Court of Appeal

Intoxication and Diminished Responsibility

R v *Hendy* [2006] 2 Cr App R 33

On the night of 25 February 1992 the appellant killed a stranger in an alleyway in Bristol. The appellant used a sheath knife to stab the victim 18 times in an unprovoked attack. He had consumed whisky, vodka and sherry at a party not more than two hours before the incident. He admitted to the killing and raised the defence of diminished responsibility at his trial under s. 2(1) of the Homicide Act 1957. Three consultant forensic psychiatrists for the appellant submitted that he was suffering from a psychopathic disorder. Evidence for the Crown contended that the appellant simply had behavioural problems, but the question of whether the appellant's loss of temper would constitute an abnormal state of mind or simply an inability to control his behaviour was complicated by the fact that he had taken a considerable quantity of alcohol on the night of the offence. The trial judge directed the jury by reference to the following questions which derived from a commentary by the late Professor Sir John Smith ([1984] Crim LR 554) on *R* v *Gittens* [1984] 3 All ER 252, and had been approved by the Court of Appeal in *R* v *Atkinson* [1985] Crim LR 314 and *R* v *Egan* (1992) 95 Cr App R 278:

> Q1. Have the defence satisfied you that it is more likely than not if the defendant had not taken drink he would have killed as he in fact did? If the answer is 'no', the verdict is 'guilty of murder'. If the answer is 'yes', proceed to question 2.
> Q2. Have the defence satisfied you that it is more likely than not that if the defendant had not taken drink he would have been under diminished responsibility when he killed? If the answer is 'no', the verdict is 'guilty of murder'. If the answer is 'yes', the verdict is 'not guilty of murder, but guilty of manslaughter by reason of diminished responsibility'. (formatting added)

The appellant was convicted of murder. On appeal against conviction, he argued that the trial judge's directions misstated the law as explained in *R* v *Dietschmann* [2003] 1 All ER 897, (2003) 67 JCL 395, which held that the questions proposed by Professor Smith did not correspond with the correct authority of *Gittens*. The Crown conceded that whilst this was correct, the directions accorded with the law as it was understood at the time of the trial when *R* v *Atkinson* [1985] Crim LR 314 and *R* v *Egan* (1992) 95 Cr App R 278 considered the questions to be good law, and thus a misdirection could not avail the defendant.

Held, allowing the appeal, the law had been correctly stated in *Gittens* above. Alcohol and drugs were not to be viewed as inherent causes of an abnormality of mind for the purposes of s. 2(1) of the 1957 Act, and the Court of Appeal in *Atkinson* and *Egan* above had wrongly approved the questions posed by Professor Smith. The law explained in *Dietschmann* was not 'new law' but merely confirmation that *Gittens* had

always been the correct authority. The trial judge's direction was therefore unsafe and the appellant's conviction for murder was quashed and a conviction for manslaughter was substituted.

Commentary

Lord Hutton in *Dietschmann* temporarily laid to rest the problematic question of whether intoxication, as opposed to the disease of alcoholism which was confirmed to come under the ambit of s. 2(1) of the 1957 Act as a result of *R* v *Tandy* [1989] 1 All ER 267, should be considered by a jury when a defendant raises the defence of diminished responsibility. His direction guided the members of the jury to ask themselves:

> . . . has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts ([2003] 1 All ER 897 at 913).

By stating 'despite the drink', Lord Hutton separated intoxication from diminished responsibility, thus adding some much needed clarity to this area of the law. This direction upholds *Gittens* in which Lord Lane CJ stated that the jury should be directed to disregard the effect of the alcohol or drugs on the defendant.

The relevant defence in s. 2(1) of the Homicide Act 1957 reads as follows:

> where a person kills, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts in doing the killing.

The Court of Appeal decision in *Gittens* is to be applauded for its no-nonsense approach to intoxicated diminished responsibility. Lord Lane CJ clearly stated that an abnormality of mind induced by alcohol or drugs is not due to inherent causes and is not within s. 2(1). This would seem right. One can only imagine the chaos in the courts if intoxication was to be considered as an inherent cause of an abnormality of mind. Professor Smith in his commentary on the *Gittens* case noted that if a jury were asked to ignore the effect of drink and drugs but nevertheless believed that the killing would not have taken place in the absence of such intoxicants, they logically had to answer two hypothetical questions: have the defence satisfied you on the balance of probabilities—that, if the defendant had not taken drink: (1) he would have killed as he in fact did? And (2) he would have been under diminished responsibility when he did so? Lord Lane CJ in *Atkinson* expressly welcomed Professor Smith's directions as clear and understood by all. The trend continued in *Egan*, when in response to the appellant's argument that Professor Smith's tests were irreconcilable with the *ratio* in *Gittens*, Watkins LJ ruled that not only should the tests be applied generally, but it was astonishing to think that the court in *Atkinson* did not have the *Gittens ratio* in mind when approving the questions.

But does this leave us with a logical test? By answering 'no' to the first question 'have the defence satisfied you that if the defendant had not taken drink, he would have killed as he in fact did?', it is assumed that

no other factors apart from the consumed intoxicants contributed to the diminished responsibility of the defendant at the time of the killing. It seems strange that the Court of Appeal did not notice this inconsistency earlier. Will not the effect of alcohol exacerbate the inherent cause rather than cancel it out? This may especially be the case if the inherent cause is psychological (*R* v *Lloyd Sanderson* [1994] 98 Cr App R 325) as opposed to a disease (*Tandy*). Once 'no' is answered to question 1, the defendant cannot then reach question 2, which asks if he was suffering from a diminished responsibility at the time of the offence. Sullivan in his commentary on *Egan* condemns these tests as placing a restrictive gloss on s. 2, suggesting that a jury should instead be asked if they are satisfied that if D had killed in the same circumstances but in a sober state his responsibility would have been substantially impaired (see G. R. Sullivan, 'Intoxicants and Diminished Responsibility' [1994] Crim LR 156–62 at 160). Lord Hutton in *Dietschmann* eventually noticed the inconsistencies by stating ([2003] 1 All ER 897 at 910):

> the approach taken by the Court of Appeal in *R v Atkinson* in applying Professor Smith's two questions was erroneous and that the judgment in that case cannot be reconciled with the judgment in *R v Gittens*, which, in my opinion, states the law correctly.

Thus, Professor Smith's two questions had not taken full account of the valuable *ratio* in *Gittens*, which recommended a consideration of all other factors within s. 2(1). Therefore, if the answer to the first question is 'no', the defence should still be available. The clarification of the law in *Dietschmann* mirrors a recent development in the law of provocation, partially governed by s. 3 of the 1957 Act. *R* v *Mohammed (Faqir)* [2005] EWCA Crim 1880, (2006) 70 JCL 121 and *R* v *James; Karimi* [2006] 1 All ER 759, (2006) 70 JCL 203, preferred the Privy Council decision of *Attorney-General for Jersey* v *Holley* [2005] UKPC 23, (2006) 70 JCL 23 when it held that provocation is to be judged against a 'one standard reasonable man' as the 1957 Act had intended, rejecting a wide range of characteristics which inevitably vary from defendant to defendant. Thus, the disease of alcoholism *is* to be considered as a response characteristic, but 'just being drunk' is not relevant in relation to provocation. This clampdown under s. 3 ends the overlap between s. 2(1) and s. 3 in relation to what were once 'shared' characteristics such as depressive illnesses, which, in the absence of a taunt directed towards the illness, can now only be relevant under the ambit of s. 2(1). Professor Smith suggested a much better alternative in his later commentary on *Dietschmann* (see [2002] Crim LR 132) that if the jury is satisfied on the balance of probabilities that an abnormality existed and played such a part in D's actions as substantially to diminish his mental responsibility for those acts, they will find him not guilty of murder. Lord Hutton commended this direction when laying down the new test in the final *Dietschmann* appeal. With the present case affirming this, it would seem logical and appropriate that alcohol were removed from the test altogether. Alcoholism has found its way into s. 2(1) of the 1957 Act through *Tandy*. Watkins LJ in the Court of Appeal held that a craving for drink to

amount to an abnormality of mind must be such as to render the accused's use of drink or drugs involuntary so as to grossly impair judgment and emotional responses and substantially impair mental responsibility. Controversially, the first drink has to be involuntary for alcoholism to be considered a disease, and *Tandy* requires a *total* inability to resist an impulse to drink in order to raise a defence under s. 2(1). Does not the nature of diminished responsibility require *some* responsibility to be retained? This firm approach is, however, correct. It is not favourable to consider general alcohol consumption as an inherent cause of a disease, and so understandably the effect of the intoxicants on the defendant's mind must be extreme to come under the ambit of s. 2(1). Can it also be argued that alcoholism does not have to be a 'disease' but merely an extreme craving impairing judgment? Professor Smith reflected upon this issue in his commentary on *Tandy* ([1988] Crim LR 308), where he noted that if the effect of the alcohol upon the defendant's mind is such that judgment is so impaired that his mental responsibility for that act is diminished, this must equally be so whether the first drink was taken voluntarily or involuntarily. The mental abnormality at the time of the act would be the same. This strict test is not as watertight as it first seems and in the future it will no doubt be weakened by drunken defendants who wish to raise a defence under s. 2(1).

Lord Hutton made some noteworthy remarks in *Dietschmann*, which were supported in the present case. The ambit of s. 2(1) was interpreted broadly by Lord Hutton when he said ([2003] 1 All ER 897 at 909):

> the defendant's drinking is to be left out of account in so far as it exacerbated his abnormality of mind. But, alcohol can have a disinhibiting effect and can lead to violence in person who does not suffer from an abnormality of mind within the meaning of s. 2(1), and the jury can take this into account in deciding whether the defendant's underlying mental abnormality did substantially impair his mental responsibility notwithstanding the drink he had taken.

There is some confusion here. Why is a jury encouraged to take into account the effect of alcohol on a normal person when it is dealing with an 'abnormal' defendant under s. 2(1) notwithstanding alcohol? In following *Gittens* and *Tandy*, it is submitted that the effect of alcohol should not be considered when not linked to an abnormality of mind induced by disease under s. 2(1). Lord Hutton also claims that 'substantial impairment of mental responsibility' within s. 2(1) does not require an abnormality of mind to be the *sole* cause of the defendant's acts. 'Substantial' was suggested in *R* v *Lloyd* [1966] 1 All ER 107 to mean more than trivial but less than total. Therefore the impairment simply need not be total; it is certainly not an invitation to conclude that factors *outside* arrested and retarded development and inherent causes induced by disease or injury are included in the definition. Lord Hutton misdirected himself and may have drawn the potential causes of diminished responsibility too widely for a jury to comprehend, but Gage LJ supported this statement in the present case (at [29–33]). If it was not for Lord Hutton's future suggestion including the phrase 'despite the drink'

([2003] 1 All ER 897 at 913, see above), alcohol at any level of consumption could clearly be a factor contributing to an abnormality of mind. A further cause for concern is Lord Hutton's analysis of *Gittens*. He took the following two points from *Gittens*:

(i) the abnormality of mind and the effect of the drink may each play a part in impairing the defendant's mental responsibility for the killing;
(ii) it is not correct for the judge to direct the jury that unless they are satisfied that if the defendant had not taken drink he would have killed, the defence of diminished responsibility must fail. ([2003] 1 All ER 897 at 907–8).

There are some problems with this analysis. First, *Gittens* did not rule that both the abnormality of mind and the effect of the drink may each play a part in the mental responsibility for the killing. The trial judge in *Gittens*—taking a direction from *R* v *Turnbull* (1977) 65 Cr App R 242—directed the jury to decide what the substantial cause of the defendant's abnormality was, the inherent abnormality on one side and the alcohol on the other. The trial judge's direction was held to be incorrect by the Court of Appeal. The reasons given by Lord Lane CJ were as follows:

> we doubt whether in any circumstances it is proper to invite the jury to decide the question of diminished responsibility solely on the basis of 'what was the substantial cause of the defendant's behaviour?' However there is no doubt that in the instant case the jury might and probably would conclude that both drink and also inherent causes played their part in the abnormality of mind (at 256).

This part of the judgment has been misinterpreted. Lord Lane CJ is not declaring that an abnormality of mind together with alcohol both play a part in the responsibility for the killing, and he is certainly not suggesting this as a future direction. He is merely commenting on the individual facts of the *Gittens* case. His comments can be construed as simply noticing that a jury may sometimes consider alcohol to have played a part in impairing the defendant's responsibility, but he then goes on to assert in the *ratio* that this consideration must be removed as it is completely irrelevant to the applicable section. Lord Hutton's point (ii) relates to Professor Smith's questions and it is correct. However, Lord Hutton's interpretation of why these tests were expelled from the law suggests that they failed to recognise that the abnormality of mind arising from a cause specified in the subsection *and* the effect of the drink may each play a part in impairing the defendant's mental responsibility. The first reading of Lord Hutton's analysis at point (ii) is that drink is an outside factor and *not* part of s. 2(1). Secondly, by announcing that the problematic directions were abolished because they failed to recognise both factors in s. 2(1) and the effect of alcohol on a defendant's impaired responsibility, Lord Hutton is implying here that a correct test should take into account both of these attributes. It is submitted that alcohol should be taken out of the equation completely. This would correspond with the recent changes in the law on provocation, which—aside from the *disease* of alcoholism—reject aggravating factors such as

simply being drunk to secure a defence under s. 3. Furthermore, this was not the problem with the tests. It is submitted that the problem with the directions was that they failed to recognise that the real question was whether an abnormality of mind arising from a cause specified in the subsection impaired the defendant's mental responsibility for the killing.

We are left with an unsatisfactory reliance on 'voluntariness' as to whether alcoholism for the purposes of s. 2(1) is a 'disease'. Will the law eventually loosen to allow voluntary but very heavy drinkers to raise diminished responsibility? Lord Hutton's *obiter* remarks concerning alcohol as not only a consideration for the jury, but as a potential cause of an abnormality leading to diminished responsibility, may be taken seriously in a future case. In the light of the present case, will *Gittens* remain authorative?

Lisa Cherkassky

Evidence: Relevance; Bad Character

R v *T (AB)* [2006] EWCA Crim 2006, [2007] 1 Cr App R 4

The appellant was convicted of two counts of indecent assault against his seven-year-old niece. The child had alleged that her uncle (the appellant), her grandfather and her step-grandfather had all sexually abused her. The grandfather was interviewed and admitted the offences. He died before the matter reached court. The step-grandfather also admitted the offences and later pleaded guilty. The appellant had denied the allegations. The prosecution were permitted to admit into evidence the contents of the late grandfather's statement and the trial judge ruled that the statement was relevant and probative. The trial judge also ruled that, balancing probative value against prejudice, evidence of the step-grandfather's conviction was also admissible.

Held, allowing the appeal, the general principle was that for evidence to be admissible as relevant it must be logically probative of a fact in issue between the parties. The fact that two other members of the complainant's family admitted sexual abuse of the complainant could not be relevant, in itself, to the issue of whether or not the appellant had abused her. The only legitimate purpose that such evidence could serve would be to establish that the complainant had told the truth in relation to the other family members, but it could not be probative of the facts alleged against the appellant. A retrial was ordered.

Commentary

Relevance

Relevant evidence is evidence which has probative value in assisting the court or jury in its determination of the facts in issue because it renders

the existence of the facts in issue more or less probable. In order to receive evidence the court must be satisfied that it is relevant to some fact in issue which is a proper object of proof in the proceedings and if evidence is considered irrelevant, it is inadmissible.

In *DPP* v *Kilbourne* [1973] AC 729, Lord Simon of Glaisdale stated (at 756):

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof . . . [R]elevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

Is the admitted sexual abuse of the complainant by the other two family members relevant to an issue at the trial of the uncle? It is submitted that the correct answer is 'no'. Abuse by other family members (the two grandfathers) does not, as a matter of logic, make it more or less likely that the complainant was abused *independently* by the uncle. The conclusion might well be different if it were established that the grandfathers and the uncle had been acting in concert, but that was not the case. In this sense then, the disputed evidence seems to be irrelevant. The court also stated that the evidence was irrelevant to the complainant's credibility as a witness, likening any such argument to a form of 'oath helping'. This, it is submitted, is too harsh. Although there is no indication in the present case that the credibility of the witness was directly in issue at the trial, if such an issue were to arise then the relevance of the disputed evidence becomes more apparent. If, for example, it were alleged that the complainant had fabricated the allegations against her uncle, surely the fact that she had, on two earlier occasions, been found to be providing truthful accounts of abuse by family members, makes it more likely that her present account is truthful and relevant.

Non-defendant's bad character and hearsay

The prosecution had relied, *inter alia*, upon ss 114 and 116 of the Criminal Justice Act 2003 as a means of securing admission of the disputed evidence, but as the court found the material irrelevant, then no further issue relating to admissibility arose.

Although not raised at trial, the Court of Appeal acknowledged that the disputed evidence might have been admissible by virtue of s. 100 of the Criminal Justice Act 2003. Evidence of the bad character of a person other than the defendant is admissible if it is 'important explanatory evidence'. It is 'important explanatory evidence' if the court or jury would find it impossible or difficult to understand other evidence in the case without it and its value for understanding the case as a whole is substantial (s. 100(2)). However, s. 100 only regulates the admissibility of evidence of bad character which is defined in s. 98 as:

> evidence of, or of a disposition towards, misconduct on his part, other than evidence which has to do with the alleged facts of the offence with which the defendant is charged . . .

It is at least arguable that evidence of abuse carried out by members of the same family on the child complainant is evidence which has to do with the alleged facts of the offence with which the defendant is charged and therefore outside the scope of s. 98 and s. 100.

Simon Cooper