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## **Diminished responsibility: no defence without evidence**

*R v Bunch* [2013] EWCA Crim 2498

*Keywords:* Murder; Amnesia; Diminished responsibility; Alcohol dependence syndrome; Voluntary intoxication

Martin Bunch (MB) and Jeanette Goodwin (JG) had an affair which ended in late 2010. From early 2011, however, MB made phone calls and sent text messages to JG in threatening and abusive terms. Eventually in July 2011 he went to JG's home and stabbed her to death with a kitchen knife that he had brought with him. JG was stabbed "more than 20 times", principally in the upper chest and arm. MB was charged with murder and was tried at Chelmsford Crown Court in August 2012. Despite "overwhelming" evidence that MB was the killer, he pleaded not guilty on the basis that either he was not the killer or, if he was, that he had consumed so much alcohol (and "some" cocaine) on the day in question that he had no recollection of what happened and/or that he lacked malice aforethought. At his trial, these pleas were rejected and he was convicted of murder. The trial judge, Gratwicke J, imposed a life sentence with a minimum term of 27 years' imprisonment. MB appealed, contending that Gratwicke J should have directed the jury on the statutory defence of diminished responsibility, on the basis that MB suffered from alcohol dependence syndrome.

**HELD, DISMISSING THE APPEAL**, that although alcohol dependence could, in principle, support a plea of diminished responsibility, in this case there was simply insufficient evidence to support such a plea. Gratwicke J had correctly decided that, even if MB was suffering from alcohol dependence, there was insufficient evidence for him to be able to prove the other elements of the defence, i.e. that he was suffering an abnormality of mental functioning, and that his medical condition (if indeed there was one) had substantially impaired his ability to understand the nature of his own conduct, to form a rational judgment or to exercise self-control, as set out in s.2(1) of the Homicide Act 1957 (as amended). Such evidence as there was indicated that MB was a binge drinker, rather than someone who was dependent on alcohol (in his own evidence, MB had denied being dependent on alcohol and had told the jury that he could control his desire to drink if it was a working day). Moreover, simply being intoxicated could not support a plea of diminished responsibility.

### **COMMENTARY**

#### ***Amnesia***

MB's claim at trial that he had "no recollection of that afternoon because he had drunk a great deal of alcohol" is no defence. In *R v Heard* [2007] EWCA Crim 125, [2008] QB 43, the accused had made a similar claim in response to an allegation of sexual assault contrary to s.3 of the Sexual Offences Act 2003. In upholding the guilty verdict, Hughes LJ (as he then was) in the Court of Appeal stated unequivocally that:

On the evidence the defendant plainly did intend to touch the policeman with his penis. That he was drunk may have meant either: (i) that he was disinhibited

and did something which he would not have done if sober; and/or (ii) that he did not remember it afterwards. But neither of those matters (if true) would destroy the intentional character of his touching... [F]or the memory to blot out what was intentionally done is common, if not perhaps quite as common as is the assertion by offenders that it has done so. (*Heard* at [17])

### ***Voluntary Intoxication***

MB's principal defence at his trial was that, despite all of the evidence to the contrary, he was not in fact the killer; rather, he suggested that JG's husband was responsible for her death. This defence, described as "cynical" by Holroyde LJ in the Court of Appeal, was rejected by the jury. MB's alternative basis for his not guilty plea was a denial of *mens rea*, specifically malice aforethought, caused by his voluntary consumption of alcohol and cocaine. As is well known, evidence of a state of intoxication, even if self-induced, is capable of preventing the Crown proving intention in "specific intent" crimes, of which murder is perhaps the quintessential example (*DPP v Beard* [1920] AC 479; *Bratty v Attorney-General for Northern Ireland* [1963] AC 386; *R v Lipman* [1970] 1 QB 152). However, simply being intoxicated is never a "defence" and, unless the intoxication is so extreme as to prevent proof of *mens rea*, it is irrelevant. The failure of MB's plea is an example of the situation described by Lane LJ (as he then was) in *R v Sheehan* [1975] 1 WLR 739 when he said:

Indeed, in cases where drunkenness and its possible effect upon the defendant's *mens rea* is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. (*Sheehan* at 744)

In the present case, Holroyde LJ had no doubt that MB's state of mind at the time of the killing fell within the parameters of "drunken intent" when he said that the "nature of the attack and the level of force used in the stabbing plainly pointed to an intention to kill, or at least to cause really serious injury" ([at 3]).

### ***Diminished responsibility***

The defence of diminished responsibility is located in s.2(1) of the Homicide Act 1957 (the 1957 Act), as amended by s.52 of the Coroners and Justice Act 2009 (the 2009 Act). It is only a defence to murder and provides that an accused will be entitled to be found not guilty of murder (albeit guilty of manslaughter instead) if the jury is satisfied that, at the time of the killing, he was suffering from an 'abnormality of mental functioning' which arose from a 'recognised mental condition', which 'substantially impaired' the accused's ability to understand the nature of his conduct, to form a rational judgment and/or to exercise self-control and which provided 'an explanation' for his doing or being a party to the killing. The burden of proof is on the defence (s.2(2)) of the 1957 Act) albeit on the lower standard, that of the balance of probability (*R v Dunbar* [1958] 1 QB 1).

In the present case, the defence did not fail because of any judicial misgivings about the acceptability of alcohol dependence syndrome as the basis of a diminished responsibility

plea. In *R v Stewart* [2009] EWCA Crim 593, [2009] 1 WLR 2507, Lord Judge CJ in the Court of Appeal stated that:

Whether or not brain damage is discernible, alcohol dependency syndrome is a disease (ICD-10) or disorder of the mind (DSM-IV-TR). It is not excluded from the operation of s.2 of the Homicide Act 1957. (*Stewart* at [26]).

Although *Stewart* was a decision on the original version of the Homicide Act, the amendment of s.2 by the Coroners and Justice Act 2009 does not undermine the veracity of this statement. It is clear that alcohol dependence syndrome is a 'recognised mental condition'. (Note: "ICD-10" refers to the 10<sup>th</sup> revision of the World Health Organisation's *International Classification of Diseases* and "DSM-IV-TR" refers to the *Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association.)

The defence in the present case failed because of a lack of evidence. The principle that medical evidence is crucial to the defence of diminished responsibility was first established in *R v Byrne* [1960] 2 QB 396, in which Lord Parker CJ said that, while there was no statutory requirement that a plea of diminished responsibility be supported by medical evidence, the "aetiology of the abnormality... does, however, seem to be a matter to be determined on expert evidence" (at 403). Similarly, in *Dix* (1982) 74 Cr App R 306, Shaw LJ in the Court of Appeal stated, with reference to s.2(1) of the 1957 Act:

...scientific evidence of a medical kind is essential... Thus while the subsection does not in terms require that medical evidence be adduced in support of a defence of diminished responsibility, it makes it a practical necessity if that defence is to begin to run at all. (*Dix* at 311)

Whilst all of these cases pre-date the amendment of the original 1957 Act by the 2009 Act, in *Bunch* both Gratwicke J in the Crown Court and Holroyde LJ in the Court of Appeal were in agreement that these principles continued to apply (at [11]). Holroyde LJ stated:

In our judgment, the judge's reasoning and conclusion cannot be faulted. The evidence on which [counsel for MB] seeks to rely was wholly insufficient to found the partial defence of diminished responsibility. Even if on the totality of the evidence the jury might properly have found that the defendant probably suffered from alcohol dependence, which we doubt, there was no evidence on which they could make any decision favourable to the applicant in relation to the other ingredients of the defence. (at [12])

The judgment also confirmed that, in the absence of evidence of an abnormality of mental functioning and/or a recognised medical disorder, MB's state of voluntary intoxication could not support a plea of diminished responsibility. Holroyde LJ stated that "In this context the law draws an important distinction between voluntary intoxication and alcohol dependency. The former cannot found a defence of diminished responsibility" (at [13]). The post-2009 Act case of *R v Dowds* [2012] EWCA Crim 281, [2012] 1 WLR 2576 was cited in support of this proposition. It should be noted that the Court of Appeal in *Dowds* relied upon several judgments delivered prior to the 2009 Act, including *R v Fenton* (1975) 61 Cr App R 261; *R v*

*Dietschmann* [2003] UKHL 10, [2003] 1 AC 1209; *R v Wood* [2008] EWCA Crim 1305, [2009] 1 WLR 496 and *R v Stewart* [2009] EWCA Crim 593, [2009] 1 WLR 2507. In *Dowds*, the Court of Appeal confirmed that the principle established in those cases – that voluntary intoxication was incapable of supporting a defence of diminished responsibility – remained applicable notwithstanding the amendments made to the defence in the 2009 Act. Hughes LJ (as he then was) stated:

[T]he exception which prevents a defendant from relying on his voluntary intoxication, save upon the limited question of whether a “specific intent” has been formed, is well entrenched and formed the unspoken backdrop for the new statutory formula... If Parliament had meant to alter it, or to depart from it, it would undoubtedly have made its intention explicit... [I]t is quite clear that the reformulation of the statutory conditions for diminished responsibility was not intended to reverse the well-established rule that voluntary acute intoxication is not capable of being relied upon to found diminished responsibility. That remains the law. The presence of a ‘recognised medical condition’ is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility. (*Dowds* at [35] and [40])