M'Naghten Rules

R. v Keal

Court of Appeal (Criminal Division): Lord Burnett CJ: Thirlwall LJ and Morris J.:
March 18, 2022; [2022] EWCA Crim 341

M'Naghten Rules - insanity - availability of plea - whether judge misdirected the jury by failing to direct them that, even if the defendant knew what he was doing was legally wrong, the defence of insanity could still be proved if the defendant believed that he had no choice but to commit the act in question

The appellant, K, was convicted of three counts of attempted murder. The victims were his parents and grandmother. His case at trial was that he was insane at the time of the acts and was operating under a multiplicity of delusions, including a belief that he was possessed by the devil. He relied on the expert evidence from two psychiatrists. The prosecution case was that K intended to kill all three victims and that the special verdict of not guilty by reason of insanity was not open to him, because at the time of the offending he knew what he was doing was against the law and wrong. The prosecution also relied on expert evidence from two psychiatrists. K argued that the defence of insanity was available to a psychotic and deluded defendant who was aware that his act was wrong but believed himself to be compelled to perform it. The prosecution submitted that this argument was an extension of the definition of 'wrong', for which there was no legal foundation. The judge ruled that he was bound by authority (*R. v Windle* (1952) 36 Cr App R 85 and *R v Johnson (Dean)* [2007] EWCA Crim 1978). He accepted the prosecution submissions and directed the jury in accordance with the Crown Court Compendium. On appeal, K argued that the trial judge erred in law in his direction to the jury.

Held, dismissing the appeal, the central issue in the appeal was whether the trial judge misdirected the jury by failing to direct them that, even if K knew what he was doing was wrong, the defence of insanity would be established if he believed that he had no choice but to commit the act in question. The court addressed the issue in three parts: the meaning of 'wrong' in the *M'Naghten* Rules; whether the *M'Naghten* Rules themselves included an element of 'choice'; and whether the law on insanity was to be interpreted as including such an element of 'choice'. To establish the defence of insanity within the *M'Naghten* Rules on the ground of not knowing the act was 'wrong', the defendant must establish both that (a) he did *not* know that his act was unlawful (i.e. contrary to law) and (b) he did *not* know that his act was 'morally' wrong (also expressed as wrong "by the standards of ordinary people"). 'Wrong' meant both against the law and wrong by the standards of ordinary reasonable people. Strictly, a jury must be satisfied that the defendant did not know that what he was doing was against the law nor wrong by the standards of reasonable ordinary people. In practice, how the jury was directed on this issue would depend on the facts and issues in the particular case. The focus in *Windle* (and *Johnson*) on 'wrong' meaning "contrary to law" flowed from the nature of each case. On the facts of both, each defendant knew what he was doing was "contrary to law", but there was evidence that he did not consider that the act was "morally wrong". The defence failed because the defendant could not establish (a) above. The defence of insanity was not available to a defendant who, although he knew what he was doing was wrong, believed that he had no choice but to commit the act in question. Parliament had legislated in the past recognising that insanity was a defence to a criminal charge on the basis that the *M'Naghten*

Rules governed the underlying question (e.g. the Criminal Procedure (Insanity) Act 1964). In the context of murder, Parliament had introduced the partial defence of diminished responsibility (Homicide Act 1957 s.2 as amended by the Coroners and Justice Act 2009 s.52(1)), which at the least had some overlap with reform of the law of insanity in crime. Significant changes to an aspect of the criminal law that had remained undisturbed for so long, laden with policy choices as they would be, were more properly for Parliament. In the present case the judge's direction of law was appropriate. The jury were directed to consider whether K knew that what he was doing was 'wrong'. On that issue, the competing opinions of the psychiatrists were placed before the jury. Two experts took the view that he did know; the other two considered that he was unable to decide that it was wrong. On the basis of that evidence, and the judge's direction, the jury could have found that K did not have relevant knowledge of wrongdoing and thus that the defence of insanity was established. They chose not to do so, but instead reached verdicts consistent with the evidence of the prosecution experts. On any view, the convictions were safe.

Cases considered: *Daniel McNaghten's case* (1843) C & F 200), 8 ER 718; *R v Windle* (1952) 36 Cr App R 85; *R v Johnson (Dean)* [2007] EWHC Crim 1978

A Campbell-Tiech QC and K Harvey appeared for the Appellant
K Maylin appeared for the Respondent

Reported by David Hargreaves, Solicitor
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Commentary

The facts of this tragic case highlight a key concern raised by the Law Commission in its 2013 Discussion Paper, *Criminal Liability: Insanity and Automatism*, namely that the *M'Naghten* Rules ('the Rules') do not encompass mental disorders that impair a person's capacities of rationality and self-control (*Criminal Liability: Insanity and Automatism,* Discussion Paper, July 2013, A.117). It was accepted (at [13]) that the appellant, who had a longstanding history of mental health problems, ADHD and drug misuse, was "seriously mentally ill" at the time of the offences. His parents, whom he attacked, had recently brought him home due to a deterioration in his mental health. His presentation had become increasingly bizarre and he attempted to commit suicide the day before the attacks. Afterwards, he was detained in hospital where he was subjected to enforced electroconvulsive therapy, an invasive treatment that is usually only trialled when symptoms are severe and other treatment options have proven ineffective. He remained so unwell that he was unable to attend parts of his trial and, following conviction was sentenced to a hospital order with restrictions. He remained housed in a medium secure unit at the date of his appeal. The rejection of his insanity plea exemplifies the limited scope of the defence and underlines the continuing need for reform of this area of law.

Defect of reason?

To establish a defence of insanity "it must be clearly proved that at the time of 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" (*M'Naghten's Case*, 210). Here, the prosecution and defence psychiatrists agreed (at [13]) that the appellant was "suffering from a disease of the mind". Specifically, he was "psychotic and deluded". Somewhat surprisingly, it was also agreed that this had led to a defect of reason because his capacity for rational thought was impaired.

The case of *Kopsch* (1927) 19 Cr. App. R. 50, upon which the present court relied to support its conclusions on the wrongfulness limb of the defence, is generally regarded as authority for the proposition that volitional or emotional impairments are not "defects of reason". In *Kopsch* (at [51]) the court rejected the contention that "an impulse which the prisoner [was] by mental disease in substance deprived of any power to resist" could found a defence of insanity. Lord Hewart LCJ famously referred to the concept of uncontrollable impulse as a "fantastic theory" and "the merest nonsense".

In the present case it appears that the appellant had command hallucinations, as he believed the devil had instructed him to attack his parents (see [16] and [29]). He also believed that the devil was controlling his actions (see [4] and [29]). These symptoms are a contemporary expression of Lord Hewart's "uncontrollable impulse". A person who experiences a command hallucination may lack the capacity to choose to decline the command. Someone with a delusion of control may be unable to behave as they wish because they believe their thoughts or actions are being controlled by outside or alien forces. Although the judgment is silent as to the appellant's diagnosis, both symptoms are recognised signs of schizophrenia and they are certainly no longer regarded as mere "theory" (see, for example, *Diagnostic and Statistical Manual of Mental Disorders,* 5th edn, American Psychiatric Association 2013, DSM-V 104, 153; *International Statistical Classification of Diseases and Related Health Problems,* 10th edition, World Health Organisation, ICD-10 F20.0). The Court of Appeal's implicit acceptance that the appellant's mental disorder led to a "defect of reason" appears to be a welcome extension of that concept beyond cognitive deficits to encompass impairment of practical reasoning and the ability to control one's actions (see Jeremy Horder, *Ashworth's Principles of Criminal Law*, 7th edn, OUP 2019, 164).

Nature and quality

The experts agreed (at [13]) that the appellant "knew the nature and quality of his actions". This limb of the defence has been interpreted exceedingly narrowly as referring solely to the physical aspects of an act (*Codère* (1917) 12 Cr App Rep 21 (CCA) 27). Although this appellant believed that his actions were not his own and that he was compelled to comply with the devil's commands, his repeated apologies to his parents during the attacks indicate that he recognised the physical nature and quality of what he was doing. The conclusions of the appellant's experts presumably precluded argument that he may not have understood the nature and quality of his actions "under a fuller more natural description relevant to the criminal law (i.e. including relevant circumstances and results)" (J.J. Child, H.S. Cronberg and G.R. Sullivan, 'Defending the Delusional, the Irrational, and the Dangerous' [2020] Crim L.R. 306, 319).

Wrongfulness

The experts disagreed (at [13]) as to the extent to which the appellant's disordered mental state impaired his ability to "know he was doing what was wrong". The prosecution psychiatrists thought that "the appellant's actions and his later explanation do not suggest that he thought he was acting lawfully". The psychiatrists called on behalf of the appellant thought (at [13]) that his mental state had been "so disturbed that … he was unable to form a rational understanding of right and wrong". The latter represents a broader conception of "knowledge", which reflects the reality that the appellant was not capable of appreciating the true facts and circumstances, or the potential consequences for both his victims and himself.

The trial judge directed the jury (at [21(9)]) that "'wrong' in this context means wrong in law i.e. against the law". The appeal focussed on this limb of the defence and was put in two ways. First, under what the court described as a "narrower approach", the appellant's counsel argued that since the appellant had believed his acts to be those of the devil, he cannot have known that *his* acts were wrong. Secondly, adopting a "broader approach", it was submitted that the *M'Naghten* Rules could – and should – be interpreted to give effect to "the overarching importance of 'agency'" and in accordance with "the modern approach to mental illness" (at [32]).

The terms of the insanity defence have been the subject of extensive and cogent criticism by academics, the appellate courts, and various statutory and parliamentary bodies. It is generally accepted that the core assumption underpinning the Rules is that "it is unjust to hold people criminally responsible when they could not have avoided committing the alleged crime through no fault of their own" (Law Commission, *Insanity and Automatism – A Discussion Paper* July 2013, para. 1.20 & Appendix A. See also: *R v Antoine* [1999] 2 Cr. App. R. 225 (CA) 1208; *DPP v Loake* at [35]).

Yet the Rules provide that even where a blameless defendant was incapable of acting differently, an insanity plea cannot succeed if he knew that what he was doing was (legally) wrong.

A defendant relying on the wrongfulness limb must prove both that he did not know that his act was wrong by the standards of ordinary people (i.e. morally wrong) *and* that he did not know it was against the law. The tendency to direct juries solely in terms of "legal wrongfulness" derives from *Windle*, in which the defendant believed that his acts were morally justified but said on arrest (at […]) "I suppose they will hang me for this", thereby demonstrating that he knew his conduct was contrary to law. Although other jurisdictions have adopted a broader interpretation of this aspect of the Rules, the Court of Appeal in *Johnson* ([2007] EWCA Crim 1978) concluded (at [2]) that it "could not do other than follow the current authorities". As the Butler Committee observed in 1975, "[k]nowledge of the law … is a very narrow ground of exemption since even persons who are grossly disturbed generally know that murder and arson are crimes".

Research published in 1999 revealed that the wrongfulness limb was not always interpreted narrowly by psychiatrists in practice. MacKay and Kerns found that "the question the majority of psychiatrists are addressing is: if the delusion that the defendant was experiencing at the time of the offence was in fact reality, then would the defendant's actions be morally justified?" (R.D. MacKay and Gerry Kerns, 'More Fact(s) About the Insanity Defence' [1999] Crim LR 714, 723) Such an approach is perhaps unsurprising given that, as one of the defence psychiatrists pointed out in the present case, any attempt to apply concepts of rational thought to a psychotic delusion "misses the point".

In addition to declining to import choice into the test of knowledge, the court disputes the contention (at [32]) that, as the law currently stands, the liability of a person experiencing a psychotic delusion "[is] determined by which side of the line the delusion falls". Yet the Rules as they are currently interpreted would distinguish between a delusion under which a person "believes he has received a divine order to slay and that it is lawful to comply with divine orders" (*DPP v Loake* [2017] EWHC 2855 (Admin), [41]), and a delusion that causes a person to believe he has no choice but to comply with Satan's commands. The former is capable of founding a defence on the basis that the defendant did not know that what he was doing was unlawful (*Loake* at [41]), whereas the latter will not support an insanity defence because "the devil is widely regarded as a malign and evil force" and the defendant "must have realised" that obeying such commands was legally wrong (*Keal* at [16]). Similarly, a defendant who used force in the delusional belief that he was being *attacked by* the devil could be found not guilty by reason of insanity on the basis that he did not recognise he was assaulting a human being (*R v Oye* [2013] EWCA Crim 1725), whereas the present case suggests

that a defendant who believed his actions were being *controlled by* the devil would be unable to satisfy the elements of the defence. .

The Law Commission

It is worth considering whether the Law Commission's proposed defence of "not criminally responsible by reason of recognised medical condition" would have achieved a different result. The Commission envisaged that this defence would be available to a person who, because of a recognised medical condition, wholly lacked one of the following capacities at the time of the alleged offence: the capacity rationally to form a judgment; the ability to understand they were doing something wrong; or the ability to control their actions. Provided the defendant adduced testimony from two experts as to the required elements, it would be for the prosecution to disprove the defence to the criminal standard.

The Commission's insistence on total, as opposed to effective, incapacity has been the subject of criticism on the basis that it renders the proposed test "absurdly stringent" (John Stanton-Ife, ' Total Incapacity' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars Publishing 2015, 155). Here, the first prosecution psychiatrist thought it was "significant" that, on the appellant's own account, he "began to process thought properly again" when his father shouted at him during the assault. The second prosecution expert concluded that the appellant's delusion was "budgeable". Meanwhile, the defence psychiatrists accepted that "the feeling of compulsion would not necessarily be constant" and its intensity could "wax and wane over time". Depending on the outcome of the jury's evaluation of the differing expert testimony, it might conclude that the appellant retained some capacity. However, the Commission's proposed test would at least focus the minds of jurors on the contribution the appellant's mental disorder made to his conduct, rather than its contribution to an abstract piece of "knowledge" that he may have lacked the capacity to retain, process or use to reason through to (in)action.

The broader approach: A "wrong turn"?

The Court of Appeal declined the invitation to develop the insanity defence in accordance with contemporary understandings of agency, choice and psychiatry on two bases. First, the court asserts that "an individual case does not provide an apt vehicle for … reconsideration of the … *M'Naghten* rules". But decisions in individual cases are precisely how the common law develops. This case was a prime example of the failure of the current law to afford equitable treatment for those with mental disorders, which is surely a matter of general public importance and a

circumstance of sufficient gravity to allow the Supreme Court to depart from previous decisions, particularly given that the Rules are not, strictly speaking, a "decision" at all. It is therefore especially disappointing that leave to appeal in to the Supreme Court has been refused.

Secondly, the court suggests that Parliament has been "active" in this area of criminal law, citing the Criminal Procedure (Insanity) Act 1964, s.2 of the Homicide Act 1957 and s.52 of the Coroners and Justice Act 2009 in support of this contention. The 1957 Act introduced the defence of diminished responsibility, which was amended by the 2009 Act; neither of these statutes had any impact on the Rules beyond the practical consequence that defendants are more likely to plead diminished responsibility in murder cases because its elements are easier to satisfy and its label less stigmatising. The court's reliance on an Act that was passed in 1964 is hardly indicative of "activity" and, in any event, that Act deals with procedure and disposals. MacKay has argued that, "[i]f Parliament had wished to incorporate the *M'Naghten* Rules … it would surely have done so expressly" (MacKay, 'Righting the wrong? - some observations on the second limb of the *M'Naghten* Rules' [2009] Crim. L.R. 80). More recently, Parliament has declined to act upon the Law Commission's recommendations for reform of unfitness to plead, and the government showed such little support for the Commission's insanity project that it did not even reach the consultation stage.

The Rules were not laid down by precedent in the conventional manner. They were formulated as answers to a series of hypothetical questions posited under a parliamentary procedure then available to the House of Lords in its legislative capacity. In *R v Johnson* [2007] EWCA Crim 1978, the Court of Appeal acknowledged (at [14]) that the questions were "dealt with without, it would appear, any argument by counsel" and the resultant "Rules" therefore "have to be approached with some caution". The court now states that reform of insanity is properly a matter for Parliament because significant change to the Rules would be "laden with policy choices", but it is by no means clear that is the case. While fashioning a new defence of necessity would be to intervene in an area in which there are diametrically opposed views, there is broad agreement that the current defence of insanity is inhumane, offensive and out of step with modern medical understanding. It would be a much less contentious proposition to align an established defence with contemporary psychiatric thinking. It has been argued elsewhere that the Rules misstated the extant law, particularly as regards the applicability of the defence to irresistible impulses (see Law Commission, *Criminal Liability: Insanity and Automatism – A Discussion Paper* at 4.42, fn 37. See also Ronnie Mackay, 'The M'Naghten Rules – a brief historical note' [2019] Crim LR 966; Child et al, 324). It is surely time for the courts to correct this "wrong turn" and reformulate the Rules to ensure they are fit for the modern courtroom.