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## **Diminished responsibility: jury verdicts and ‘uncontradicted’ psychiatric evidence**

### ***R v Brennan* [2014] EWCA Crim 2387, Court of Appeal**

*Keywords:* Murder; Diminished responsibility; Jury verdicts

Michael Brennan, 22, worked as a male escort. In May 2013, he sent a text to one of his clients, Paul Simons, a 54-year-old divorced antiques dealer, inviting him to visit Brennan at a flat in Chelmsford. The flat was rented by Brennan’s boyfriend, who was on holiday at the time, and so was otherwise unoccupied. There, Brennan stabbed Simons to death with three knives in what was described as a “savage and sustained attack”. The probable cause of death was a stab wound that penetrated Simons’ heart to a depth of 15 cm. There was a second stab wound to the chest and a blow to the back of his head with a hammer (probably inflicted post-mortem). There were a total of 22 stab wounds, mostly to Simons’ back, caused while he was lying face down on the floor. Brennan then left the flat and rang the police to tell them that he had just killed someone.

Brennan was charged with murder and appeared before Judge Ball QC and a jury at Chelmsford Crown Court in December 2013. Brennan had previously offered a plea of guilty to manslaughter on the basis of diminished responsibility, but that was rejected by the Crown. At the trial, it was undisputed that Brennan had killed Simons and that he had done so intentionally. The only defence was diminished responsibility, under s 2, Homicide Act 1957 (as amended by s 52, Coroners and Justice Act 2009). Giving evidence at the trial, Brennan’s mother Angela said that her son had been the subject of homosexual bullying after coming out aged 14, and had stones thrown at him by other children. Even before then, he had had personality and mental health issues since early childhood. The only expert evidence adduced during the trial was from a consultant forensic psychiatrist, Dr Gillian Mezey. Her opinion was firmly in support of the defence. She told jurors that Brennan suffered from two recognised medical conditions, “Schizotypal Disorder” and “Emotionally Unstable Personality Disorder”. Her evidence was based on Brennan’s family, medical and personal history and an interview that she had conducted with him two months after the killing. She further testified that Brennan’s medical disorder would have substantially impaired his ability to form a rational judgment and/or to exercise self-control at the time of the killing and finally that his disorder would have been a significant contributory factor in causing him to act in the way that he did. Dr Mezey’s testimony was not contradicted by any expert evidence adduced by the Crown, which called no expert evidence at all in that regard. Nevertheless, the jury convicted of murder. Brennan appealed.

**HELD, ALLOWING THE APPEAL**, that the murder conviction should be quashed and a verdict of manslaughter substituted (at [3]). The case involved “two relevant but potentially conflicting principles”. First, “in criminal trials cases are decided by juries, not by experts”; and second, “juries must base their conclusions on the evidence” (at [43]). Davis LJ said:

“There can... be no room for departure from so fundamental a principle as the second principle. It reflects the very essence of the jury system and of a just and fair trial. But the first principle, whilst most important and undoubtedly descriptive of the general position, is also capable... of admitting of degree of

qualification in a suitably exceptional case... [S]uppose, for example, a matter arises falling exclusively within the domain of scientific expertise; suppose, too, that all the well qualified experts instructed on that particular matter are agreed as to the correct conclusion and no challenge is made to such conclusion. Can it really be said that the jury nevertheless can properly depart from the experts as to that conclusion on that particular matter: simply on the basis that it is to be said, by way of mantra, that the ultimate conclusion is always for the jury? We would suggest not. Where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so." (at [44])

Davis LJ pointed out that the present case was the first of its kind to come before the Court of Appeal involving the amended version of s 2 of the Homicide Act 1957. He said that the new wording of s 2 gave "significantly more scope to the importance of expert psychiatric evidence" (at [49]). There was now "essentially" a four-stage test and "most, if not all, of the aspects of the new provisions related entirely to psychiatric matters" (at [51]). It was "both legitimate and helpful... for an expert psychiatrist to include in his or her evidence a view on all four stages, including a view as to whether there was substantial impairment" (at [51]).

Moreover, in a murder trial where the medical evidence supporting diminished responsibility was "uncontradicted" and there was no other evidence "capable of rebutting" it, the murder charge ought to be withdrawn from the jury (at [65]). It was "unprincipled" that a charge of murder should be left to the jury "simply and solely because the prosecution wants it to be" (at [66]).

## COMMENTARY

### ***Power of the Court of Appeal to overturn jury verdict***

As the Court of Appeal acknowledged, *Brennan* is the first case to raise a question as to the safety of a murder conviction returned in defiance of "uncontradicted and unchallenged" expert psychiatric evidence under the amended provisions of s 2, Homicide Act 1957. However, it is far from the first such case since 1957. The present case is similar to the decisions in *R v Matheson* [1958] 1 WLR 474, *R v Bailey* [1961] Crim LR 828; (1978) 66 Cr. App. R. 31 and *R v Pearce* (2000; unreported). In the first case, Albert Matheson, 52, killed a 15-year-old boy by hitting him over the head with a water-filled bottle and a claw hammer. He then cut the body in half, disembowelled it, and packed the intestines in a suitcase. He hid the remains in a sump underneath the St. James' Boxing Hall in Newcastle before handing himself in to the police. At his murder trial, the three medical experts agreed that Matheson was suffering a mental abnormality based on retarded development (one of the admissible causes of an abnormality of mind under the original s 2). Two of the experts said that Matheson's mental development was that of a boy of 10. No medical evidence was given by the prosecution in rebuttal. Despite this, the jury at Durham Assizes rejected the defence and Matheson was convicted of murder. However, the Court of Criminal Appeal quashed his conviction, substituting one of manslaughter. Lord Goddard CJ said that where there was "unchallenged" evidence of medical abnormality (at p. 478) and where "no facts or circumstances appear that can displace or throw doubt on that evidence" (at p. 479) then the Court was "bound to say that a verdict of murder is unsupported by the evidence" (at p.

479). The Lord Chief Justice was careful to say that this was not a case of the courts usurping the role of the jury:

“The fact is there was unchallenged evidence that this man was within the provisions of s 2 of the Homicide Act 1957, and no evidence that he was not. This decision, therefore, in no way departs from what has been said in other cases, that the decision is for the jury and not for the doctors; it only emphasizes that a verdict must be supported by evidence. If there is evidence and a proper direction, this court will not usurp the function of the jury, unless, indeed, there is evidence so overwhelming that the court comes to the conclusion that though it might be said there was some evidence the other way, the verdict would amount to a miscarriage of justice. We base our decision on the ground that the evidence in this particular case did not support the conviction” (at p. 479)

In *Bailey*, the appellant had battered a 16-year-old girl to death with an iron bar. Three medical experts including a senior prison medical officer agreed that Bailey suffered from epilepsy, that he had suffered a fit at the time of the killing, and that it had substantially impaired his mental responsibility at that time. However, despite that evidence, the jury at Leicester Assizes rejected the defence and Bailey was convicted of murder. He appealed and the Court of Criminal Appeal quashed his murder conviction, substituting a verdict of manslaughter. Lord Parker CJ said:

“[O]f course juries are not bound by what the medical witnesses say, but at the same time they must act on evidence, and if there is nothing before them, no facts and no circumstances shown before them which throw doubt on the medical evidence, then that is all that they are left with, and the jury, in those circumstances, must accept it.” (at p.32)

In *Pearce*, the appellant had killed a 17-year-old woman with whom he was in a long-term relationship. The killing was described as “exceptionally violent” (at [4]). He was charged with murder, and his plea of guilty to manslaughter on grounds of diminished responsibility was rejected by the Crown. At the trial, two doctors who gave evidence for the defence testified that Pearce was suffering from a mental abnormality at the time of the killing as a result of a combination of drug-induced psychosis, involving “auditory hallucinations and abnormal beliefs”, clinical depression, and low intelligence. Despite this, the jury at Wolverhampton Crown Court rejected the defence and convicted Pearce of murder. However, the Court of Appeal quashed his conviction and substituted one of manslaughter. Swinton Thomas LJ explained that “there was no evidence which could possibly justify a jury in coming to a conclusion other than that his responsibility for his actions in killing the deceased was substantially diminished” (at [27]).

In *Brennan*, Davis LJ in the Court of Appeal noted that there had been several other cases where juries had returned verdicts of guilty to murder despite expert evidence supporting a defence of diminished responsibility, and that these verdicts had been upheld on appeal. However, those cases were all distinguishable from *Brennan*. In the first of these cases, *Walton v R* [1978] AC 788, the accused had pleaded not guilty to murder based on evidence of retarded development. However, this was rejected by the jury in the High Court of

Barbados, who returned a verdict of guilty to murder. The Barbados Court of Appeal and the Privy Council both upheld the verdict. Lord Keith described the expert evidence as “not entirely convincing” (at p.793). He pointed out that “the jury *on occasion* may properly refuse to accept medical evidence” (at p.793, emphasis added). In *Brennan*, Davis LJ said that “no *entirely unqualified* right on the part of the jury so to refuse was acknowledged” by the Privy Council (at [57], emphasis added).

Similarly, the Court of Appeal refused to overturn the jury’s verdict of guilty to murder, despite evidence supporting a plea of diminished responsibility in *R v Sanders* (1991) 93 Cr. App. R. 245 and *R v Eifinger* [2001] EWCA Crim 1855. In the former case, Watkins LJ explained that there were “two clear principles” applicable in all diminished responsibility cases. The first was that “if there are no other circumstances to consider, unequivocal, uncontradicted medical evidence favourable to a defendant should be accepted by a jury and they should be so directed” (at p.249). The second was that “where there are other circumstances to be considered the medical evidence, though it be unequivocal and uncontradicted, must be assessed in the light of the other circumstances” (at p.249). In *Sanders*, the appeal was dismissed because, although there was uncontradicted psychiatric evidence of reactive depression, there were “other circumstances” which cast doubt on whether the appellant’s mental responsibility was substantially impaired. Specifically, the Crown had argued that *Sanders* involved an “intentional premeditated killing by a man overwhelmed with bitterness and jealousy”. Watkins LJ said that “On the evidence as a whole the jury were... entitled to reach their verdict” (at p.251).

In *Eifinger*, although two psychiatrists were prepared to corroborate the defence of diminished responsibility, the only evidence of a depressive illness was provided by the appellant himself. The appeal court held that the jury was therefore “in a position to decide the essential question, namely if there was a depressive illness, could it be described as an illness of such severity as to have substantially impaired the appellant’s responsibility for his acts?” Latham LJ said that “this court can, and indeed should, interfere where the material before the jury really does not support any other conclusion but that the jury must have come to a perverse conclusion on the facts” (*Eifinger* at [19]). However, in the case, the appeal court had no “doubt but that the jury understood what their task was and had material upon which they could come to the conclusion that they did” (*Eifinger* at [20]).

### **Power of the trial judge to withdraw murder from the jury**

In *Brennan*, Davis LJ emphasised that, while trial judges had the power to withdraw murder charges from the jury in diminished responsibility cases, this should not be seen as a violation of the “general principle that all criminal trials must be left to be decided by a verdict of the jury” (at [64]). Rather, it was “an application of the fundamental principle that juries may only properly convict on evidence capable of justifying a conviction” (at [64]). Davis LJ said:

“So to say is not... to permit an otherwise impermissible judicial encroachment on the proper functions of the jury nor unduly to encroach on the burden of proof placed on the defence. Rather, it is to acknowledge that there may be cases where the other evidence is, for example, too tenuous or, taken at its highest, insufficient (set in the light of the uncontradicted expert evidence) to

permit a rational rejection of the defence of diminished responsibility... A charge of murder should not be left to the jury if the trial judge's considered view is that on the evidence taken as a whole no properly directed jury could properly convict of murder" (at [65 – 66]).

The decision in *Brennan* was based on various statements made in *R v Khan* [2009] EWCA Crim 1569, [2010] 1 Cr. App. R. 4; [2010] Crim LR 136. In that case, Aikens LJ said:

"[T]here may be very exceptional cases where the defence of diminished responsibility is raised by the defence but contested by the Crown in which a judge would be entitled to withdraw the charge of murder from the jury at the close of the evidence. [T]here is no legal principle that would prevent a judge from taking such a course if the proper criteria could be met. However, whilst that course is theoretically possible, we think that it would only be in very rare cases that the proper criteria would be satisfied. A trial judge would have to be satisfied that the evidence, both medical and factual, was such that no reasonable jury, properly directed, could conclude that the defendant had failed to prove [the defence]. In a case where the defence of diminished responsibility was being advanced by a defendant and was being actively challenged by the Crown, it seems to us highly unlikely that a trial judge could reasonably reach such a conclusion" (at [42]).

Commenting on this, Davis LJ in *Brennan* observed that "It may well be the position... that the exercise of this power to withdraw... will only be in exceptional circumstances" but he noted that, ultimately, each case "must be decided on its own facts and circumstances" (at [67]). He concluded as follows:

"We add, however, that in the light of the new provisions of s 2 as amended, with its significantly different structure and effect, pursuit by the prosecution of a charge of murder in the face of a defence of diminished responsibility which is unequivocally supported by reputable expert evidence but which is not contradicted by any prosecution expert evidence should, we venture to suggest, become relatively uncommon... Accordingly, where the Crown proposes to contest a defence of diminished responsibility the new provisions set out in s 2 as amended should be taken as an encouragement for the Crown to adduce its own expert evidence to support its stance" (at [67]).