NOTES OF CASES

R. v. *Podola*[1]

HYSTERICAL AMNESIA AND PLEA IN BAR OF TRIAL

On September 24th, 1959 in the Central Criminal Court, London, Mr. Justice Davies passed sentence of death on Guenter Fritz Erwin Podola for the capital murder of a police officer.

Before passing on to the important questions of law which were later considered by the Court of Criminal Appeal, it is necessary to notice two issues preliminary to the trial proper. [2] The first was a question of fact: was the prisoner genuinely suffering from hysterical amnesia covering the period of the commission of the alleged crime and his subsequent arrest? The second was a matter of law: does hysterical amnesia constitute insanity within the terms set out in section 2 of the Criminal Lunatics Act, 1800 as amplified by *R.* v. *Pritchard?* [3]

The answer to both of these was 'No.'

Podola's case marked a unique occasion in English criminal law for it was the first time on record that loss of memory was relied on by the defence to support a plea in bar of trial. Lawton for the prisoner likened his mental condition to a railway engine which had shed a carriage but which still carried on. The carriage represented events which filled him with repugnance, its shedding was attributed to fear generated by the physical violence attending his arrest. [4] At no time during his trial was it claimed that Podola was 'medically insane' within the meaning of the M'Naghten rules.

As the result of a petition submitted on behalf of the prisoner, the Secretary of State invoked section 19 (a) of the Criminal Appeals Act, 1907 to refer to the Court of Criminal Appeal the question of the burden of proof that the prisoner was unfit to plead. When this issue had arisen at first instance during the preliminary submissions, Davies J. had declared that the onus was on he who claimed bar of trial (i.e. the prisoner). To discharge this burden it was necessary to show that on the balance of probabilities the prisoner was not fit to stand trial.

The Court of Criminal Appeal in a reserved judgment expressed the view that it was impossible to embark upon a consideration of this question without also deciding whether amnesia was capable of bringing the appellant within section 2 of the 1800 Act. In short, the issue of burden of proof could only arise if the alleged loss of memory on which it was contingent, came within the definition of insanity sufficient to render the prisoner unfit to plead. [5]

Having ascertained its competence to entertain the reference,[6] the Court reviewed the question of burden of proof when raised by the defence. Lord Parker

1. Before the Court of Criminal Appeal: Lord Parker C.J., Hilbery, Donovan, Ashworth and Paull JJ. October 1959. 43 Cr. App. R. 220; [1959] 3 W.L.R. 718; 103 S.J. 856; [1959] 3 All E.R. 418.
2. On which nine days were spent.
3. (1836) 7 C. & P. 303.
4. Hence its description as "hysterical amnesia." It is more normal for the condition to result from actual injury to the brain.
5. See *Caborn-Waterfield* 40 Cr. App. R. 110 [1956] 2 Q.B. 379.
6. In so deciding the Court overruled the argument of Darling J. in R. v. Jefferson (1908) 24 T.L.R. 877 where that learned judge contended that a rejected plea of unfitness to plead did not constitute a conviction (which is the statutory prerequisite to the right of appeal). The flaw in this is plain, for a finding of fitness to plead is inextricably bound up with the prisoner's subsequent conviction. If he is found fit to plead and then acquitted of the offence he is hardly likely to appeal on the ground that the plea in bar of trial should have been upheld.

C.J., delivering the court's judgment, vindicated the trial judge's opinion that the onus rests with he who alleges unfitness to plead. *Leys Case* (1828),[7] *Davies* (1853)[8] and *Sharp* (1957)[9] were declared to be bad law, and the Court turned to *Dyson* (1831),[10] *Turton* (1854)[11] and *Rivett* (1950)[12] which accorded with *Russell* v. *H.M. Advocate* (1946)[13] in which a plea in bar of trial on similar facts was rejected. In that case the Lord Justice-Clerk stated, "The onus is always on the accused to justify a plea in bar of trial[14] and to do so not to the satisfaction of expert witnesses but to the satisfaction of the court."[15]

The courts'[16] main objection to admitting amnesia as a ground rendering the prisoner unfit to plead was one of policy — " pour decourager les autres." It was thought that such a plea, if countenanced, would provide a tempting refuge for all those offenders who were unable to contrive credible defences. Maxwell Turner for the Crown gave voice to this fear in these words: "In every case where a man who, through drunkenness, let us say, was unable to remember what happened or where a motorist suffered concussion with consequent loss of memory following an accident in which he might be charged with an offence, that person would be unfit to plead."

This is open to criticism on two counts. First, as a matter of practice, it is most unlikely that such a plea would be entered for any prisoner not facing a capital charge, for on proof of unfitness to plead he could be detained during Her Majesty's pleasure — and that might mean incarceration for as much as life.[17] Such a prospect should serve to dampen its appeal for the majority of would-be abusers of the plea. Second, and more fundamentally dangerous, is the inference that every prisoner who alleges amnesia is in fact guilty of the crime charged. How can the court be sure that a good defence is not excluded with the other details of the 'crime' which evade the prisoner's recall? Is the concussed motorist to be convicted regardless of the possibility that he drove recklessly under the duress of another who escaped unnoticed from the scene of the crash? Should a possible defence of mistake of fact be denied the drunken 'offender' just because it is 'improbable' that he filled himself with gin under the honest misapprehension that it was lemonade?[18]

To anyone with a sense of fair play there is something utterly abhorrent about trying, convicting and perhaps hanging a man for actions he cannot remember and against which he is consequently unable to defend himself — particularly when there may have existed a legally acceptable explanation for them.

Section 2 of the Criminal Lunatics Act, 1800 provides that: "If any person indicted for any offence shall be insane, and shall upon arraignment be found to be so by a jury lawfully impanelled for that purpose, so that such a person cannot be tried upon such indictment . . ." then the court may proceed to order his detention

7. 1 Lewin 239.
8. 6 Cox 326.
9. 41 Cr. App. R. 197.
10. 7 C. & P. 305 n.
11. 6 Cox 385.
12. 34 Cr. App. R. 87.
13. S. C. (J) 37.
14. The issue of unfitness to plead may be raised by the court, by the prosecution or the defence. Where it falls on the latter to discharge the burden it is enough to show that on the balance of probabilities the prisoner is not fit to stand trial, where the matter is brought up by the prosecution the burden is probably the same as in other criminal cases i.e. proof beyond reasonable doubt that the prisoner was unfit to plead. If the issue is raised by the judge the onus presumably lies on the prosecution.
15. *Ibid*. at p. 44.
16. Both English and Scottish.
17. S. 2 Criminal Lunatics Act 1800.
18. A too ready rejection of the plea is particularly ill-advised where the accused's actions were unwitnessed.

during Her Majesty's pleasure. As the result of frequent judicial extension the scope of this section has outgrown the definition of insanity under the M'Naghten rules. The tests to be applied where fitness to plead is in issue were set out by Baron Alderson in *Pritchard:*

" First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence — to know that he might challenge any of you to whom he might object — and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."

The third test contains the key to the whole question of the legal appropriateness of amnesia within the insanity definition. It is discoverable in the phrase "sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence." The prisoner who is suffering from a genuine inability to recall the events which gave rise to the proceedings may nevertheless be capable of 'following' the course of those proceedings, but only in the same way as a spectator whose knowledge of the case is restricted to what he can see and hear in the court room. It is doubtful whether such a man can 'comprehend' the proceedings to the extent of being able to make 'a proper defence' in the sense of providing his legal advisers with adequate instructions for his defence.

The Court of Criminal Appeal took a narrow view of the *Pritchard* tests. Lord Parker said of them: "In our judgment the direction given by Alderson B. is not intended to cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds."[19] From this interpretation it would appear that the court is more concerned with the outward impression of justice being done than with protecting the prisoner against the possibility of an unjust conviction.

The learned Lord Chief Justice acknowledged his debt to Lord Cooper and his brothers Mackay and Stevenson, whose reasons for upholding on appeal Lord Sorn's rejection of *Russell's* plea in bar of trial, were approved by the Court of Criminal Appeal and adopted as the basis of its decision in *Podola.*

Closer inspection reveals that the rejection of the plea in Russell was made in the face of some strong language from Dunedin in *H.M. Advocate* v. *Brown* (1907)[20] the facts of which were similar to *Russell* and *Podola.* In his charge to the jury the learned Lord Justice General said: "It (insanity)[21] means insanity which prevents a man from doing what a truly sane man would do, maintain in sober sanity his plea of innocence and instruct those who defend him as a truly sane man would..... But that is not enough. There is something which is not generally asked about, and that is that a person who is giving these instructions should not only intelligently, but without obliteration of memory as to what has happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed."

Lord Cooper, adverting to these dicta in *Russell* could not see that they were "intended to be understood or are capable of being understood literally as applying to the case of a sane prisoner....." and added the 'reason' "for so to read them would come near to paralysing the administration of criminal justice."[22]

19. 43 Cr. App. R. 220, at p. 239. Lord Parker had this to say of the word 'comprehend' as used by Baron Alderson: "We do not think that this word goes further in meaning than the word 'understand'." [1959] 3 W.L.R. 718, at p. 732.

20. In the High Court of Justiciary, [1907] S.C. (J). 67, at p. 77.

21. Under s.87 of the Lunacy (Scotland) Act 1857 whose words are little different from those of s.2 of the Criminal Lunatics Act, 1800.

22. [1946] S.C. (J.) 37, at p. 40. The Court of Criminal Appeal distinguished *Brown* on the ground that there the accused was medically unsound of mind as well as suffering from loss of memory. Podola could plead no actual damage to his mind.

He was prepared to admit the plea in bar of trial only where there was evidence of

" (*a*) Insanity in the ordinary or special sense of s.87 of the Lunacy (Scotland) Act, 1857 and (*b*) the condition of a deaf mute."

Thus section 87 requires a medical condition of unsoundness of mind which precludes the prisoner's communication with the court and with his legal representatives. The decision in *Russell* countenances an extension of such insanity to include the deaf mute. (Though it is not difficult to envisage cases where the latter, if able to read and write, is placed in an infinitely better position to defend himself than the genuine amnesia victim.)

By adopting the questionable reasoning in *Russell* the Court of Criminal Appeal has, in the absence of home-grown authority, turned once more to Scotland for succour [23] — in this case for the succour of an over-cautious assessment made from between the blinkers of public policy.

An additional cause for concern in this case has been the Attorney-General's refusal to grant his fiat for a further appeal to the House of Lords. Sir Reginald Manningham-Buller's decision was difficult to justify in view of the considerable legal complexity of the case and the wide expression of public anxiety it aroused as to whether justice had been done.[24]

It is hoped that the new Criminal Justice Bill [25] will afford the means whereby a more fortunate applicant than Podola may by-pass the obstacle of an Attorney-General, caught between conflicting duties, and take this dark corner of the law up into a higher place for a long-overdue airing.

B. J. BROWN.

23. Recent examples of this practice are the adoption in *R.* v. *Jones* [1959] 1 W.L.R. 190; [1959] 1 All E.R. 411 by Lord Parker of Lord Sorn's interpretation of s.5(1)(*a*) of the Homicide Act 1957 in *H.M. Advocate* v. *Graham* [1958] S.L.T. 167, 169. For criticism of *Jones* see my note in *University of Malaya Law Review* Vol. 1, pp. 154-156. For a more advantageous 'borrowing' see the adaptation of the Scottish doctrine of diminished responsibility embodied in s.2 of the Homicide Act.

24. Podola was hanged. The Home Secretary did not reprieve him, possibly feeling that his one trump card had been played and lost when he invoked s.19(a) of the 1907 Act.

25. The Bill was laid before Parliament on 8th March, 1960. Its first clause would enable the defendant or prosecutor in any criminal case to appeal to the House of Lords from the Divisional Court of the Queen's Bench Division and from the Court of Criminal Appeal without the Attorney-General's fiat.

On the second reading in the Lords on 24th March, 1960 (reported in *The Times* newspaper 25th March, 1960) the Lord Chancellor criticised the existing machinery for final appeal as anomalous due to the Attorney-General's overlapping functions. For he is a member of the executive, he might have appeared for the prosecution in the criminal appeal (as he, in fact, did in *Podola*) and is called upon to act in a quasi-judicial capacity when deciding on whether to grant the fiat.