoxication – cases arising before the 2008 Act – the courts had only been required to deal with the situation where the accused's belief in the need to use defensive force arose because he was, at that time, under the influence of an intoxicating substance or substances. The best-known cases are *O'Grady* [1987] QB 995 and *Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr. App. R. 16, both of which involved the accused inflicting fatal injuries on the victim in the mistaken belief that the victim was attacking the accused; moreover, in both cases the accused was intoxicated at the time. In both cases the Court of Appeal held that in such circumstances a mistaken belief in the need to use force could not be relied upon. The appellant's contention in the present case therefore involved an argument that s.76(5) should only apply in cases such as *O'Grady* and *Hatton*.

Hence, when the Court of Appeal in the present case ruled that s. 76(5) also applies to a mistaken belief 'attributable to' in the sense of 'ascribed to' or 'caused by' the longer-term effects of voluntary intoxication it went beyond the common law precedents. In reaching this conclusion, the Court relied on various policy statements set out by the House of Lords in *DPP v Majewski* [1977] AC 443. That case did not involve self-defence but rather the question whether or not evidence of a state of self-induced intoxication could be used to deny proof of recklessness. The answer to that question ('no') had no bearing on the Court of Appeal in the present case; however, various statements from their Lordships' speeches in *Majewski* lent support to the general proposition that voluntary intoxication – as a matter of public policy – could not be deployed to provide an accused, especially one accused of a violent crime, with a defence (except where the evidence of intoxication prevented proof of a specific intent).

These passages are very well-known and there is no need to repeat them here (although the Court of Appeal in the present case does so at [55]). In the light of those passages, it was probably to be expected that the Court of Appeal in the present case would not find sympathy with the appellant's contention. The Court of Appeal was well aware of the fact that the situation in *Majewski* (as in *O'Grady* and *Hatton*) involved an accused who was intoxicated at the time of the offending, whereas T in the present case was (apparently) sober at the time of the assault on M. Nevertheless, as Leveson P said, 'it is difficult to see why the language (and the policy identified) is not equally apposite to the immediate and proximate consequences of such misuse… We see that as an application of Majewski, rather than an extension of that decision or, at the highest, a most incremental extension' (at [57]).

The Court of Appeal was careful to point out that the decision in the present case did not affect the rule that where an accused's long-term alcohol and/or drug consumption has brought about a state of mind that satisfies the *M'Naghten* rules, then he or she can plead the insanity defence. That rule dates from *Davis* (1881) 14 Cox CC 563. It was confirmed by the House of Lords in *DPP v Beard* [1920] AC 479 ('drunkenness is one thing and the diseases to which drunkenness leads are different things', per Lord Birkenhead at p 500) and applied most recently by the Court of Appeal in *Coley* [2013] EWCA Crim 223 ('insanity which is temporary is as much insanity as that which is long-lasting or permanent. Davis was a case of a defendant suffering (temporarily) from *delirium tremens*. That, self-evidently, is not intoxication. It is, if anything, the opposite', per Hughes LJ at [15]).

'Reasonable force in the circumstances'

The alternative basis for upholding T's conviction was the ruling that T had used unreasonable force. On this point, s.76(3) of the 2008 Act provides that 'the question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be'. Section 76(4) adds that D is entitled to be judged on his or her genuine (and not necessarily reasonable) belief as to the facts, whether mistaken or not. Section 76(5) then explicitly precludes reliance on mistaken beliefs attributable to intoxication (as discussed above). However, the 2008 Act makes no reference to mistaken beliefs attributable to psychosis, paranoia or any other psychiatric condition or disorder. Does that mean that the jury should have been directed to take T's

paranoia into account when determining whether his belief that M (an electrician) was in fact a terrorist? The answer is 'no'… not because of the 2008 Act, but because the point of law has already been decided at common law. Hence, evidence of T's paranoia was irrelevant when determining his belief as to the circumstances.

The Court of Appeal in the present case placed reliance on the ruling in *Oye*, which was itself based on two earlier Court of Appeal rulings, *Martin* [2001] EWCA Crim 2245; [2003] QB 1 and *Canns* [2005] EWCA Crim 2264. In Martin, Lord Woolf CJ said that 'we would not agree that it is appropriate, except in exceptional circumstances which would make the evidence especially probative, in deciding whether excessive force has been used to take into account whether the defendant is suffering from some psychiatric condition' (at [67]; emphasis added). Presumably, given the dismissal of T's appeal, there was no 'especially probative' evidence of psychiatric disorder in the present case.

Section 76 is a curious piece of legislation in that it incorporates some – but by no means all – of the common law principles underpinning self-defence into legislation. Thus, s.76(4) is based on the decision in *Williams* (1984) 78 Cr. App. R. 276; s.76(5) has its origins in the *O'Grady* and *Hatton* cases (as discussed above). The fact that there is no 'duty to retreat', although any 'possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account', now found in s.76(6A) of the 2008 Act, can be traced back to the judgment of Lord Lane CJ in *Bird* [1985] 1 WLR 816 at p.821.

The proposition in s.76(7)(a), that 'a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action', can be found almost verbatim in the judgment of Lord Morris in *Palmer* [1971] AC 814 at p.832. Likewise the proposition in s.76(7)(b), that 'evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose' – Lord Morris in *Palmer* again (with some minor tweaking).

However, the 2008 Act is conspicuously silent about the effect of D's psychiatric conditions or disorder (if any) on his or her beliefs as to the circumstances. If / when Parliament revisits section 76 (something it has done twice already, with amendments by s.148 of the Legal Aid,

Sentencing and Punishment of Offenders Act 2012 and by s.43 of the Crime and Courts Act 2013) it might care to address this point. In a case note discussing *Oye* in this journal ('Self-Defence: Insane Delusions and Reasonable Force' (2014) 78(1) J. Crim. L. 12), this author suggested that a further amendment along the following lines (based on Lord Woolf's judgment in *Martin*) might not be inappropriate:

> 'Subsection (4)(b) does not enable D to rely on any mistaken belief induced by psychosis or any other psychiatric disorder, unless there are exceptional circumstances which would make the evidence especially probative.'