Ruling by the Bailiff – 3 August 2001

The Law Officers of the Crown

v

Derek Lee Harvey.

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Judgment of the Bailiff on the preliminary issue as to the test to be applied in determining insanity in criminal proceedings in Guernsey.

THE BAILIFF: Derek Lee Harvey has pleaded not guilty to two counts of murder. The victims of his alleged crime were his estranged wife and child respectively.

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His counsel, Mr. Merrien, has raised as a preliminary point the issue of what directions I should be giving to the Jurats at this moment in time on how they should approach the issue of whether the accused is insane to the extent that a special verdict should be recorded in accordance with the provisions of the Criminal Justice Special Verdicts (Guernsey) Law, 1961.

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In his original skeleton Mr. Merrien appeared to be inviting me to apply the same test as has recently been promulgated by my brother Bailiff in Jersey in the case of Attorney General v. Jason Cyril Prior, February 2001. Put briefly, the Bailiff of Jersey found that the test should be stated in that Island as that a person would be insane within the meaning of similar legislation in Jersey *"If at the time of the commission of the offence, his unsoundness of mind affected his criminal behaviour to such a substantial degree*

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that the Jury consider that he ought not to be found criminally responsible."

As Mr. Merrien developed his arguments he somewhat broadened his approach and invited me to go down other routes in my search for a suitable test for insanity to meet the objections that have been expressed concerning the application of the rules known as the M'Naghten Rules, formulated by the judges in England in 1843.

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Mr. Robey, who appears for the Crown in this matter, on the other hand urges me to stay with the well tried tests set out by the courts in England following the judges' pronouncements in M'Naghten. Mr. Robey has developed a critique of the Bailiff of Jersey's judgment and endeavoured to draw attention to the problems that would arise if I were to adopt a similar approach in Guernsey.

As Counsels' helpful submissions developed a second path leading me to a different conclusion from that originally suggested by Mr. Merrien opened up, namely, the question as to whether notwithstanding the fact that Guernsey has not legislated on the lines of the Homicide Act 1957, this Court should accept that the defence of diminished responsibility as it has developed in the last 40 years in England should be incorporated into the criminal law of Guernsey. In this judgment I propose first of all to deal with Mr. Merrien's first argument that the M'Naghten Rules should be rewritten and then to look at the issue of diminished responsibility.

The first and somewhat fundamental area where I feel bound to depart from my brother Bailiff is in his conclusion expressed in paragraph 29 of his judgment which reads as follows:-

> *"(1) The M'Naghten Rules do not form part of the Law of Jersey and do not therefore at first blush provide the answer to the question of the meaning of insanity in the Criminal Justice and Insane Persons (Jersey) Law 1964."*

Sir Philip Bailhache says that he can find no case in Jersey where the M'Naghten Rules have been applied. That may of course be because the law in that Island has developed differently or it may be, as indeed would be wholly understandable with any small jurisdiction, that issues of sanity of accused persons have not troubled the Courts of that Island to the same extent as they have the Courts of this Island. In his judgment, and also in Mr. Robey's submissions, we have reference to local experts who gave evidence to the Royal Commissioners sent in 1848 to enquire into the state of the criminal law in both Jersey and Guernsey and I would just say at this stage that I cannot attach a great deal of weight to those answers, as to a certain extent the answers in both Islands of the Jurats, Advocates and others seem to me to be somewhat speculative. I think it is however worth looking at that report in a little detail because it does show how the criminal law of this Bailiwick was consciously developed in the 1840s.

The Royal Commission of 1848 seems to have been instigated as a result of heavy disquiet in Jersey over a number of matters. The Commissioners in their report on Guernsey make it clear that the situation was nothing like as fraught as it appears to have been in Jersey albeit, and this can be found from reading the text of the report, a number of people did come forward to give evidence and they seemed to have complaints, many of which were probably justified, that they had been treated in a somewhat arbitrary way in the Courts of the Island, particularly if they happened to be strangers to the Island. The following quotation from page 17 of the report as to how the Commissioners saw the future pattern of the development of the criminal law is perhaps just worth reading:-

> *"We do not think it necessary to detail more minutely the several heads of crime, and the punishments incident to them. It is sufficient to state that we found scarcely a single incidence in which the law could be traced to a higher source*

than the discretion of the Court, or in which that discretion was itself secured from continual variation in practice. We except, of course, the cases in which Ordinances have been passed by the Legislature of the Island. We have already stated the nature of the subjects of these Ordinances; and we need only add that manifestly the Criminal Law of the Island, in the higher and more general sense of that term, cannot be considered as resting upon this foundation to any serious extent.

It is clear that the continuance of such a system is inconsistent with the administration of justice on any fixed principle, and it tends to subject the Court to the imputation of partiality or caprice. The community may fairly demand a definite state of law; and we think the Judges themselves entitled to be relieved from the exercise of a discretion which cannot fail to be embarrassing to themselves and unsatisfactory to the community. We recommend the adoption of a course, with regard to the criminal law of Guernsey, similar to that suggested in our First Report with regard to the criminal law of Jersey: that is to say, that a code be drawn up, embodying in as few words as possible the definitions of crime, and, so far as may be thought expedient, assigning punishments, in language which has already become familiar in the English law books. The effect of this will be to supply those who have to administer the Criminal Law in Guernsey with that which they cannot possibly obtain from their own Court, namely, a copious body of practical precedents accessible through authorised publications. The present Bailiff is an English lawyer of experience, and takes a very great interest in the discharge of that part of his duties which regards the administration of justice.

We are ourselves greatly indebted to him for his most valuable information and assistance in the progress of this inquiry, and feel confident that he is the person best qualified, from his familiarity with the existing law and the confidence which the Court place in him, to prepare a measure which shall remedy these defects. The amendments which have taken place in the law during the short period he has held the office, and the improvements which his legal experience has enabled him to introduce into the practice of the Court, are a satisfactory guarantee of his willingness and ability to co-operate with the States in preparing a definite system of penal law."

It appears that for some time prior to that the criminal law had developed in an unstructured way and the need was to have a clear criminal law with offences defined and categorised and the various glosses on such offences developed over the centuries in the English courts imported into Guernsey jurisprudence. Consequently, since 1848 one has witnessed the development of common law offences on parallel lines to those offences in England and also the development of local legislation dealing with the more common offences of dishonesty and other offences such as criminal damage that have been the creatures of statute mirroring English provisions. Jersey law, I accept, has not always developed in a similar direction.

The M'Naghten Rules were of course not statutory but they have been applied in England since 1843 and they have also been applied on three occasions with approval in the Royal Court of Guernsey. Cases where they have been referred to are The Law

Officers of the Crown v. de la Mare [1935], Law Officers of the Crown v. Murdoch [1958], and Law Officers of the Crown v. Poole [1982]. With such clear precedents I would hesitate before concluding that the Royal Court was in error on each of those three occasions. Accordingly, I should follow their reasoning and not go out and say that the reasoning was wrong and that the law of Guernsey relating to insanity on those occasions was something other than what the Court decided it was. That, however, is not an end of the matter, so far as Mr. Merrien's argument is concerned I must also consider whether, even if they were correct, a correct statement of the law as recently as 1982, there are circumstances where this Court should be redefining the rules of insanity as Mr. Merrien urges.

I must go on to draw out a second point where I part company with my brother Bailiff and I fear he was led into error by submissions of Counsel. This is illustrated by his statement in the middle of paragraph 3 of his judgment as follows:-

> *"I interpose that it is also common ground between Counsel that the M'Naghten Rules are not on their face compatible with convention rights and the 2000 Law which incorporates the Convention into the Domestic Law of Jersey is not yet in force."*

I have had the benefit of fuller argument from Counsel than the Bailiff of Jersey appears to have had and on reflection I cannot find that the M'Naghten Rules are in themselves incompatible with the Convention. As I put it to Mr. Merrien there appears to be no authority for saying that sane people who are convicted and imprisoned for murder because the M'Naghten Rules do not extend to treating them as insane do not appear to have any grounds for saying that their human rights are being infringed. Where those dealing with the problem in Jersey have in my judgment fallen into error is by their confusing with the issue of detention, the circumstances of making a finding of insanity about which there seems to be little European learning. Indeed it seems that there are considerable variations within countries covered by the Convention as to how the test for establishing whether somebody is insane to the extent that they should not be responsible in law for their criminal conduct is interpreted.

The European cases to which I have been referred are concerned with another issue, namely, what is to be done with somebody after a finding that that person is insane and in particular after they have been discharged from being tried for the offence in respect of which there has been a finding of insanity. The European Court of Human Rights has in a number of cases involving several European countries come out strongly in favour of the principle that mental patients should not be imprisoned, and that their cases should be reviewed regularly under a recognised system of review, the patient having assistance of Counsel if necessary. Further the point emerges that just because somebody has committed a heinous act years ago when he was insane does not justify that person being kept in a secure mental hospital forever. It goes without saying therefore that these "European" problems, as I call them, will still be there whether or not I adapt the M'Naghten Rules. They are still a potential problem in Jersey despite the Bailiff's apparently modernist approach.

The M'Naghten Rules do present a very stark distinction between the person who walks away in the old days with their life on the grounds of insanity and the person who had to pay the ultimate penalty for their offending. Even today the contrast is considerable

as murder carries a life sentence both here and in England, whereas a person found to be insane is likely to be released into the community as soon as it is safe to let him go because of the European jurisprudence to which I have referred. I can therefore well see why, despite our more enlightened views today, English courts and Parliament have B set their head against widening the categories of persons who can escape responsibility from killing somebody on the grounds of insanity and have in particular resisted the idea, which Mr. Merrien admits is the consequence of moving in the direction he is asking me to move, of leaving it to the doctors to decide whether or not a person is medically insane.

C However, it is quite clear when one opens the chapter in Blackstone's Criminal Practice (2001 edition) on diminished responsibility that since 1957 the pressure resulting from the stark situation I referred to above has been lifted by the introduction of the defence of diminished responsibility. Blackstone deals with that in paragraph B1.13:-

> *"Basis of Defence*
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> D *This defence is purely statutory, having been introduced for the first time into English law (it had long been known to the Scottish courts) by the Homicide Act 1957 S. 2."*

That section is then set out. I will not read it in full. Section 2(2) puts the burden of proof on the defence, although this burden is only required to be on the balance of E probabilities rather than beyond reasonable doubt. It then says:-

> *"The placing of the burden on the defence does not breach Article 6 of the European Convention on Human Rights and is therefore unaffected by the Human Rights Act 1998..."*

F The next paragraph reads as follows:-

> *"The defence of diminished responsibility has largely replaced the insanity defence in murder cases."*

And then it says later:-

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> *"The courts have interpreted and applied the defence in a fairly flexible manner to enable it to reduce a wide range of killings, where there are compelling mitigating circumstances, from murder to manslaughter. Nevertheless, some supporting medical evidence will invariably be required, and the court must formally be satisfied of the following ingredients..."*

H And it then goes into a detailed discussion of the ingredients of the defence of diminished responsibility.

Mr. Merrien with his usual diligence has produced a couple of other authorities with which I was not conversant, namely, Clarkson & Keating Criminal Law: Text and Materials 1998, 4th edition; and Allen's Textbook on Criminal Law, published by the Blackstone Press. I read from Clarkson and Keating:-

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"H. Diminished Responsibility

1. Introduction

The 'defence' of diminished responsibility is not a general defence and, strictly, ought to be discussed elsewhere in this book, since, like provocation, it operates only as a defence to murder, reducing liability to manslaughter. However, it will be discussed at this stage, rather than in the context of homicide, for two important reasons.

First, the partial defence raises problems of responsibility similar to those raised by the insanity defence, and secondly, the practical effect of the availability of the defence of diminished responsibility has been to decrease resort to the insanity plea.

2. The Problem

Royal Commission on Capital Punishment Cmnd. 8932 (1949-1953), para. 411:

It must be accepted that there is no sharp dividing line between sanity and insanity, but the two extremes of 'sanity' and 'insanity' shade into one another by imperceptible gradations. The degree of individual responsibility varies equally widely; no clear boundary can be drawn between responsibility and irresponsibility. The existence of degrees of responsibility has been recognised in ... [other] legal systems. ... The acceptance of the doctrine of diminished responsibility would undoubtedly bring the law into closer harmony with the facts."

And then it goes on to various discussions on this and then it refers to the solution which is in Section 2 of the Homicide Act. The writers continue on the next page to state that:-

"Rather, the judiciary have instead been content to permit the diminished plea to operate in a largely pragmatic manner."

From Allen I think it is worth just quoting an extract relating to official statistics:-

"On average, in the period 1988 to 1997 there were about sixty-five convictions per year of manslaughter due to diminished responsibility. By contrast, over the same period, there were only eleven verdicts in total of not guilty by reason of insanity on indictments for murder. The defence has all but replaced the insanity defence on a charge of murder where the accused was suffering from a mental incapacity. The defence covers all cases which would fall within the M'Naghten Rules and many other conditions which these do not cover."

It is clear from these writers, that the diminished responsibility defence has proved an effective way of dealing with homicides where in the expression of using the words of Blackstone there were *"compelling"* mitigating circumstances. Why one asks has not Guernsey followed suit and introduced legislation similar to the Homicide Act 1957?

One reason is perhaps that Guernsey led the way in being the first part of the British Islands to abolish the death penalty for murder and that may have taken some of the heat out of any local pressure to reform the law further. Apart from that I can see no reason other than perhaps an incapacity on the part of the Law Officers to move law reform in an area which was unlikely to give rise to problems save on the rarest occasion. It has to be noted that until recently the public legal service has been somewhat under resourced and in this area and, indeed, a number of other areas legislation which has not been perceived as of the utmost urgency has been put on one side, although its absence from the statute book was and remains wholly indefensible. Therefore, I think I should take account of this being a small jurisdiction with a certain limitation on its resources for promoting legislation, and further, emboldened by the judgment of the Court of Appeal in Morton v. Paint (1999) which mildly chastised me for declining the opportunity of bringing the law on occupiers' liability in Guernsey into a modern state by means of a piece of judicial law making, I am going to set off down the path of engaging in some judicial law making, fully cognisant of the admonition of Southwell, JA, in Morton, that *"development of the civil common law by the courts is more readily undertaken than that of the criminal common law."*

In the time that I have had to prepare this judgment, it has not been possible for me to engage in a critique of the five aids to navigation referred to in Morton and also in the earlier case in England of C. v. Director of Public Prosecutions (1996) AC1. Suffice to say that I find these aids generally unfavourable when considering any proposal to widen the range of people who should be excused from criminal responsibility on the grounds of insanity, whereas the aids are more clear in guiding me to adopting the defence of diminished responsibility as part of the law of this Island.

I accordingly hold that in this case the Jurats should be directed that so far as the test of insanity is concerned the M'Naghten Rules still form part of our law and I would propose giving directions on the lines previously given by Bailiffs Bell and Sherwill, and Deputy Bailiff Dorey, as he then was, in the three cases to which I have referred, but they will also be directed that it is within their power if they are satisfied that the accused is suffering from diminished responsibility as defined in the jurisprudence which has been developed in the English courts since 1957 that they can find the accused not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility.

As in England, the burden of establishing diminished responsibility should rest with the accused and that would be on the balance of probabilities.

I will endeavour to get that judgment typed up and available for you early next week. So those are the directions that we give. We can now proceed, is it Monday morning to start?

ADVOCATE ROBEY: Yes sir, the prosecution opening. What time sir?

THE BAILIFF: 9.30?