DIMINISHED RESPONSIBILITY [1a]

Section 2 of the amending Ordinance No. 16 of 1961 of the Singapore Penal Code[1] introduces a defence of substantial impairment of mind as the seventh Exception to section 300, whereby murder may be reduced to culpable homicide not amounting to murder.

This addition bears a close resemblance to the English defence of diminished responsibility as enacted by section 2 of the 1957 Homicide Act,[2] (which section is an adaptation of the Scottish doctrine of the same name).

The new Exception provides that the accused shall not be convicted of murder:

> if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

Insofar as it sets a less exacting test of mental disorder than that required to be satisfied for the defence of legal insanity under the Penal Code, Exception 7 should provide a popular alternative defence to section 84.[3] It may also have the effect of reducing murder to the less serious crime where the accused is unable to fulfil the objective requirements of the defence of provocation (Exception 1 to section 300): — *viz.;* where he reacts to provocation in an unreasonable way, and his 'unreasonableness' stems from some substantial defect of the cognitive faculty.[4]

1. Which came into force on June 2nd, 1961.

1a. In the composition of this Note I wish to record my indebtedness to Mr. Loke Siew Hoong for his valued suggestions. This acknowledgment is not, however, intended to convey the impression that he necessarily agrees with all I have written.

2. 6 & 6 Elz. 2, c.11.

3. As indeed it has already proved in England as an alternative to legal insanity under the M'Naghten rules and to other defences. In the first twenty-seven months of its availability (*i.e.* up to April 1960) diminished responsibility was pleaded on seventy-three occasions: see Wootten (1960) *L.Q.R.* Vol. 76. at p. 224.

4. See, *e.g. R.* v. *Alexander* (1912) 107 L.T. 240; 7 Cr. App. E. 110, C.C.A., *R.* v. *Wilkinson. The Times,* December 2, 1953; [1954] Crim. L.R. 22, C.C.A. These two cases constitute good examples of situations in which diminished responsibility would, had it existed as a defence in English law when they were decided, probably have reduced the prisoners crimes from murder to manslaughter. In each case the prisoner's mental abnormality was insufficient to bring his killing within the M'Naghten rules, though sufficient to preclude him from consideration as a 'reasonable man' for the defence of provocation. [It should be noted that the English law now recognises two reasonable men: one for the purposes of provocation — *Bedder* v. *D.P.P.* [1954] 2 AH E.R. 801, who is regarded as being impossible of definition in positive terms, see *R.* v. *McCarthy* [1954] 2 Q.B. 105; and one for the question of forseeability of consequences who has been defined in positive terms in *R.* v. *Ward* [1956] 1 Q.B. 361, and in *D.P.P.* v. *Smith* [1960] 3 W.L.R. 546. From the approval accorded by Malayan courts in *Mat Sawi bin Bahodin* v. D.P.P. (1958) 24 M.L.J. 189, *Chan Tong v. R.* (1960) 26 M.L.J. 250, and *Loo Geok Hong* v. P.P. (1961) 27 M.L.J. 157, to authorities which support testa of objectivism in provocation, there can be little doubt that such considerations as: —

> "Would a reasonable man have lost his self-control when faced with the provocation which the accused received?" and
>
> " Would a reasonable man have resented the provocation in the manner in which the accused retaliated?" — would be invoked today by the Singapore courts to determine the degree of the accused's liability.

In view of the similarity of the wording of the English and the Singapore defences of diminished responsibility, it is likely that English (and perhaps also Scottish)[5] decisions will be relied on in interpreting the new palliative defence, and that some of the problems which have been posed for the English courts may be the more readily solved in their Singaporean context.

In the first three years of the operation of the doctrine the English Court of Criminal Appeal displayed an uncharacteristic humility in its reluctance to offer guidance as to the meaning of "abnormality of mind" and "mental responsibility."[6] However, from the judgment of that court in *R.* v. *Spriggs* (1958),[7] and from several other decisions at first instance,[8] it may be gathered that the test is based mainly on an intellectual rather than a purely emotional criterion.[9] In *Spriggs* the defence had adduced evidence of mental depression together with "temperamental instability: old history of psychiatric trouble . . . apathy . . . personality disorder; psychopathic personality with emotional abnormality . . . emotional instability."[10] This led one writer to describe the prisoner as "a clear, laboratory specimen of the kind of case Parliament had in mind;"[11] but it was not sufficient to save Spriggs from conviction for capital murder. The language of Lord Goddard C.J. in delivering the judgment of the appellate body (which dismissed the appeal) has been described, not unfairly, as revealing more than a little suggestion of "diluted M'Naghten."[12] This comment is also true of the directions of most Scottish and English judges to their juries where the courts of trial on indictment have been faced with similar evidence. The effect of this attitude is to place disorders of intellectual and emotional origins into two watertight compartments and to reject the possibility (which is generally appreciated by the medical profession)[13] of any interaction between the two.

However, the English Court of Criminal Appeal in *R.* v. *Byrne* (1960)[14] was willing to take notice of emotional-cum-intellectual disorder in the case of a man who had killed during a sexual frenzy, — subject to the condition that such disorder was due to abnormality of mind rising out of one of the causes specified in the parenthesised passage in section 2(1).

5. See *e.g. H.M. Advocate* v. *Savage.* 1923 S.C. (J) 49, *Muir* v. *H.M. Advocate,* 1933 S.C. (J) 46, *H.M. Advocate* v. *Braithwaitc,* 1945 S.C. (J) 65.

6. See [1958] 1 All E.R. 300. at p. 303 *(per* Lord Goddard C.J.). It was decided in *R.* v. *Matheson* [1958] 1 W.L.R. 474; [1958] 2 All E.R. 87, that the defence should be applied where there is unchallenged evidence that the appellant was within the provisions of section 2(1) of the Homicide Act. The Court of Criminal Appeal in *R.* v. *Walden* (1959) 43 Cr. App. R. 201 followed *Spriggs* in that it was a sufficient direction if the judge drew the jury's attention to the words of section 2(1) of the Homicide Act, [though see *contra R.* v. *Byrne* [1960] W.L.R. 440 and *R.* v. *Terry* [1961] 2 W.L.R. 961; but it was not improper for him to indicate to the jury the sort of things they could look for to decide whether diminished responsibility was made out.

7. [1958] 1 Q.B. 270; [1958] 1 All E.R. 300.

8. *E.g. R.* v. *Dunbar* (1967) Unreported; see the rejected arguments put for the defence, in (1960) *L.Q.R.,* Vol. 76. at p. 232; *R.* v. *Teed* (1968), *ibid.,* at p. 234, and the trial Judge's summing up as quoted in *Rose v. The Queen* [1961] 2 W.L.R. 606.

9. See *R.* v. *Byrne* [1960] 3 W.L.R. 440.

10. Quoted from the transcript of the trial in *The Oxford Lawyer,* Trinity 1958, at p. 23.

11. Silverman, ibid.

12. Wootten (1960) *L.Q.R.,* Vol. 76. at p. 227.

13. See the reference made in the *Report* of the (British) *Royal* Commission on *Capital Punishment* (1949-1953). Cmd. 8932, to the evidence of the British Medical Association (at p. 93, para. 264). See also *Minutes of Evidence* of the Commission, at p. 313 (Dr. Dennis Hill); 317, 324, 326, 328 (Dr. T. Rowland Hill); 325 (Dr. Gordon); 545 (Memorandum submitted by the Institute of Psycho-Analysis). See generally on this topic D. K. Henderson and R. D. Gillespie, *Textbook of Psychiatry,* 1950.

14. [1960] 3 W.L.R. 440.

Byrne's case is perhaps more significant in that it recognised that an 'uncontrollable impulse' could, in stated circumstances, be accommodated by the doctrine of diminished responsibility. Should the Singapore courts have future cause to follow this decision there would be introduced a further area of difference between the criminal law of Singapore and that of the Federation of Malaya.[15]

Apart from difficulties involved in the interpretation of the phrases "abnormality of mind" and "mental responsibility" in the new defence, certain evidentiary and procedural problems may be encountered by the Singapore courts.

(i) By section 2(2) of the (English) Homicide Act, 1957 and by section 106 of the Singapore Evidence Ordinance, the burden of proving diminished responsibility is placed on the accused. The extent of that burden was first considered by an English court in *R.* v. *Dunbar* (1957).[16] There the trial Judge, Donovan J., sought to direct the jury on the onus of proof by merely reading to them the words of section 2(2) and furnishing them with copies of it:

> On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

The Court of Criminal Appeal upheld Dunbar's appeal on the ground of insufficient direction[17] and, following *R.* v. *Carr-Briant* (1943),[18] held that the accused was entitled to a verdict of manslaughter if he persuades the jury that it is more probable than not that when he killed he was suffering from such abnormality of mind as to bring him within that aspect of the defence.

The quantum of proof is not the same in Singapore. The new Exception 7, like the six foregoing Exceptions to section 300 of the Penal Code, must be read in the light of section 106 of the Singapore Evidence Ordinance, which purports to place the burden of proving those palliative defences to murder squarely on the accused. However in *Lim Tong* v. P.P. (1938)[19] it was held, following *Woolmington* v. *D.P.P.* [20] and *Emperor v. Dampala,*[21] that where the accused fails to discharge fully the burden of proving an Exception, though the evidence or arguments reveals a reasonable doubt as to whether the prosecution has satisfied the jury that such criminal intention as would justify a verdict of murder is established, then the accused is entitled to the benefit of such doubt. This would, therefore, seem to place an even lighter burden of proof on the defence where diminished responsibility is raised in Singapore than in England.

(ii) A problem for which no solution is proffered by either statutory provision is that of what standard of proof requires satisfaction by the Crown where it seeks to show that the accused was suffering from legal insanity in cases where the defence relies on diminished responsibility. In the English case of *R. v. Bastian* (1958) [22]

15. The present position in the Federation of Malaya is that 'uncontrollable' or 'irresistible' impulse which falls short of the requirements of section 84 of the Penal Code is no defence: *Sinnasamy* v. P.P. (1956) 22 M.L.J. 36, C.A.

16. [1957] 2 All E.E. 737.

17. See also in this respect *R.* v. *Terry* [1961] 2 W.L.R. 961, which places the judge under a duty to give a proper explanation of the terms of section 2. The 'proper explanation' was considered by the Court of Criminal Appeal in that case to be that which was given in R. v. *Byrne* [I960] 2 Q.B. 396.

18. [1943] K.B. 607.

19. (1938) 7 M.L.J. 41.

20. [1936] A.C. 462.

21. [1937] A.I.R. Rangoon 83.

22. [1958] 1 All E.R. 568.

the defence argued that the prisoner (who had killed two of his children) had, at the relevant time, been suffering from a sufficiently substantial impairment of mind to reduce the killings to manslaughter; while the prosecution adduced evidence with a view to proving that he was 'guilty but insane' within the M'Naghten rules. The Court of Criminal Appeal held that the burden of proof on the prosecution was no different in this case from that where it set out to prove that the prisoner had committed a criminal offence, thereby indicating that the prosecution must prove the prisoner's insanity at the time he committed the act *beyond reasonable doubt.* [23]

There would seem, in the absence of any provision to the contrary, to be sufficient logic in this view to enlist the approval of the local courts should they be confronted with a similar situation. The judge and jury would then be faced with the unusual prospect of the Crown seeking to obtain an *acquittal* for the accused, and the defence trying to establish (on nothing more exacting than the standard set out in section 106 of the Evidence Ordinance as interpreted in *Lim Tong)* that the accused was guilty of culpable homicide not amounting to murder.[24]

CRITICISM OF THE DEFENCE

1. A possible shortcoming of the new defence in its Penal Code definition may prove to be its want of direction on the contingency provided for by section 2(4) of the English Homicide Act:

> The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

'What,' it may be asked, 'Would be the position under the Singapore Penal Code if X abets Y in the perpetration of what, had not Y been found to have been suffering from diminished responsibility, would have amounted to murder?'

The clear terms of section 109 of the Penal Code render X (despite his murderous intention) guilty of no more than culpable homicide not amounting to murder — the offence of Y, the actual killer; for "whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided *for the offence."* [25]

Against this it can be argued that where X, manifesting a murderous intention, abets a child, a lunatic or any other 'innocent agent' to kill on his behalf, he is clearly guilty of murder [section 108 and the Illustrations (a), (b), (c) and (d) to Explanation 3 thereof]. But it would be stretching the doctrine of diminished responsibility too far in favour of the killer and his abettor to regard the former as an

23. Satisfaction of the same degree of proof would appear to be required where the prosecution seeks to show that the accused was suffering from diminished responsibility: R. v. Nott (1959) 43 Cr. App. R. 8.

24. In *R.* v. *Dixon* [1961] 1 W.L.R. 337, it was held in a case where prosecuting counsel on a trial for murder proposed to call evidence of insanity as part of the case for the Crown, that evidence tending to show insanity could not be led for the Crown until the defence had raised an issue with regard to the mental state of the prisoner. By analogy with English criminal law there would seem to be no legal-procedural obstacle to the occurrence of such a reversal of functions. It should be noted that the English verdict of "guilty but insane" where the prisoner is found to be within the M'Naghten rules, is for all practical purposes no different from an acquittal under section 84 of the Singapore Penal Code: *Felstead* v. *R.* [1914] A.C. 534. Another question which could be posed for the Singapore courts in that of whether acts done in a temporary state of voluntary intoxication could attract the defence of diminished responsibility. This was one of the questions which the English Court of Criminal Appeal was invited to consider in *R.* v. *Di Duca* [1959] Crim. L.R. 782; there, however, the Court declined to give an opinion.

25. Emphasis supplied.

'innocent agent' in the same sense as a person who would qualify for the operation of, for instance, sections 82, 83, 84, 85 and 86 of the Penal Code. For a person suffering from 'substantial impairment of mind' may avail himself of the palliative defence of diminished responsibility even though he has committed an offence *prima facie* within one of the four descriptions of murder under section 300, and was at the time of the commission a sober adult capable of understanding the nature of the act, that it was wrong or contrary to law and that it was not done under any misconception of fact. In no sense of the term can such a person be described as an 'innocent agent'.

Illustration (f) to Exception 1 to section 300 may also be invoked to support the case against X's conviction for the less serious offence, under section 109. This illustration refers to the defence of provocation:

Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. *Here B may have committed only culpable homicide, but A is guilty of murder.*[26]

However, despite the several ways in which diminished responsibility resembles provocation,[27] there is some support (in the maxim *expressio unius est exclusio alterius)* for the claim that the application of Illustration (f) should not be extended to cases falling outside Exception 1.

The possibility of such a conflict arising before the courts of Singapore could have been avoided by the simple expedient of adopting the words of the fourth subsection to section 2 of the English provision as a Proviso to Exception 7 to section 300 of the Penal Code: — *abundans cautela non nocet.*

2. An accused person who successfully pleads Exception 7 to section 300 will be convicted of culpable homicide not amounting to murder and be subject to punishment (in the same way as persons who fall within any of the other six Exceptions) within the wide limits of section 304 of the Penal Code. No similar arrangement is made for the administrative detention (and treatment) of the prisoner who is suffering from diminished responsibility as that which is provided under the Criminal Procedure Code[28] for he who is found to have committed the act complained of, but is acquitted because of insanity within the requirements of section 84 of the Penal Code.

The English courts, who have been embarrassed by the same defect, have sought to insure against the repetition of the offences of dangerously disordered persons such as Dunbar, Matheson and Byrne, by sending them to prison for long periods.[29] But this 'preventive' sentencing policy does not eliminate the possibility of such prisoners being let loose on the community before they are 'cured' of their mental abnormality. It could also mean that other prisoners may be left to serve at least a substantial part of similarly severe sentences, even though their mental aberrations may be remedied (or may remedy themselves) in the first few months of imprisonment. In short, where persons are convicted of offences committed whilst they were

26. Emphasis supplied.

27. They are both Exceptions to the same section of the Penal Code [s.300] whereby a charge of murder may be reduced to culpable homicide not amounting to murder; they are subject to the same burden of proof under section 106 of the Evidence Ordinance, and in either case the defence will apply even though the accused manifested an intention to kill which would (had not Exception 1 or Exception 7 applied) have amounted to murder.

28. Sections 362, 363.

29. In *R. v. Dunbar* [1957] 3 W.L.R. 330, and *R.* v. *Byrne* [1960] 3 WL.R. 440, although verdicts of manslaughter were substituted by the Court of Criminal Appeal for murder, the sentences of life imprisonment were left undisturbed. In *R.* v. *Matheson* [1958] 1 W.L.R. 474; [1958] 2 All E.R. 87, a verdict of manslaughter and sentence of twenty years' imprisonment were substituted for capital murder and sentence of death.

labouring under some mental disorder recognized by the criminal law, it is hard to appreciate how the infliction of any one or more of the punishments available under the Penal Code can form an adequate substitute for the flexibility of executive discretion.[30]

3. If, as is likely, the Legislature is not prepared to make any sweeping change in the law of insanity, and Exception 7 is permitted to remain on the statute hook as a defence to murder only, then it is respectfully suggested that the following amended version of diminished responsibility would introduce to the doctrine some of the realism of medical experience which it now lacks.

> " Culpable homicide is not murder if the offender was suffering from such defect of reason (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease of injury, or caused by disorder of the emotion or will-power arising from any one or more of the foregoing conditions) as substantially impaired his responsibility for his acts and omissions in causing death or being a party to causing the death."

Disease of the reason is not one disease, but a large number of diseases which differ from one another as a common cold differs from tuberculosis.[31] In many cases even the experienced psychiatrist is unable with certainty to attribute the cause of any one such disorder exclusively to the cognitive faculty, to the emotional faculty or to the power of the will. On what grounds therefore can it be claimed that a judge and jury are in any way qualified to perform the task? In their present terms both section 2 of the (English) Homicide Act and the seventh Exception to section 300 of the Singapore Penal Code would seem to demand from judge and juror a more exact scientific consideration of the prisoner's state of mind than that which could be fairly expected from the specialists who are called upon to give evidence before them.

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30. However, even if this view were widely accepted there would bound to be disagreement on the selection of a method wherewith to implement it, for it would probably necessitate the abolition of section 84 of the Penal Code and its replacement by a suitably amended defence which embraces diminished responsibility — along similar lines to those indicated by the American Law Institute in its Draft No. 4 of the Model Penal Code and the present Article 17 of the Penal Code of Switzerland. The former suggests the following formulation:

" (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to confine his conduct to the requirements of law."

" (2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

The Swiss Code provides that :

" (1) The administrative authority . . . will put into effect the judge's decision ordering detention, treatment or removal to hospital of offenders not responsible or only partially responsible for their actions.

" (2) The competent authority will order the termination of detention, treatment or confinement to hospital as soon as the reason for it no longer exists."

" The judge will decide if and to what extent the sentence passed on an offender only partially responsible for his actions is then to be carried out." [See also to similar effect, as to a broad formula correlating responsibility to control, the recommendation of a minority of the members of the [British] Royal Commission on Capital Punishment (1949-1953) that the M'Naghten rules should be replaced by a determination by the jury whether "at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible." See also the suggestion made by the British Medical Association that, "when a jury find that an accused person, at the time of committing the act, was labouring, as a result of disease of the mind, under a defect of reason or a disorder of emotion to such an extent as not to be fully accountable for his actions, they should return a verdict of 'guilty with diminished responsibility'."].

Although it is submitted that these various formulae, American, Swiss and British, are improvements on the present laws of insanity in America, Britain and Singapore, they nevertheless suffer from the defect indicated in the concluding paragraph of this note.

31. An analogy which is often employed by critics of the present law of legal insanity in England.