SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith (aka Stella)* [2021] QCA 139
PARTIES:	**R** **v** **SMITH, Mark Anthony (aka STELLA, Mark Anthony)** (respondent)
FILE NO/S:	CA No 194 of 2019 SC No 45 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville – Date of Conviction: 23 July 2019 (North J)
DELIVERED ON:	Date of Orders: 5 May 2021 Date of Publication of Reasons: 29 June 2021
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2021
JUDGES:	Sofronoff P and Bond JA and Davis J
ORDERS:	**Orders delivered: 5 May 2021** **1. Appeal allowed.** **2. Set aside the conviction for murder.** **3. A retrial be ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant admitted to killing a man and was charged with murder – where the appellant was referred to the Mental Health Court which ordered that there be a trial by jury due to factual uncertainties – where the appellant pleaded not guilty to murder but guilty to manslaughter – where the appellant was convicted of murder by a jury trial – where the defence of diminished responsibility under s 304A of the *Criminal Code* was raised at trial – where the appellant called a psychiatrist to give evidence of the appellant's psychiatric condition at the time of the offending – where the Crown called a psychiatrist in rebuttal evidence – where the trial judge did not direct the jury on the meaning of the phrases "abnormality of mind" or "substantially impaired" as relevant to s 304A(1) of the *Criminal Code* – where the appellant submits that the trial judge erred in law by failing to direct the jury on the meaning of the phrase "substantially

impaired" as relevant to s 304A of the *Criminal Code* – whether in the alternative, the trial judge's failure to direct the jury on the meaning of the phrase "substantially impaired" occasioned a miscarriage of justice and deprived the appellant of a reasonable chance of acquittal

Criminal Code (Qld), s 2, s 23, s 26, s 27, s 291, s 293, s 300, s 302, s 304, s 304A
Criminal Code and Other Acts Amendment Bill 1961 (Qld)
Homicide Act 1957 (UK)
Homicide Bill 1957 (UK)
Offenders Parole Amendment Act 1961 (Qld)

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41, cited
Carter v Attorney-General (Qld) [2014] 1 Qd R 111; [2013] QCA 140, cited
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55, cited
HKSAR v Jutting [2018] HKCA 5, cited
McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
R v A2 (2019) 93 ALJR 1106; [2019] HCA 35, cited
R v Biess [1967] Qd R 470
R v Brennan [2015] 1 WLR 2060; [2014] EWCA Crim 2387, cited
R v Chayna (1993) 66 A Crim R 178, cited
R v Falconer (1990) 171 CLR 30; [1990] HCA 49, cited
R v Golds [2016] 1 WLR 5231; [2016] UKSC 61, cited
R v Goode [2004] QCA 211, cited
R v Lloyd [1967] 1 QB 175, cited
R v Miller [2016] QCA 69, cited
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Mullen (1938) 59 CLR 124; [1938] HCA 12, cited
R v Pateman [1984] 1 Qd R 312, cited
R v Spencer [1987] AC 128; [1987] UKHL 2, cited
R v Squelch [2017] EWCA Crim 204, cited
R v Tonkin [1975] Qd R 1, cited
R v Trotter (1993) 35 NSWLR 428; (1993) 68 A Crim R 536, cited
Re M'Naghten's Case (1843) 8 ER 718; [1843] EngR 875, cited
RPS v The Queen (2000) 199 CLR 620, cited; [2000] HCA 3, cited
SZTAL v Minister for Immigration and Border Protection (2017) 91 ALJR 936; [2017] HCA 34, cited
Widgee Shire Council v Bonney (1907) 4 CLR 977; [1907] HCA 11, cited
Woolmington v Director of Public Prosecutions [1935] AC 462, cited

COUNSEL: H Blattman and S R Morris for the appellant (pro bono)

D L Meredith for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I joined in the orders made on 5 May 2021 for the reasons given by Davis J.

[2] **BOND JA:** I joined in the orders made on 5 May 2021 for the reasons given by Davis J.

[3] **DAVIS J:** The appellant was charged with the murder[1] of Bradley Lester. He was convicted of that offence by a jury sitting in Townsville on 23 July 2019.

[4] The appellant appealed against his conviction. On 5 May 2021, the court allowed the appeal, set aside the conviction and ordered a retrial.

[5] It was not in issue at the trial that Mr Lester was dead. It was not contested that the appellant killed him. The appellant participated in an interview with police in which he explained the circumstances of the killing. He told police that he and Mr Lester had argued, Mr Lester hit him in the jaw and the appellant then "snapped" and put Mr Lester in a "sleeper hold" until he was dead.

[6] None of the exculpations provided by Chapter 5 of the *Criminal Code* were raised although it is necessary in this appeal to consider some aspects of ss 23 and 27.[2]

[7] When arraigned, the appellant pleaded not guilty to murder but guilty to manslaughter.[3] At the trial issues were raised concerning whether the appellant intended to kill or do grievous bodily harm to Mr Lester and whether the appellant acted under provocation[4] so that he was guilty only of manslaughter, not murder. However, on this appeal the only issue raised by the appellant concerns whether the appellant was in a state of diminished responsibility[5] so that he was guilty of manslaughter rather than murder.

[8] Diminished responsibility is a true defence, as opposed to an exculpation. Proof of the defence lies upon the accused who must discharge the onus on the balance of probabilities.

[9] The appellant did not give evidence. He relied upon his interview with police, other aspects of the Crown evidence and he called a psychiatrist, Dr Grant. The Crown called a psychiatrist, Dr Phillips, in rebuttal.[6]

[10] Dr Grant gave evidence of the appellant's medical history and various aspects which were thought to be relevant to the appellant's state of mind at the time of the killing. What became the critical issue was whether the appellant's capacity to

---

1 *Criminal Code*, s 302.
2 Section 23; acts independently of the exercise of will, s 27; insanity.
3 *Criminal Code*, s 300.
4 Section 304.
5 Section 304A.
6 The Crown has a right to call rebuttal evidence when s 304A is raised; *R v Pateman* [1984] 1 Qd R 312 and *R v Goode* [2004] QCA 211.

control his actions or his capacity to know that he ought not do the act which killed Mr Lester were "substantially impaired" by an "abnormality of the mind" at the time of the killing.[7]

[11] Dr Grant was asked to address the ultimate question as to the effect of the appellant's psychiatric condition upon the relevant capacities identified in s 304A of the Code. Critically, the doctor said this:

> "One or more of the capacities?---I think particularly the – two capacities. One capacity being that he ought not do the act or that he knew it was wrong. I think that his thinking was impaired by his illness, and that his judgment about what – how he should react to a situation was impaired. And I also believe that his control over his actions was probably impaired as well by – by that illness and by cognitive deficits and his ability to reason about the situation and the – and his controls over his actions.
>
> I'll come to the issue of intoxication in a moment. But when you use the term 'substantially', what test or – do you have in mind when you use the term 'substantially'? Is there another way you might describe it for the jury that might assist them?---Well, this – it's in the area of the inter – interface between psychiatry and the law, which is always – can be problematic because the law defines things in certain ways and then, really, psychiatrists have to try and fit their understanding of illness and so on into those criteria. In the past, in terms of impairment, psychiatrists have been asked to say whether there's a significant degree of impairment or substantial degree of impairment. And in the past, courts, when – when asked about the definition of 'substantial', used to say, 'Well, more than trivial but less than total.' So that was - - -
>
> Not very helpful?---That wasn't terribly helpful, but usually it wasn't so hard to say, 'Well, this certainly was more than trivial. This person has a significant illness, was just having all these effects and so on.' More recently, psychiatrists have been asked to try to consider it differently, and it seems like the bar has been raised in terms of what 'substantial' might mean, and it's been suggested that it might be used in the same way as, you know, you have a substantial meal or you earn a substantial salary. Again, that's not necessarily easy to match up with a clinical assessment. However, I think that then it leaves me with the question, does that schizoaffective psychosis represent something substantial? And I – I – I believe it does. I don't think you can sort of wave away a serious illness like this, which is treatment-resistant, which has active symptoms, which is not being adequately treated at that time, it's bound to have effects upon a person's judgment in response to offence and their ability to control what they're doing, to some extent. Now, clearly, there are other factors at play as well. There's personality factors and there's the drug intoxication factors, and any environmental issues and interactional factors that might've been occurring. So it's a complex picture, but I – I consider that the

---

7 Section 304A(1).

underlying substrate of that illness is a substantial factor in impairment.

Now, Doctor, I expect in due course the jury will be asked to consider this issue of substantial impairment attributable to the illness and cognitive deficit, not taking account of other things that might have been impacting Mark Smith. Now, there's some evidence that he may have been impacted at the time of the offence by things other than the illness and the cognitive impairment, that is, there's some evidence he might've consumed drugs and be affected by them. How do you approach – are you able to express an opinion as to whether Mark Smith was still substantially affected, still substantially impaired if one removes the effect of the drugs, if they were taken, from the equation?---Well, that's where it's – you know, it's a matter of judgment and there's no firm criteria that you can necessarily rest your hat on. But as I said, this is a substantial illness. It's a very severe illness. It's been chronically present since he was 16. It's caused him to have all sorts of problems in the past and required a lot of treatment. He doesn't respond well to treatment. He doesn't go into remission. He hasn't had active treatment when he should've, and he's missing his medication. And I think that on its own, that illness represents a substantial factor. Clearly, it's in – acting in cont – in concert with all the other issues, particularly with intoxication, but I think it's – on its own, it's substantial."

[12] Dr Phillips, when called by the Crown in rebuttal, gave this evidence:

"Okay. Can we go to – actually, before we do that – I don't think it's controversial, but at that time, the accused did suffer from an abnormality of the mind?---That's correct. It's my opinion that he suffered from schizoaffective disorder.

Thank you. Now, that's – we can go to your diagnostic opinion?---Yes. My - - -

Now - - -?--- - - - diagnostic opinion is largely similar to Dr Grant's in that I agree that Mr Smith has a well-established diagnosis of schizoaffective disorder. He also likely has some cognitive impairment, which was very mild, and I can expand on that if you'd like. He has a very clear diagnosis of longstanding substance abuse problems of multiple different types of substances – cannabis, amphetamines, solvents, opiates, benzodiazepines – and also has a significant antisocial personality disorder.

…

Thank you. Now, ultimately, what were your findings?---Yes. So ultimately, my findings were that, at the relevant time, that Mr Smith was suffering from an abnormality of the mind, that being a schizoaffective disorder and, likely, a mild cognitive impairment. However, it was my opinion that, despite those conditions being present at the relevant time, that they were not of the severity that was – that he was substantially impaired in any one of the three relevant capacities.

So he wasn't substantially in any – either of the three?---That – that is my opinion.

And - - -

HIS HONOUR: So is your opinion that he didn't have an impairment of any of those three capacities?---That's correct. Can I – can I – can I perhaps clarify one aspect of that. It – the opinion depends on how it is that you choose to define substantial impairment. As Dr Grant spoke about in his testimony, the way in which the courts have asked psychiatrists to be able to define 'substantial impairment - - - '

Well, the – we – you're talking about a different court?---Yes.

I think you're talking about the way in which matters may be approached. But for the purposes of this trial, regardless of what may be the cause - - -?---Yes.

- - - is it your opinion that the defendant was not suffering from any impairment of any of those three capacities that the section talks about?---My opinion was that he – he – he had an abnormality of mind. He did have some impairment, but I am – I do not believe that he met the threshold for substantial impairment.

And what was impaired, which capacity or capacities?---The third capacity, which I thought was that he was impaired – had some impairment in his capacity to know that he ought not to do the act. And I – I – I thought that he would have met – if you were looking at substantial impairment in the way of it just needing to be more than trivial, as it has previously been considered, then I would have thought that it – the impairment was more than trivial, but not at a higher level of the threshold of a requirement that it be a severe impairment." (emphasis added)

[13] Dr Phillips continued:

"Yes, please?--- - - - capacities? Okay. So the – the – the reason I didn't think that he was deprived of the first capacity, which is that the person be de – be substan – substantially impaired of the capacity to – to understand what they're doing, that's really about the physical nature of the act. So did somebody understand what they were physically doing during the commission of the crime? And I think it's quite clear, when you watch the police interview and the walkthrough in the police interview and also in his descriptions to both psychiatrists, that, at the time of – of choking the victim, that he was aware that – that he was doing that act and it had the potential to cause physical harm and death to the – to the victim. So I don't think that there was any impairment or deprivation of that capacity. Now, in terms of the second act, which is the capacity for con – to be able to control one's actions, the way in which that is – if you were to have a case where somebody was substantially impaired or even deprived of that ca – that capacity, the way that that would usually come about from a condition such as schizoaffective disorder or schizophrenia is through specific types of symptoms. So for

> example, there may be command auditory hallucinations to commit an act. So a person may hear voices, for example, telling them to kill the person and that they felt compelled to act on those voices and weren't in any way capable of resisting them; that's one way. Now, that wasn't present for Mr Smith. Another way in which that capacity can be either impaired or deprived is if somebody has what's called passivity phenomena, for example, if somebody has delusions of control, that their body is being controlled or their mind is being controlled in some way to perform the act. And although Mr Smith has had those psychotic experiences in the past, he has not described them being present at the relevant time of the – of the harming of the victim. So in that way, I don't think that they are – are relevant for this case. Somebody can also be deprived or severely – or substantially impaired of that capacity to control on the basis of somebody being severely manic and elevated and so disinhibited that they're acting without any ability to be able to moderate their actions. But there really is no evidence, either in Mr Smith's self-report or any of the contemporaneous assessments that he was suffering from significant manic symptoms at that time. He has had them at other times in the trajectory of his illness, but not at the time of the alleged offence. So that's the reason that I don't think that he meets the first two - - -" (emphasis added)

[14] She then gave this evidence:

> "Two, yeah?--- - - - of the capacities. So in terms of the third, which is, perhaps, the more difficult, because I think that there is some impairment but, in my mind, not quite enough to meet the threshold. And I'll step you through what my thinking was on that. Now, one of the factors that need to be consideration when thinking about whether somebody is substantially impaired or even deprived of the third capacity, which is about the impairment of somebody's capacity to understand the wrongfulness of their actions, one factor – not the only factor, but something that you do think about is whether they understood the legal wrongfulness of their actions, because that's one way in which reasonable people think about wrongfulness. And so I thought, when I looked at the materials, there - - -" (emphasis added)

[15] His Honour intervened and this exchange occurred:

> "HIS HONOUR: I have a concern that the doctor's giving the jury a lecture on how they should reason - - -
>
> MR REES:[8] No, your Honour - - -
>
> HIS HONOUR: - - - as opposed to highlighting facts that she's taken into account or that lead her to a certain conclusion.
>
> MR REES: Your Honour has raised a concern. I was just going to say, 'Well, can I stop you there - - -'
>
> HIS HONOUR: Yes. Yes.

---

[8] The Crown prosecutor.

MR REES: '- - - can we go back to the facts of the case and apply them to the third test and why - - -'

HIS HONOUR: What do you mean, 'the third test?'

MR REES: Sorry, the third capacity - - -

HIS HONOUR: All right.

MR REES: - - - and why you don't say.

HIS HONOUR: Well, what – see, the doctor's evidence is that she agrees there's an abnormality of mind, being the schizoaffective disorder, and also some mild degree of cognitive impairment - - -

MR REES: Yes.

HIS HONOUR: - - - which is – so one's a disease, and one's an illness. And she's said that they, but primarily the schizoaffective disorder, have caused a degree of impairment of one of the capacities, but she has said it's not a substantial impairment.

MR REES: Sure. Yes.

HIS HONOUR: See, the difficulty is there appears to have been some case law in another court designed to assist consultant psychiatrists who are asked to give expert evidence for the court and to assist the court to a conclusion. That may or may not be the way in which the issue should be framed for the jury. I mean, the notion of substantial impairment, it's a bit like reasonable doubt. It's a word of common sense and - - -

MR REES: Yes.

HIS HONOUR: - - - well-known and doesn't really call for a definition. It just calls for the jury to make its judgment about whether, in terms of causative effect - - -

MR REES: Your Honour, if I can - - -

HIS HONOUR: - - - there is – this abnormality or intoxication, which is not an abnormality, is a substantial cause of the incapacity at the relevant time, but that's a matter for the directions to the jury, I think." (emphasis added)

[16] Dr Phillips then gave some further evidence. After the evidence was concluded, his Honour produced a draft of the summing-up. His Honour distributed that draft to the parties and there was an exchange about whether there ought to be any particular directions on the meaning of the term "substantial" as used in s 304A. His Honour said:

> "Frankly, I don't think it's appropriate to draw this jury into an attempt to draw some sort of mathematical formula as to where a causation effect becomes substantial or where it's trivial or where it's moderate or whatever it – or distinctions between those words. The section calls for a conclusion that there's a substantial impairment caused by the relevant abnormality of one or more of the relevant impairments – capacities. Seems to me 'substantial' is a common

> sense term. What I've – what I was proposing to direct you'll see typed there, for example, tell them that an abnormality of mind caused by intoxication as a result of consumption of drugs or alcohol or a combination is not – well, it's not an – it's – no. How can I say – behaviour caused by intoxication –what I've got here. I should read out what I've got:" (emphasis added)

[17] Counsel took no issue with that approach and his Honour directed the jury consistently with the draft summing-up which had been distributed.

[18] The directions on diminished responsibility were these:

> "During the trial, you heard the words diminished responsibility used on a number of occasions. The ordinary meaning of those words is that a person's responsibility for their actions is less than it would otherwise be. In our criminal law, it means that, in the circumstances of this case, what would otherwise be a verdict of guilty of murder becomes a verdict of guilty of manslaughter.
>
> So we speak of the defence of diminished responsibility to a charge of murder. Before it becomes necessary to consider the defence of diminished responsibility, the prosecution must have proved beyond reasonable doubt the elements of murder, which I have already outlined. Providing you are satisfied beyond reasonable doubt of those elements, it falls to the defendant to show that the responsibility is diminished. He does not have to satisfy you beyond reasonable doubt of that, but he does have to satisfy you that it is more probable than not that when he killed Bradley Lester his mental responsibility for his actions were substantially impaired. To discharge this burden, the defendant must show three things, that at – firstly, that at the time he did the things which constituted the charge, he suffered from an abnormality of mind; secondly, that the abnormality of mind arose from a condition of arrested or retarded development of mind or from an inherent cause or it was induced by disease or injury; <u>thirdly, that the abnormality of mind must have substantially impaired either the defendant's capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he could not do the act or make the omission</u>. If the act or acts in question that I've referred – the act or acts in question that I've just referred to are the act or acts that you conclude caused the death of Bradley Lester when you consider the count of murder." (emphasis added)

[19] His Honour returned to the topic of diminished responsibility when he summarised the expert evidence and counsel's arguments. It is unnecessary to analyse those comments.

[20] The jury retired to consider their verdicts and convicted the appellant about an hour after retiring.

Diminished responsibility

[21] The proper construction of s 304A must be ascertained from the words of the section taken in the context of the Code.[9] By s 2 of the Code, an offence consists of an "act" or "omission" which renders the person doing the act or making the omission liable to punishment. Usually, but not always,[10] the person is rendered liable to punishment because the act or omission causes a particular result.[11] Where an element of an offence is the occurrence of a particular result, intention to cause that result is not an element of the offence unless "it is expressly declared to be an element of the offence".[12]

[22] Issues of common law *mens rea*,[13] are dealt with through the various exculpations provided by Chapter 5 and by "defences". Some of those are true defences where the onus of establishing the defence is upon the accused and some are of the nature of exculpations where the onus of disproving the defence is upon the Crown, once the defence is raised on the evidence.[14]

[23] Section 302 of the Code provides the definition of murder and s 300 makes murder a crime. The elements of the offence of murder are:

1. the deceased is dead;
2. the accused killed the deceased;
3. the accused did so unlawfully;
4. at the time of the act which caused the death, the accused intended to kill or do grievous bodily harm.[15]

[24] An accused kills the deceased if the accused "causes the death … directly or indirectly by any means whatsoever …".[16] The killing is unlawful if it is not "authorised, justified or excused by law".[17]

[25] Section 27 provides:

> "**27 Insanity**
>
> (1) A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to

---

9 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47], *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [14] and [35]-[40], *R v A2* (2019) 93 ALJR 1106 at [32], *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78].

10 For example, see cases of possession of prohibited substances.

11 As recognised by ss 23(1)(a) and 23(1)(b).

12 Section 23(2).

13 *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981.

14 *Woolmington v Director of Public Prosecutions* [1935] AC 462, followed in *R v Mullen* (1938) 59 CLR 124.

15 Section 302(1)(aa) is not relevant here. And see generally, *Carter v Attorney-General* [2014] 1 Qd R 111.

16 Section 293.

17 Section 291.

know that the person ought not to do the act or make the omission.

(2) A person whose mind, at the time of the person's doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of subsection (1), is criminally responsible for the act or omission to the same extent as if the real state of things had been such as the person was induced by the delusions to believe to exist."

[26] Section 27 is a statutory adoption and adaption of the *M'Naghten* Rules.[18] An accused is presumed to be sane[19] and the onus is upon an accused to prove insanity on the balance of probabilities.

[27] Where the act or omission that kills is done when "mental disease or natural mental infirmity" has "deprived" the accused of one of the capacities identified in s 27(1) the killing is excused by operation of s 27 and therefore not "unlawful". The accused is therefore guilty of neither murder nor manslaughter.

[28] Section 304A provides:

"**304A Diminished responsibility**

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons."

[29] Diminished responsibility as a partial defence, reducing murder to manslaughter, originally appeared in the law of Scotland before being introduced into the law of

---

18 *Re M'Naghten's* case (1843) 8 ER 718.

19 Section 26.

England by the *Homicide Act 1957* (UK). Section 304A was introduced into the Code of Queensland by the *Criminal Code* and *Offenders Parole Amendment Act 1961* (Qld). When introducing the *Criminal Code and Other Acts Amendment Bill*, the Honourable AW Munro, Minister for Justice, cited what was said by Lord Chancellor Viscount Kilmuir when speaking to the *Homicide Bill 1957* (UK) in the House of Lords:

> "May I say a word about diminished responsibility? I apprehend that more uneasiness has been caused to your Lordships by the refusal of the present law to make allowance for mental infirmity short of complete insanity than by any other substantive legal doctrine. Clause 2 is an attempt to remove the cause of that uneasiness. It introduces into English law the Scottish doctrine of diminished responsibility. This doctrine permits a man accused of murder to raise the defence that he was at the time suffering from an abnormality of mind which substantially reduced his responsibility for his act. I should make it clear that a real abnormality, not just an exceptional fit of temper or jealousy, must be proved before the clause will apply. If this defence is established to the satisfaction of the jury, the prisoner may be convicted of manslaughter, not murder. It might be asked why this doctrine should be peculiar to murder. The answer is that in murder alone the sentence is fixed, and will remain fixed under the Bill: in other cases, once guilt is proved, the court, in assessing sentence, will always make allowances for human weakness. In murder it can make no such allowance. I have little doubt that this provision in Clause 2 will practically eliminate those distressing cases which I have mentioned, and will do so under a well-tried practice of Scottish law."

[30] Section 304A was intended to operate where there is no defence of insanity but there is an abnormality of mind affecting the accused which reduces the offence from murder to manslaughter. That reduction occurs when the abnormality "substantially" affects one of the three capacities of mind identified in s 304A(1).

[31] Sections 27 and 304A have similarities. Both concern an accused who suffers an "abnormality of mind" which affects at least one of three particular mental capacities. The capacities identified in s 27 are the same as those identified in s 304A.

[32] Section 304A applies only when, but for the operation of the section, the act or omission done by the accused "would constitute murder". Therefore, the killing must have been intentional (or at least there must have been an intention to do grievous bodily harm) and the accused must not have been so "deprived" of the relevant mental capacity as to give him the lawful excuse of insanity under s 27. "Murder may be established where the beach of duty is deliberate and is accompanied by an intention to kill or do grievous bodily harm".[20]

[33] The critical distinction is that s 27 operates where there is a "deprivation" of one of the capacities, whereas s 304A operates where one of the capacities is "substantially impaired".

---

[20] *R v MacDonald & MacDonald* [1904] St R Qd 151, *R v Young* [1969] Qd R 417 approved in *Koani v The Queen* (2017) 263 CLR 427 at [27].

[34] In *R v Lloyd*,[21] the following direction was given by a trial judge in relation to diminished responsibility:

> "Fourthly, this word 'substantial', members of the jury. I am not going to try to find a parallel for the word 'substantial'. You are the judges, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?"

[35] That direction was approved on appeal to the Court of Appeal of England and Wales and was later also approved by the Queensland Court of Criminal Appeal in *R v Biess.*[22]

[36] This substantial impairment of capacity, if found, must have a causal relationship to the act or omission which constituted the killing. The Court of Appeal for Hong Kong in *HKSAR v Jutting*[23] approved trial directions in the following terms:

> "**Substantially impaired** means just that. You would have to conclude that his abnormality of mind was a real cause of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it but he must show that it was more than a merely trivial one which made no real or appreciable difference to his ability to control himself."

[37] Section 304A creates the relationship between the abnormality of mind and the murder because, to establish the deficiency the accused must show that the abnormality of mind affected the accused's ability to think in relation to the killing act or omission, in the sense that in the case of each "capacity" the impairment must be shown to bear upon the accused's ability to "*understand* what the person *is doing*" or "*control* the person's *actions*" or to "*know* that the person ought not to *do the act*".

[38] The duty of a trial judge in summing up a case to a jury includes instructing the jury on the onus and burden of proof and "identify[ing] the issues in the case and relat[ing] the law to those issues".[24] It is for the jury to determine whether any impairment is substantial.[25] What assistance is to be given to a jury in its consideration of that issue will vary with each case.

[39] In my view, it was necessary in this case for the learned trial judge to direct the jury that, to show that the accused was not guilty of murder but only guilty of manslaughter, the appellant had to prove, on the balance of probabilities, that:

---

21 [1967] 1 QB 175.

22 [1967] Qd R 470.

23 [2018] HKCA 5.

24 *RPS v The Queen* (2000) 199 CLR 620 and *R v Mogg* (2000) 112 A Crim R 417 at [54] and generally on the trial judge's duty to comment on the facts and issues see *McKell v The Queen* (2019) 264 CLR 307.

25 *R v Trotter* (1993) 68 A Crim R 536 at 537 and *R v Squelch* [2017] EWCA Crim 204.

(a) he was in a state of abnormality of mind when he did the act or omission which killed the deceased;

(b) his abnormality of mind actually impaired, in a substantial way:

(i) his capacity to understand what he was doing when he killed the deceased; or,

(ii) his capacity to control his act of killing; or,

(iii) his capacity to know that he ought not do the act of killing.

(c) to be a substantial impairment to a capacity, the impairment need not have been total (or else the accused would be not guilty of any offence at all by reason of insanity) but it must have been more than trivial. Whether further direction on the meaning of the term "substantial" is required will depend upon the circumstances of the particular case.

[40] It will also usually be necessary for the trial judge to draw the jury's attention to the evidence on diminished responsibility (which will include expert medical evidence) relevant to the critical issues which are:

1. the abnormality of mind;

2. the capacity said to be impaired;

3. whether the impairment was "substantial" which will invariably involve consideration of how the abnormality impacted the accused's ability to think in relation to the act or omission which killed.

The error here

[41] The psychiatrists called in the present case were experts who could give opinion evidence as to the abnormality of the mind of the appellant and the effect of that abnormality upon his relevant capacities. The doctors could also give an opinion as to the ultimate issue: whether the impairment of any of the capacities was "substantial".[26]

[42] The jury had to consider the degree of the impairment based not only on the medical evidence but upon the whole of the case.[27] Whether there was evidence beyond the medical evidence relevant to that determination was a matter of fact for the jury. So too were the factual foundations upon which the doctors had based their opinions. If the jury rejects the factual foundation for the opinions, then medical evidence swearing the ultimate issue may be of limited, if any, use.[28] Where the factual foundations of the expert opinion are contentious, findings by the jury on those contentious facts may render the opinion evidence worthless. In some cases, it will be appropriate to fashion appropriate directions to deal with that possibility.

[43] The meaning of the word "substantial" in s 304A, which must be a focus of the jury's consideration, is a matter of law not a matter of medicine. Therefore, if doctors giving expert evidence are to express a view on the ultimate issue, that issue must be correctly defined for their consideration.[29] If doctors express their opinions based on an erroneous view of the meaning of substantial, their opinions will be

---

26 *R v Brennan* [2015] 1 WLR 2060 at [51], *R v Biess* [1967] Qd R 470 at 477.

27 *R v Trotter* (1993) 68 A Crim R 536 at 537.

28 *R v Trotter* (1993) 68 A Crim R 536 at 537, *R v Chayna* (1993) 66 A Crim R 178 at 188.

29 *R v Miller* [2016] QCA 69 at [62] and [63].

inadmissible because they will be, at best, irrelevant, and, at worst, actively misleading.

[44] Difficulties have been encountered in cases in which there have been doubts about whether the experts have properly understood and considered the correct legal test.[30]

[45] In *R v Biess*,[31] Hart J observed:

> "Dr Apel here, despite his hesitations, had to interpret for himself and the jury the meaning of a word of degree. He should in my opinion have been given more assistance as to the range of meaning of the word substantially. There would have been no objection to his using this word, to summarise his evidence, if its meaning had been legally interpreted for him and for the jury. But it was not and the Crown Prosecutor was specifically requested by His Honour to put his questions as closely as possible in the words of the section. The range of meaning of substantially was a question of law, and the asking of questions, without explanation, in terms of the section forced the doctor to indulge in legal interpretation. This was not his business and the unsatisfactory result can be seen. With no explanation two doctors could each think the impairment was greater than minimal, and yet in all good faith one could swear there was substantial impairment and the other that there was not. It is not possible, as I have said earlier, wholly to escape from words of degree; the required degree can however be made much plainer."[32]

[46] When Dr Grant and Dr Phillips gave their evidence they both expressed some doubts about what was the correct legal test. The doctors referred to their understanding that the legal test may have recently changed. That may have been a reference to *R v Golds*.[33] Dr Grant referred to the meaning of the adjective "substantial" by reference to its use in expressions such as "substantial meal" and "substantial salary"[34] and seemed to concentrate upon the substantiality of the appellant's mental disorder, the "abnormality of mind", rather than the substantiality of any impairment of a capacity. Dr Phillips spoke of an unidentified "threshold". At one stage, she spoke of the impairment having to be "severe". In some of her evidence, she conflated "substantial impairment" with a lack of "any ability to be able to moderate their actions" which suggests a total impairment. This evidence was misleading and inadmissible but that was not the fault of the doctors but due to the fact that nobody had given them coherent and accurate instructions upon which to offer an admissible opinion.

[47] The evidence was not properly presented to the jury. The legal concept of "substantially impaired" as it appears in s 304A ought to have been properly explained to the doctors before they formed their opinions about the medical issues. The doctors should have been asked to describe the abnormality of mind which existed and then give their opinion as to whether that abnormality had or had not

---

30 *R v Biess* [1967] Qd R 470, *R v Miller* [2016] QCA 69, the judgment of McMurdo JA at [61], [64], *R v Chayna* (1993) 66 A Crim R 178 at 188 and *R v Tonkin* [1975] Qd R 1.

31 [1967] Qd R 470 at 477.

32 At 477; followed by Philip McMurdo JA in *R v Miller* [2016] QCA 69 at [63].

33 [2016] 1 WLR 5231.

34 Expressions used in *R v Golds* at [27].

substantially impaired any of the three capacities. They should have been asked to identify the facts supporting the opinion and to explain the reasoning by which their conclusion flowed from the facts proved so as to reveal that their conclusion was based on their expertise.[35]

[48] Once the inadmissible expert evidence had been given a miscarriage was inevitable. In *R v Tonkin*[36] Dunn J said:

> "Difficulties will sometimes arise if an expert, in expressing an opinion, uses the *ipsissima verba* of a statute, which the expert may do in all good faith. For instance, a doctor giving evidence in a 'diminished responsibility' case may — as Dr Parker did in this case — speak of a 'substantially impaired capacity'. If that happens, it seems to me, the jury should be cautioned that, whilst the words chosen by the doctor are words which he finds apt to express his personal point of view, it is the sole province of the jury to determine — having regard to the directions as to the law to be given by the judge — whether the accused has a 'substantially impaired capacity' within the meaning of s.304A; and that the medical evidence may be used in appraising all the evidence, but is not to be treated as definitive of capacity."

[49] Here, the problem is that the medical evidence was irrelevant and, in some respects, prejudicial to the appellant, given that the opinions had been expressed by reference to a test that had not been defined.

[50] The barristers were wrong to agree with his Honour's suggestion that the case be put to the jury without any elucidation of the meaning of the term "substantial impairment". True, that is the direction contained in the Benchbook. Standard directions do not obviate the requirement that "each summing-up should be tailormade to suit the requirements of the individual case"[37] or the duty to read and consider relevant case authorities before making submissions.

[51] Here, the psychiatrists expressed different views about what "substantial" meant in the context of "a substantial impairment". Both doctors sought to swear the ultimate issue but without guidance as to the legal meaning of "substantial impairment", against which the jury could consider the evidence.

[52] The only valid direction would have been to tell the jury to ignore the medical evidence entirely but that would have resulted in the total distortion of the presentation of the defence.

[53] Inadmissible evidence about a defence having been given, no direction, could have eliminated the prejudice caused to the appellant's defence.

Conclusions

---

35 *R v Sica* [2014] 2 Qd R 168 at [104] and *R v Lentini* [2018] QCA 299 at [55].

36 [1975] Qd R 1.

37 *R v Spencer* [1987] AC 128 at 135.

[54] The fact that the evidence was given by the doctors without reference to the proper legal test and the failure of the trial judge to direct the jury with specificity caused the appellant to lose a reasonable chance of acquittal.

[55] A miscarriage of justice occurred.

[56] For those reasons, I joined in the orders allowing the appeal and ordering a retrial.