[HIGH COURT OF AUSTRALIA AND PRIVY COUNCIL.]

SODEMAN . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

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MELBOURNE, *Mar.* 30, 31; *April* 1, 2.

Latham C.J., Starke, Dixon and Evatt JJ.

PRIVY COUNCIL.* 1936.

May 28.

Criminal Law—Insanity—Irresistible impulse—Evidence—Burden of proof—Direction to jury—Sufficiency.

On a trial for murder the prisoner admitted the killing but raised the defence of insanity. The defence was that by reason of mental disease the prisoner was subject to impulses which he was unable to control. The trial Judge directed the jury that the Crown must prove beyond reasonable doubt every element necessary to constitute the crime, but that on the defence of insanity the position was entirely different and the prisoner had the burden of proving clearly that insanity did exist. The Judge stated the rule in *M'Naghten's Case*, (1843) 10 Cl. & F. 200; 8 E.R. 718, and explained it by reference to cases of delusional insanity. At the conclusion of the summing up the Judge told the jury that they had to be "satisfied" that the prisoner murdered the girl and, as to the defence of insanity, that the prisoner must "satisfy" them that he was insane at the time of the killing. The prisoner was convicted. He applied to the Court of Criminal Appeal of Victoria for leave to appeal, but the application was refused.

Held, by *Latham* C.J., *Starke*, *Dixon* and *Evatt* JJ., that the accused had the onus of satisfying the jury of his insanity, but not the onus of satisfying them beyond reasonable doubt.

Latham C.J. and *Starke* J. were of opinion that the summing up was adequate, and, in particular, that it was not likely to have misled the jury into thinking that the prisoner had to prove insanity beyond reasonable doubt: *Dixon* and *Evatt* JJ. were of the contrary opinion. The Court being equally divided, special leave to appeal from the decision of the Court of Criminal Appeal of Victoria: *R.* v. *Sodeman*, (1936) V.L.R. 99, was refused.

The prisoner petitioned the Privy Council for special leave to appeal.

Held that the case was not one in which leave should be granted.

* Present—Viscount Hailsham L.C., Lord Macmillan, Sir Isaac Isaacs.

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APPLICATION for special leave to appeal from the Court of Criminal Appeal of Victoria.

Arnold Sodeman was presented before the Supreme Court of Victoria for the murder of a young girl. He confessed that he had killed the girl, and also that he had killed three other girls in somewhat similar circumstances. The confessions as to all the killings were put in evidence by the Crown without objection on the part of counsel for the prisoner. The defence of insanity was taken. The trial Judge directed the jury that the burden lay on the Crown to prove beyond reasonable doubt everything necessary to constitute the crime, but, as to the defence of insanity, the position was entirely different and the prisoner had the burden of proving clearly that insanity did exist. His Honour directed the jury on the legal test of insanity as laid down in *M'Naghten's Case* (1), and concluded by saying that the jury must be satisfied that the prisoner murdered the girl, and on the question of insanity they must be satisfied that the prisoner was insane. The terms of the summing up appear more fully in the judgments hereunder. The prisoner was convicted. He applied to the Court of Criminal Appeal of Victoria for leave to appeal against his conviction, but the application was refused: *R.* v. *Sodeman* (2).

The prisoner applied to the High Court for special leave to appeal from that decision.

Further facts appear in the judgments hereunder.

Bourke, for the applicant. The confessions were put in to negative accident. The prisoner did not give evidence. It was proved that his father had died from general paralysis of the insane, that his grandfather had died in a hospital for the insane and that his mother had suffered for a number of years from amnesia. The prisoner had had a substantial quantity of alcohol on the day in question. He called three doctors in support of the plea that he was insane at the time of the killing, and they deposed that he was not able to appreciate the nature and quality of his act and did not know that what he was doing was wrong. The result of one doctor's evidence is that without alcohol he has a controlled obsession, but when he

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

(2) (1936) V.L.R. 99.

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has taken alcohol he loses control of himself and his position is quite different from that of a normal person who has lost control of himself through drink. The prisoner's statements in his confessions are rather reconstructions of past events than recollections of his acts. The Court should consider whether the rules in *M'Naghten's Case* (1) are a proper criterion in the circumstances of this case. That case does not lay down rules of general application (*Archbold's Pleading, Evidence and Practice*, 29th ed. (1934), p. 14; *Stephen's History of the Criminal Law of England* (1883), vol. 2, p. 154; *R.* v. *Jones* (2); *R.* v. *True* (3)). The jury were not sufficiently directed that the prisoner's state of mind at the time of the killing was the first matter they had to consider. *M'Naghten's Case* (1) was one of delusional insanity, and the House of Lords intended to deal only with that type of insanity (*Russell* on *Crimes and Misdemeanours*, 8th ed. (1923), p. 67). The trial Judge did not direct the jury in accordance with *R.* v. *Davis* (4), or in accordance with the summing up of *Dixon* J. in *R.* v. *Porter* (5), which followed the opinion of *Stephen* in his *History of the Criminal Law of England* (1883), vol. 2, p. 167, as adopted in *R.* v. *Hay* (6), *R.* v. *Fryer* (7) and *R.* v. *Jolly* (8). The jury should have been told to consider whether owing to his mental deficiency the prisoner was able to understand the effect of the acts he was doing. They should also have been told that, even if he knew that he had seized the girl by the throat or even that he was killing her, they had to consider whether he was capable of knowing that the act was dangerous or wrong (*R.* v. *Hay* (6); *R.* v. *Fryer* (7)). The jury should have been directed that if disease of the mind deprived the prisoner of all control he was insane. An irresistable impulse that arises from disease of the mind does not come within *M'Naghten's Case* (1) (*R.* v. *Jolly* (8); *R.* v. *Holt* (9)). The present case differs from *R.* v. *True* (10) and *R.* v. *Kopsch* (11) because the prisoner at the time of the killing suffered from a disease of the mind and the jury should have been directed on that basis. In spite of the reference in *R.* v. *Kopsch* (11) to the prisoner's

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(2) (1910) 4 Cr. App. R. 207, at p. 217.
(3) (1921) 16 Cr. App. R. 164, at p. 170.
(4) (1881) 14 Cox C.C. 563.
(5) *Ante*, p. 182.
(6) (1911) 22 Cox C.C. 268.
(7) (1915) 24 Cox C.C. 403.
(8) (1919) 83 J.P. 296.
(9) (1920) 15 Cr. App. R. 10.
(10) (1922) *Notable British Trials* 246; 16 Cr. App. R. 164.
(11) (1925) 19 Cr. App. R. 50.

having a disease of the mind, the case must be limited to the facts raised in that case, and in that case there was no evidence of mental disease. Irresistible impulse was not properly dealt with in the summing up. The prisoner was entitled to have it put, as it was put in *R.* v. *Holt* (1), that if the impulse was the result of disease of the mind which prevented the actions being controlled, he was not guilty (See also *R.* v. *Flavell* (2); *R.* v. *Curran* (3); *H. M. Advocate* v. *Sharp* (4)). As to the onus of proof.—An accused person is affected by two presumptions of law, (1) that he is innocent, and (2) that he is sane and responsible for his actions. The law casts upon the Crown the onus of displacing the first presumption, and on the accused the onus of displacing the second. The displacement of these presumptions is brought about in different ways: (1) In the case of the presumption of innocence, by proof beyond reasonable doubt; (2) in the case of the presumption of sanity, on the balance of probability, or, as *Tindal* C.J. put it in the trial of M'Naughten (5), "on balancing the evidence." The jury are the tribunal that has to go through these respective mental processes, and if the jury are misled into believing that they are to apply the same test in each case it is a misdirection. The Victorian Court of Criminal Appeal in its judgment said in effect that the jury could not be expected to distinguish between these two methods of coming to a conclusion. It is submitted that that is wrong and that the jury were not properly directed on this matter. The trial Judge did not sufficiently distinguish the onus that rests on the Crown from the onus that rests on the accused, and from the words which he used it might appear that the degree of proof was the same in each case, and that the prisoner had to prove his insanity beyond all reasonable doubt. The same language is used to describe the onus resting on the Crown as that resting on the prisoner: This is not correct (*Brown* v. *The King* (6); *Hicks* v. *The King* (7); *Clark* v. *The King* (8); *R.* v. *Porter* (9)). It is difficult to

(1) (1920) 15 Cr. App. R. 10.
(2) (1926) 19 Cr. App. R. 141.
(3) (1922) 22 S.R. (N.S.W.) 405, at p. 410.
(4) (1927) S.C. (J.) 66.
(5) (1843) 4 St. Tri. N.S. 847, at col. 925.
(6) (1913) 17 C.L.R. 570, at p. 584.
(7) (1920) 28 C.L.R. 36, at p. 45.
(8) (1921) 61 S.C.R. (Can.) 608.
(9) *Ante*, p. 182.

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reconcile *Woolmington* v. *Director of Public Prosecutions* (1) with *M'Naghten's Case* (2). The *Trial of Lunatics Act* 1883 (46 & 47 Vict. c. 38), sec. 2, makes it clear that all that the accused has to do is to make it appear to a jury that he was insane, and this can be done by proof falling short of proof beyond all reasonable doubt. Sec. 451 of the *Crimes Act* 1928 (Vict.) is based on that provision but has a different effect. As to the admissibility of the evidence relating to the deaths of the other three girls: This evidence was admitted to prove intention; before such evidence can be used the issue of intention must be actually raised (*Woolmington's Case* (1)). This evidence was not admissible at all, and, if it was properly admitted, it was wrongly used (*R.* v. *Bond* (3); *Thompson* v. *The King* (4); *R.* v. *Herbert* (5); *R.* v. *Armstrong* (6); *Phipson* on *Evidence*, 7th ed. (1930), p. 167). If the intent is manifest from evidence other than evidence of prior similar acts, the evidence of similar acts is inadmissible (*R.* v. *McDonnell* (7)). Such evidence, if it could have been tendered at all on the question of insanity, should have been tendered only in rebuttal (*R.* v. *Oliver Smith* (8); *R.* v. *Abramovitch* (9); *R.* v. *G. O. Smith* (10)). Whatever right the Crown had to give evidence on the issue of intention, the Crown had no right to give evidence of the outraging by the accused of one of the dead girls.

Book K.C. (with him *Maurice Cussen*), for the Crown. The evidence of the other killings was admissible as being evidence that the killing in the case charged was deliberate. The only question on that point is whether evidence of the outraging of one of the dead girls was admissible. It was open to the Crown to show that the other crimes were deliberate and malicious (*R.* v. *G. J. Smith* (11)). The Crown can prove that they were intentional killings and give evidence to prove that. The charge to the jury was sufficient. Though *M'Naghten's Case* (2) did arise out of delusional insanity, it has become an authority for the law as to insanity generally

(1) (1935) A.C. 462.
(2) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(3) (1906) 2 K.B. 389, at p. 420.
(4) (1918) A.C. 221, at p. 232.
(5) (1916) V.L.R. 343; 37 A.L.T. 199.
(6) (1922) 2 K.B. 555, at p. 566.
(7) (1850) 5 Cox C.C. 153.
(8) (1910) 6 Cr. App. R. 19.
(9) (1912) 23 Cox C.C. 179.
(10) (1912) 8 Cr. App. R. 72.
(11) (1915) 11 Cr. App. R. 229.

(*R.* v. *J. W. Smith* (1)). The defence of insanity arising from an irresistible impulse should not be regarded as a defence (*R.* v. *Kopsch* (2) ; *R.* v. *Flavell* (3)). The latter case went beyond the rules laid down in *M'Naghten's Case* (4). Here there was no evidence that the confessions were not made voluntarily or that the accused was insane. The jury must be taken to have found that the confessions were made unassisted, and when they reached that stage in this case the only conclusion open is that the accused knew the nature and quality of the acts done. Even if the Court thought that something more should have been added to the summing up, it is not sufficient to warrant this Court in interfering. *M'Naghten's Case* (4) is an authority both as to the burden of proof and on the question of insanity. The defence of insanity must be clearly proved to the satisfaction of the jury (*M'Naghten's Case* (4)). In the present case the trial Judge followed *M'Naghten's Case* (4) on the burden of proof. If the defence relies on insanity to offer an excuse for an act, whether coming within *M'Naghten's Case* (4) or otherwise, that burden lies on the accused. The distinction between " clearly proved " and " proved beyond reasonable doubt " is very fine ; in fact, the expressions are almost synonymous. *Clark's Case* (5) is distinguishable on two grounds. The expression " proof " is used instead of " clearly proved to their satisfaction," and in *Clark's Case* (5) there was, notwithstanding the words in the section, the distinct statement that the jury must be satisfied beyond reasonable doubt of his insanity. *R.* v. *Porter* (6) does not alter the law in any way. In *R.* v. *Coelho* (7), though the prisoner said he could not remember the crime at all and although the Judge did not give the direction suggested by *Stephen*, the direction was held sufficient. The direction which the defence says should have been given would from a practical point of view have made no difference whatever. The jury in this case could not have been misled even though they thought the Judge directed them that they had to be satisfied beyond reasonable doubt of the prisoner's insanity. This being an application for special leave to appeal, no

(1) (1910) 5 Cr. App. R. 123, at p. 129.
(2) (1925) 19 Cr. App. R. 50.
(3) (1926) 19 Cr. App. R. 141.
(4) (1843) 10 Cl. & F. 200 ; 8 E.R. 718.
(5) (1921) 61 S.C.R. (Can.) 608.
(6) *Ante*, p. 182.
(7) (1914) 10 Cr. App. R. 210.

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leave should be given unless the Court considers that it should extend the rule in *M'Naghten's Case* (1), and as that is well settled it should not be altered except by the Legislature.

Bourke, in reply. The requirements of *M'Naghten's Case* (1) are not fulfilled by the Judge's stating the rule and then giving a summary which in effect amounts to a description of various aspects of insanity having nothing to do with the problem the jury have to consider, a statement of reasons why the only evidence of the accused's state of mind at the critical time should not be accepted, and a misleading statement of the standard of proof. *Stephen* J. did not regard the rule which he laid down in *R.* v. *Davis* (2) and explained in his *History of the Criminal Law of England* (1883), vol. 2, p. 167, as a departure from the rule in *M'Naghten's Case* (1) (See *Stephen's Digest of the Criminal Law*, 7th ed. (1926), pp. 31 et seq.). The prisoner is entitled to have the rule explained in such terms as those used by *Stephen* J. in *R.* v. *Davis* (2). The distinction between the onus of proof in a criminal case and that in a civil case is explained in *Doe d. Devine* v. *Wilson* (3) and *Ross* v. *The King* (4). *R.* v. *G. J. Smith* (5) is not an authority for leading evidence of prior killings in this case. In that case the evidence was admitted to prove the identity of the prisoner with the person who brought about the death. But where there is no doubt as to identity and the evidence is led only to prove intent and to disprove accident, it should not be led unless there is a real issue on that subject before the jury (*Phipson* on *Evidence*, 7th ed. (1930), p. 153). The accused has a right to have the law explained accurately and sufficiently to the jury (*Peacock* v. *The King* (6)), and special leave to appeal should be allowed.

Cur. adv. vult.

April 2. The following written judgments were delivered :—

LATHAM C.J. The accused was tried for the murder of June Rushmer. The only defence was insanity, the killing of the girl by Sodeman not being challenged. The Crown proved a written

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(2) (1881) 14 Cox C.C. 563.
(3) (1855) 10 Moo. P.C.C. 502, at p. 531; 14 E.R. 581, at p. 592.
(4) (1922) 30 C.L.R. 246, at p. 254.
(5) (1915) 11 Cr. App. R. 229.
(6) (1911) 13 C.L.R. 619.

confession that he killed the girl which was signed by him. This confession was supported by other evidence. The jury found him guilty. He made an application for leave to appeal to the Court of Criminal Appeal and the application was dismissed. He now seeks special leave to appeal to the High Court.

As I have said, the only defence was insanity, and accordingly no question really arose as to the standard of proof to be satisfied by the Crown, though the learned Judge in his summing up, both before and after explaining what was involved in the crime of murder, told the jury that the Crown must prove beyond reasonable doubt every element necessary to constitute the crime.

In dealing with the defence of insanity the Judge said that the accused himself had "the burden of proving clearly to you that insanity did exist." He said: "The obligation is his to satisfy you that he was insane at the time of committing the offence." He also said that in the leading case on the subject (*M'Naghten's Case* (1)) it was settled that "every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury." In using these various phrases the Judge repeated the words of the answers of the Judges given in *M'Naghten's Case* (1). The authority of that case on this point cannot, it seems to me, be disputed. In *Woolmington* v. *Director of Public Prosecutions* (2) the House of Lords considered important questions relating to the onus of proof upon a charge of murder. Viscount *Sankey* L.C. referred to *M'Naghten's Case* (1) as "the famous pronouncement on the law bearing on the question of insanity in cases of murder" and said:— "In *M'Naghten's Case* (1) the onus is definitely and exceptionally placed upon the accused to establish such a defence. See *R.* v. *Oliver Smith* (3) where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant." There is no doubt that the learned Judge was quite right in telling

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718; *sub nom. M'Naughten's Case*, 4 St. Tri. N.S. 847.
(2) (1935) A.C. 462.
(3) (1910) 6 Cr. App. R. 19.

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the jury that the onus of establishing a defence of insanity to the satisfaction of the jury rested upon the accused.

It is contended, however, that the Judge should have done more than state accurately the character of the onus upon the Crown and upon the accused respectively and that he should have given some further explanation in order to emphasize the distinction which was already expressed in the words which he had used. This particular argument assumes that everything necessary has been clearly and accurately stated to the jury but asks for further elaboration by the Judge. In my opinion, where the charge on a particular point states all the relevant propositions in clear and accurate language, the degree of elaboration which is necessary or desirable, by way of explanation, comparison or contrast, is a matter which is better determined by the trial Judge than by a Court of appeal.

But it is further objected that the direction on the question of standard of proof was likely to mislead the jury. This argument is founded on the fact that at the end of the summing up the Judge referred to the onus of proof resting on the Crown on the issue of killing with malice aforethought in the same terms as those which he used with respect to the onus of proof resting on the accused with respect to the issue of insanity. He said:—"I will simply recapitulate that you must be satisfied, before you find a verdict of guilty at all in this case, that the accused did murder June Rushmer, that is to say, that he did kill her, and did kill her intentionally with malice. Having come to the conclusion that, apart from insanity, that is the position, then you must ask yourselves the question, has the accused satisfied us that there was that degree of insanity which entitles him to a verdict of not guilty on the ground of insanity."

It is said that the jury may have been misled into thinking that, as the Crown had to prove its case beyond reasonable doubt, so the accused, in order to succeed upon the defence of insanity, had to prove insanity beyond reasonable doubt. I accept the proposition that it is the law that, while a prosecutor must prove his case beyond reasonable doubt, an accused person can succeed in establishing a defence upon a preponderance of probability. The

proposition might be expressed in other language, without the use of the established phrase " reasonable doubt " (which has become less clear by reason of much explanation) and by referring to " satisfying the jury " instead of to " preponderance of probability." Taking the summing up as a whole and in relation to the circumstances of the case, I regard it as very improbable that a jury could have been misled by what the learned Judge said on this matter. In substance the only matter to which the jury had to give consideration was the defence of insanity, because otherwise the charge was in effect admitted. What the jury was told as to the standard of proof required in order to justify a finding of insanity was accurate and sufficient and it was repeated several times. In my opinion this ground of the application for special leave should fail.

There was evidence of medical witnesses who said that the accused at the time of the killing " did not, in their opinion, know the nature and quality of the act or know that it was wrong." If the jury accepted this evidence they would, in the light of the statement of the law by the learned Judge as laid down in *M'Naghten's Case* (1), have brought in a verdict of insanity. The jury, however, was not bound to accept this evidence, and there was, in addition to the presumption of sanity, other evidence, showing planning and deliberation by the accused, choice of a secluded spot, and immediate arrangement of an alibi—all of which tended against the plea of insanity.

Confessions of four killings were made by the accused. They were dictated by him to the detectives who gave evidence. They were intelligent and consecutive, and contained detailed accounts of the movements and actions of the accused on each occasion. The accused visited three of the localities with the police and repeated his movements in their company. The police witnesses gave evidence that these detailed statements were made by the accused without prompting or suggestion. The medical witnesses agreed that if the accused really did make the statements in this manner and if they were accurate, then he would have appreciated the nature and quality of his acts when he did them. The medical witnesses admitted that they had to assume, as part of the basis of their

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

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opinions, that the police evidence as to the way in which the confessions were made should not be accepted. It was plainly open to the jury to accept this police evidence and to accept the confessions as accurate and, if they did so, then the medical evidence would assist them in declining to find insanity. Insanity is essentially a question of fact for the jury (*R.* v. *True* (1)).

It is important, however, that the jury should be properly directed upon the issue of insanity. The learned Judge stated the propositions laid down in *M'Naghten's Case* (2) in the very language used in that case. It is said, however, that this is not sufficient and that authorities such as *R.* v. *Davis* (3) and *R.* v. *Fryer* (4) show that the jury should have been told that if a mental disease from which the accused was suffering produced such a degree of madness at the time when he committed the crime that he was deprived of the capacity of controlling his actions, he was not morally responsible. The phrase "the capacity of controlling his actions" appears in the case of *R.* v. *Fryer* (4). In *R.* v. *Davis* (5), Mr. Justice *Stephen* after referring to *M'Naghten's Case* (2) said: "As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong." It is suggested that these authorities show that it is not sufficient merely to direct the jury in the terms of *M'Naghten's Case* (2) where the mental disease is or may be such as to make the accused subject to an uncontrollable impulse.

The Judge did, in referring to the medical evidence, state to the jury that the doctors had come to the conclusion "that the accused man was irresponsible for his acts in the legal sense, that is to say, each of them said that in his opinion at the time the accused killed June Rushmer, he was in such a state from mental disease that he did not understand the nature of the act he was doing in strangling the girl, and in addition they went on further, which was not necessary

(1) (1922) 127 L.T. 561; 16 Cr. App. R. 164.
(2) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(3) (1881) 14 Cox C.C. 563.
(4) (1915) 24 Cox C.C. 403.
(5) (1881) 14 Cox C.C., at p. 564.

for the purpose, but would be another string to the bow if it were necessary, that he did not know that what he was doing was wrong. One said that, and the others said he did not know right from wrong, which, though not perhaps strictly to the point, comes practically to the same thing." He explained that " the mere desire, however strong, however hard, however impossible to control—would not be sufficient to entitle a man to a verdict of not guilty on the ground of insanity, but Dr. Ellery at any rate goes this step further and says that if a man has an obsession, if he gives way to that obsession and does the thing which is always before his mind as the thing he wants to do, then in doing it he does not know the quality of his act, he does not know what he is doing, and does not know whether it is right or wrong."

On six separate occasions during the summing up the Judge stated that the jury had to consider what was the mental state of the accused " at the time " when he killed June Rushmer. The Judge explained that an obsession might involve an impulse which it became impossible to control. The direction, taken as a whole, was sufficient to inform the jury that if such an impulse produced a mental blank at the critical time, they should find that the accused was insane in the legal sense. Other terms than " obsession " or " impossible to control " might, it is true, have been used. Reference might have been made to disease of the mind involving passion, frenzy, or paroxysm, producing a mental blank, but the Judge thought it better to use the words used by the medical witnesses than to substitute expressions the equivalence of which might possibly have been challenged. It appears to me that the defence raised—and any defence that could have been raised on the evidence —was fairly put to the jury.

The parts of the direction which I have quoted were given after the Judge had stated and given some explanation of the law as established by *M'Naghten's Case* (1). The direction explains that uncontrollable impulse in itself is not a defence, but that uncontrollable impulse resulting from mental disease which brings about or is associated with an incapacity to know the nature and quality of an act or to know that it is wrong amounts to insanity which

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

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constitutes a defence. In my opinion this is an accurate statement of the law. It was not directly argued that an irresistible impulse in itself was a defence to a charge of murder. The authorities are clear that such a proposition cannot be maintained (*R.* v. *Barton* (1); *R.* v. *Holt* (2); *R.* v. *Quarmby* (3); *R.* v. *Kopsch* (4)). Such an impulse may, however, be one manifestation of mental disease. It may have the effect of destroying or preventing knowledge of the nature and quality of the act done or knowledge that the act is wrong. In such a case insanity is established—but by reason of the latter feature of the case and not by reason of an uncontrollable impulse *per se*. This principle of the law is frequently criticised, especially by medical and other scientific men, but a Court must administer the law as it finds it. The Court of Criminal Appeal, in *R.* v. *Flavell* (5), definitely dealt with this class of case and decided that it had no power to alter and that it would not alter the rules laid down in *M'Naghten's Case* (6) so as to introduce a new and independent category of insanity under the head of uncontrollable impulse. In my opinion this Court ought to adopt the same position. The refusal to recognise a defence of uncontrollable impulse *per se* doubtless looks for its justification, not exclusively to opinions (often differing) in scientific theory or moral doctrine, but to the interests of society and to practical considerations affecting the security of the community, while it finds its safeguard, in Victoria, in the power of the Executive Government to review any sentence of a Criminal Court and especially in the duty of the Executive Government to consider every sentence of death. Any change in the law which may be thought to be desirable should be made by Parliament.

In addition to the confession of the killing of June Rushmer the accused confessed that he had killed three other girls. The bodies of all the girls were tied in a similar way in each case, part of the underclothing was found pushed into the mouth, and the position of the bodies when discovered was very similar in three of the cases. The defence properly and strongly relied upon this evidence to support the plea of insanity. In the circumstances of this case,

(1) (1848) 3 Cox C.C. 275.
(2) (1920) 15 Cr. App. R. 10.
(3) (1921) 15 Cr. App. R. 163.
(4) (1925) 19 Cr. App. R. 50.
(5) (1926) 19 Cr. App. R. 141.
(6) (1843) 10 Cl. & F. 200; 8 E.R. 718.

where the only defence was insanity, there can be no objection—and no objection was taken at the trial—to this evidence being introduced in the Crown case.

But evidence relied upon to show insanity may possibly also be used to rebut an allegation of insanity. On the emotional and volitional side the acts of the accused in this case show a deranged deviation from normality. But the law, for purposes of criminal responsibility, emphasises the cognitive aspect of the mental content at the time when the act constituting the offence is done. Neither extreme anger in itself nor uncontrollable impulse in itself is a defence in law, even if resulting from mental disease. The defence of insanity is established in law only if it is shown that the accused did not, at the relevant time, know the nature and quality of his act or, if he did, did not know that it was wrong, and that this absence of knowledge arose from a defect of reason amounting to a disease of the mind (*M'Naghten's Case* (1)). It may be said that this legal analysis depends upon an abandoned system of faculty psychology which divided the mind into almost unrelated functions each existing in a separate compartment. But, on the other hand, it should be remembered that, as already stated, the law recognises that mental disease manifested in, for example, what is called " uncontrollable impulse," may also be manifested in lack of knowledge, or incapacity to have knowledge, of the nature and quality of an act or of its character as a wrong act. Such an impulse may be evidence of this very lack or incapacity. Indeed, that was the effect of the medical opinions given in evidence in this case, and this aspect of the case was definitely put to the jury by the Judge.

I said that evidence used to show insanity in the relevant sense may also be used to rebut an allegation of insanity. Thus, in this case, the evidence which was relied upon to show uncontrollable impulse for the purpose mentioned contained elements which had a direct bearing upon the cognitive capacity and state of the accused. The Crown relied upon the evidence to show that the accused knew and recollected with remarkable exactness what he had done in similar cases, and therefore used this evidence of the mental capacity and state of the accused to rebut the contention that at the time

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

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he took June Rushmer away by herself and attacked her he did not know the nature and quality of his act or that it was wrong. Such evidence was admissible for both purposes, that is, not only to support the plea of insanity but also as tending to show that the accused, with appreciation of what he was doing, used a similar method, when he had girls in his company, of enticing them to a secluded spot and killing them in a particular way, and that therefore in the case of June Rushmer he acted with knowledge of the significance of his acts gained from his own past experience. The weight to be attached to the evidence from this point of view was a matter for the jury.

It also appears to me that the evidence was admissible in relation to the issue of intent to kill. It was possible for the accused to contend that the actual death happened accidentally—that it was a quite unexpected, unforeseen and fortuitous occurrence. The evidence of previous acts, similar in outstanding characteristics, went to show that in the case of June Rushmer he was doing substantially the same thing that he had done before on three occasions, when in each case death had resulted. Such evidence could legitimately be used to meet a possible defence of accident or absence of intent and, indeed, to anticipate it and prevent it being raised with prospects of success. It is the duty of the Court to prevent the unfair introduction of evidence which might be prejudicial to an accused person. But it is well established that evidence of similar acts by the accused, even though it establishes the commission of other crimes, may be relevant " if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused " (*Makin* v. *Attorney-General for New South Wales* (1), per Lord *Herschell* L.C.).

Thus, in my opinion, the issues were properly explained to the jury by the learned Judge, and no evidence was wrongly admitted or used for a wrong purpose. There was undoubtedly evidence to support the findings of the jury, and there is in my opinion no ground for giving leave to appeal.

(1) (1894) A.C. 57, at p. 65.

STARKE J. A motion has been made on behalf of Arnold Karl Sodeman, a prisoner under sentence of death for murder, for special leave to appeal to this Court from a judgment of the Supreme Court of Victoria in Full Court, dismissing his appeal to that Court (*Crimes Act* 1928 (Vict.), sec. 593). This Court has an unfettered discretion in a criminal case to grant such leave where special circumstances are shown to exist, but I again repeat the opinion I hold that this Court should only intervene where it is shown that substantial and grave injustice has been done. All the States have now, I think, constituted special tribunals for hearing appeals in criminal cases, and interference by this Court in such cases, unless under the circumstances mentioned, is calculated to lead to mischief and inconvenience in the administration of criminal justice.

This case involves the mental elements of responsibility necessary to establish a charge of murder. Those elements, so far as insanity is concerned, were stated by the Judges of England in reply to questions propounded by the House of Lords in relation to the case of *Daniel M'Naghten* (1). "The questions . . . had reference only to the effect of insane delusions and insane ignorance. But insanity affects not only men's beliefs, but also, and indeed more frequently, their emotions and their wills" (*Kenny, Outlines of Criminal Law*, 3rd ed. (1907), p. 55). The rules in *M'Naghten's Case* (1) have, however, been maintained by the Courts, despite professional criticism, and by no one more acutely than by Sir *James Fitzjames Stephen* in his *History of the Criminal Law of England* (1883), vol. 2, c. xix., pp. 124-186. See *R.* v. *Coelho* (2); *R.* v. *Kopsch* (3); *R.* v. *Flavell* (4). But various Judges have directed juries that an actual disease of a man's mind such as to deprive him of the power of controlling his actions is relevant evidence for the purpose of establishing that one or other of the exemptive defects stated in *M'Naghten's Case* (1) "was actually present" (*R.* v. *Davis* (5); *R.* v. *Fryer* (6)). Sir *James Fitzjames Stephen* himself did not regard such a direction as opposed to the rules in *M'Naghten's Case* (1) (See *History of the Criminal Law* (1883), vol. 2, pp. 167, 168).

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(2) (1914) 10 Cr. App. R., at p. 216.
(3) (1925) 19 Cr. App. R. 50.
(4) (1926) 19 Cr. App. R. 141.
(5) (1881) 14 Cox C.C. 563.
(6) (1915) 24 Cox C.C. 403.

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Now in the present case, *Gavan Duffy* J., who presided at the trial of the prisoner, admittedly directed the jury in the special terms stated in *M'Naghten's Case* (1). Such a direction is in accordance with the law as it exists, and cannot, on the authorities as they stand, be regarded as wrong. It is said, however, that it was insufficient in the circumstances of this case. Doubtless, disease of the mind " powerfully affects, or may affect, the knowledge by which our actions are guided; the feelings by which our actions are prompted; the will by which our actions are performed " (*Stephen, History of the Criminal Law* (1883), vol. 2, p. 148). It is not enough, however, to say that the disease of the mind affects the feelings of a prisoner or his will, unless the disease or obsession of the mind prevents him from knowing or appreciating what he is doing or that his act is wrong. If the disease or obsession of the mind deprives him of the power of controlling his actions, and so affects his mental faculties that he is unable to understand or to appreciate what he is doing or that it is wrong, then, as before indicated, one or other of the exemptive defects stated in *M'Naghten's Case* (1) is established. (See *Stephen, History of the Criminal Law* (1883), vol. 2, pp. 163, 164.) But the more I have read the charge of the learned Judge, the more I am convinced that he made this matter perfectly clear to the jury. I extract a passage from the charge :—" It is said that this man had an obsession, but you will understand that would not be enough, the mere desire, however strong, however hard, however impossible to control—would not be sufficient to entitle a man to a verdict of not guilty on the ground of insanity, but Dr. Ellery, at any rate, goes this step further and says that if a man has an obsession, if he gives way to that obsession and does the thing which is always before his mind as the thing he wants to do, then in doing it he does not know the quality of his act, he does not know what he is doing and does not know whether it is right or wrong. The other two doctors based their conclusion, not on that question of obsession or acting under an obsession, but [on] their experience of what was said and not said by the accused when they interviewed him. I will simply recapitulate that you must be satisfied, before you find a verdict of

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

guilty at all in this case, that the accused did murder June Rushmer, that is to say, that he did kill her, and did kill her intentionally with malice. Having come to the conclusion that, apart from insanity, that is the position, then you must ask yourselves the question, has the accused satisfied us that there was that degree of insanity which entitles him to a verdict of not guilty on the ground of insanity." In my opinion, the charge was not only adequate on this matter, but so clear that no jury could misunderstand it.

Another objection taken to the charge was that the learned Judge directed the jury that the burden of establishing insanity was upon the prisoner. The learned Judge used such phrases as " he himself has the burden of proving clearly to you that insanity did exist " : " the obligation is his to satisfy you " : " every man is presumed to be sane . . . until the contrary is proved to the satisfaction of the jury " : " has the accused satisfied us that at the time of killing June Rushmer he was labouring under such a disease of the mind as not to know that in fact he was strangling the girl " : " has the accused satisfied us that there was that degree of insanity which entitles him to a verdict of not guilty on the ground of insanity." The cases show that this is not only a common but an accurate direction to the jury (*M'Naghten's Case* (1) ; *R.* v. *Oliver Smith* (2) ; *R.* v. *Coelho* (3) ; *Russell on Crimes and Misdemeanours*, 6th ed. (1896), vol. I., pp. 121-137, and directions there cited). But it is contended that the Judge should have gone further, and told the jury that if the preponderance of the evidence was in favour of the insanity of the prisoner, then the jury would be authorized to find him insane. But English-speaking juries understand English words and phrases, as do most other English-speaking people, in their plain and ordinary signification. A phrase such as " the preponderance of probabilities " is grandiloquent enough, but would probably be less understood by a jury than the common English words that they must be satisfied of the insanity of the accused.

Lastly, the admission of evidence, or rather confessions, of the prisoner, of the killing of three other girls in somewhat similar

(1) (1843) 10 Cl. & F. 200 ; 8 E.R. 718.
(2) (1910) 6 Cr. App. R. 19.
(3) (1910) 10 Cr. App. R. 210.

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circumstances to the killing of June Rushmer, was objected to. But the evidence falls within the principles stated in *Makin* v. *Attorney-General for New South Wales* (1) and the *Brides in the Bath Case* (*R.* v. *G. J. Smith*) (2).

The mental element of responsibility in criminal cases is a legal question which has excited controversy. But I should like to repeat a passage from Sir *James Fitzjames Stephen's History of the Criminal Law*, (1883), vol. 2, p. 185, to which I referred during the argument, and for the purpose of making plain that, whatever view one may take of the legal problems involved in the defence of insanity, still there is little reason to suspect that differences of opinion are likely to cause any real injustice. "The importance," says Sir *James Fitzjames Stephen*, vol. 2, pp. 185, 186, "of the whole discussion as to the precise terms in which the legal doctrine on this subject are to be stated may easily be exaggerated so long as the law is administered by juries. I do not believe it possible for a person who has not given long-sustained attention to the subject to enter into the various controversies which relate to it, and the result is that juries do not understand summings up which aim at anything elaborate or novel. The impression made on my mind by hearing many—some most distinguished—Judges sum up to juries in cases of insanity, and by watching the juries to whom I have myself summed up on such occasions, is that they care very little for generalities. In my experience they are usually reluctant to convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime. But their decision between madness and crime turns much more upon the particular circumstances of the case and the common meaning of words, than upon the theories, legal or medical, which are put before them. It is questionable to me whether a more elaborate inquiry would produce more substantial justice." These are the words of the most distinguished criminal lawyer of our times, and I add them in view of the differences of opinion disclosed in the judgments of this Court in the present case.

Special leave to appeal should be refused.

(1) (1894) A.C. 57.

(2) (1915) 11 Cr. App. R. 229.

DIXON J. In my opinion special leave to appeal should be granted to the prisoner. His appeal pursuant to such leave should then be allowed, his conviction quashed and a new trial ordered.

He was convicted of the murder of a girl of six and a half years of age. The body of his victim was found lying prone upon the ground, with the hands tied behind her back and the clothes pulled up, leaving the lower part of the body and legs bare. The child's bloomers had been stuffed into her mouth and part of her frock had been tied round the neck and round the chin just below the lower lip. There was a bruise upon the thyroid gland and the child had died of suffocation.

The prisoner made a written confession five days later. His statement was to the effect that while he was riding his bicycle he happened to pass the child, who asked him for a ride, and that he gave her a ride on the bar of his bicycle. After they had gone some distance she said it was far enough. He dismounted and told her she could walk home. The confession then goes on :—" I made a run towards her and she ran into the bush. I ran after her and caught her round the neck and she started to scream. I held her by the neck and she went limp all of a sudden. I then took her bloomers off and jammed them in her mouth. I then got her belt from her frock and tied it over her mouth and around the back of her neck. I then tore a strip of her dress and tied her hands behind her back and left her lying face downwards. I then left her there." He adds that he cannot say why he did this to the child, that he then realized he had done a dreadful act and that he went around to try and show he was away from the scene.

He next confessed to killing, five years previously, a girl whose body had been found in a vacant dwelling. She was twelve years of age. He gave a detailed description of how he found her playing in a park, took her a tram ride, gave her money to get something to eat, brought her back by bus and then, seeing a vacant house, asked her to come into it. The statement goes on :—" I found the back door open. We both went inside and as soon as we did I grabbed her by the throat and held her and she went limp. I then dragged her into the bathroom and let her throat go. She fell on to the floor. I then tore portion of her clothing from her body

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and stuffed it into her mouth. I then tore another piece of her clothing and tied it around her mouth and around the back of her neck. I then tore another piece from her clothing and tied her hands behind her back. I then tore another piece of her clothing and tied her legs together. If I had sexual intercourse with this girl I have no recollection of it." In fact fresh spermatozoa had been found in this girl's vagina.

He next confessed that two months later he was the author of the death of a girl whose dead body had been found on a vacant allotment about two hundred yards from her home. Again he described in some detail how the girl, who was sixteen, got into his company and what their movements were up to the time of his attack upon her. The account the confession gives of the homicide is as follows :—" We were talking together and started pulling each other and skylarking and I then grabbed her by the throat and she dropped in my arms and went limp almost immediately. I then let her throat go and she fell on the ground. I looked up and down and around and then caught her under both arms and dragged her along the street, passing her home, and dragging her to a vacant allotment. . . . I placed her on the vacant allotment. I took off her stockings, stuffed one of her stockings into her mouth, tied her other stocking around her neck, tore a piece of her petticoat and tied it across her mouth and around the back of her neck. I took her bloomers off and tied them around her ankles and I took her leather belt and tied her hands behind her back with it. I also tore another piece of her underskirt and tied her hands together."

He then made a fourth confession of homicide. The time when he committed it was four years later, eleven months before the homicide which forms the subject of his conviction for murder. The girl was twelve years old. He says, in effect, that she knew him and happened to meet him when they were both at the beach and that she persisted in accompanying him for a walk. They walked along a track in the scrub. The statement then goes on :—" She poked her hand into my ribs and I started tickling her in the ribs. She kept poking me in the ribs. I then grabbed her by the neck and held her. She went limp. I then dragged her off the track and laid her down. I looked at her and I thought she was dead." The

confession then describes how again he turned the body over, tied the girl's hands behind her, stripped the lower limbs, stuffed clothing into her mouth and tied a stocking round her mouth. He also tied the feet.

The bodies were found in each case tied up as the confession describes.

These confessions were made after the prisoner had been interrogated for some hours by officers of police. In their evidence the officers said that he gave the details, which they contain, spontaneously, and that his memory received little or no prompting. After completing them he wrote a note to his wife saying he had confessed his mania and would pay for his sins.

Upon the face of the statements it is evident that the prisoner's actions are governed by recurrent mental or volitional conditions which result in his committing atrocities peculiarly uniform in their characteristic features. It is also apparent that each statement fails to give the details of the violence he must have used after he seized his victim's throat and before she collapsed. The omission is, of course, natural on any view of the facts. Its importance arises from the nature of the medical testimony.

The defence made for the prisoner was insanity. It was supported by the evidence of two gaol medical officers and of an independent mental specialist, all of whom expressed the opinion that at the time of his killing the girls the prisoner through a disorder of his faculties was unable to know the nature of his act and to understand that it was wrong. The opinion was based upon the nature of what he had done, on observation and examination of the prisoner while in custody and upon the fact that his father had died in a mental asylum of general paralysis of the insane and that his grandfather had died in an asylum. There was some evidence that, before the commission of the several homicides, the prisoner had had some alcohol and this the medical witnesses considered to be a contributory factor.

The Crown called no evidence in rebuttal, but relied upon the cross-examination of the medical witnesses and the considerations which arise upon the general facts of the case. In both matters, much reliance was placed by the prosecution upon the function of

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memory and the degree to which the prisoner was said to have exhibited it as to the facts preceding, attending and following the deeds to which he confessed.

The learned Judge who presided at the trial, in defining for the jury the legal standard of irresponsibility, used the formula of *M'Naghten's Case* (1). He illustrated it by various examples of delusional insanity but did not enter upon any exposition of the well-known phrase: "Such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

Upon the hearing of this application counsel for the prisoner contended that this direction was insufficient because it did not include as a ground of irresponsibility disease of the mind which deprives the prisoner of all capacity to control his actions in relation to the matters charged as a crime. He contended that such a condition affords an excuse although the prisoner is capable of understanding the nature of those acts and of forming a judgment that those acts are wrong according to the ordinary standards of reasonable men. In England the Court of Criminal Appeal has pronounced against such a doctrine (*R.* v. *True* (2); *R.* v. *Kopsch* (3); *R.* v. *Flavell* (4)). As I think that, in any event, there should be a new trial in the present case, it is in strictness unnecessary for me to express any opinion upon this question, but I should be very reluctant to refuse upon such a question to follow the definite pronouncement of the English Court of Criminal Appeal. It is one thing, however, to say that, if he is able to understand the nature of his act and to know that the act is wrong, an incapacity through disease of the mind to control his actions affords no excuse and leaves the prisoner criminally responsible. It is another thing to suppose that inability through disease of the mind to control conduct is in opposition to an incapacity to understand the quality of an act and its moral character. Indeed, while negativing the rule contended for, it is important to bear steadily in mind that if through disorder of the faculties a prisoner is incapable of controlling his

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(2) (1922) 127 L.T. 561; 16 Cr. App. R. 164.
(3) (1925) 19 Cr. App. R. 50.
(4) (1926) 19 Cr. App. R. 141.

relevant acts, this may afford the strongest reason for supposing that he is incapable of forming a judgment that they are wrong, and in some cases even of understanding their nature. It is also necessary to remember that many people find the expression "understand the nature and quality of the act" anything but illuminating. It has been said by a learned text writer that "nature" and "quality" are mere synonyms, and it has been decided that they refer to the physical character of the act and not to its moral aspect (*R.* v. *Codere* (1)). Applied to such a case as the present, it appears to me to mean the capacity to comprehend the significance of the act of killing and of the acts by means of which it was done. The alternative test of irresponsibility in the formula already quoted from *M'Naghten's Case* (2) is stated with a false appearance of simplicity. When a derangement of the mind manifests itself only intermittently and in acts of passion, frenzy or the like, the question whether the party accused labours under such a disease of the mind that he did not know that what he was doing was wrong may well provoke in response two further questions—namely, what is meant by "know," and, at what stage in the course of his progress towards the commission of the acts charged must capacity to know cease ? In general it may be correctly said that, if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented from knowing that what he does is wrong. In *R.* v. *Davis* (3) *Stephen* J. laid down a test expressed more widely, but based upon the necessity of a capacity in the accused person to attain some rational composure. In *R.* v. *Kay* (4) *Channell* J. adopted the test formulated by *Stephen* J. Perhaps it was too widely expressed, but it is necessary to remember that it has no application whatever except in cases where there is a disease, disorder or defect of the reason. If that exists, its operation in depriving the subject of a knowledge of the moral qualities of his act must be considered. It is then that it becomes important to

(1) (1916) 12 Cr. App. R. 21.
(2) (1843) 10 Cl. & F. 200; 8 E.R. 718.
(3) (1881) 14 Cox C.C. 563.
(4) (1904) 68 J.P. Jo. 376.

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understand what degree of capacity to think whether his act is wrong is required. *Stephen* J. directed his observations to that question.

The conditions of irresponsibility must exist at the time when the prisoner commits the acts with which he is charged. In the present case the prisoner's statement is consistent with the possibility that until the child began to obey his injunction to walk home he restrained himself. It may therefore be desirable to add that when, under the influence of derangement or instability of mind, there are rapid changes in the condition of a man's understanding as he proceeds in or towards the commission of the act charged, the law would appear to be that he establishes his irresponsibility only if no intention to do it exists in his mind at a time when he is both capable of understanding the nature and quality of his act and knowing that it is wrong. This seems to be so on principle.

The burden of proving his irresponsibility is upon the prisoner. At common law two standards of persuasion exist. Upon a criminal charge the constituent elements of the offence charged must be proved beyond reasonable doubt. " In civil cases the preponderance of probability may constitute a sufficient ground for a verdict " (per *Willes* J., *Cooper* v. *Slade* (1)). " The jury must weigh the conflicting evidence, consider all the probabilities of the case . . . and must determine the question according to the balance of those probabilities " (per Sir *John Patteson*, *Doe d. Devine* v. *Wilson* (2)). Where by statute or otherwise the burden of disproving facts or of proving a particular issue is thrown upon a party charged with a criminal offence, he is not required to satisfy the tribunal beyond reasonable doubt. It is sufficient if he satisfies them in the same manner and to the same extent as is required in the proof of a civil issue. At common law, as distinguished from ecclesiastical law, no third standard of persuasion appears to have been known. But questions of fact vary greatly in nature and in some cases greater care in scrutinizing the evidence is proper than in others, and a greater clearness of proof may be properly looked for. In the end, however, every issue must be determined by reference to one or other of these

(1) (1858) 6 H.L.C. 746, at p. 772; 10 E.R. 1488, at p. 1498.

(2) (1855) 10 Moo. P.C.C. 502, at p. 531; 14 E.R. 581, at p. 592.

standards. When in their advice to the House of Lords the Judges said that irresponsibility must be clearly proved, they did not, in my opinion, intend to introduce a third standard of proof. The question has been elaborately considered in the Supreme Court of Canada in *Clark* v. *The King* (1). The judgment of *Duff* J. appears to me completely to establish his conclusion, which is expressed as follows: "The jury should be told that insanity must be clearly proved to their satisfaction but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say a clear preponderance of evidence" (2).

I have now stated the principles which appear to me to be applicable to the present case. The horror naturally inspired by the terrible nature of the prisoner's deeds on the one side, and, on the other side, the irrationality they exhibited and the need for applying the legal standard to his condition of mind during a short interval of time, made it doubly necessary that the jury should be fully and accurately instructed in their duty and made to appreciate the full strength of the case which the medical evidence undoubtedly made in the prisoner's favour. Two of the medical witnesses, namely, the gaol medical officers, must have had exceptional opportunities of acquiring knowledge of criminal insanity. They must have had experience also in examining persons in custody and forming an opinion as to the genuineness of what they say and do. Moreover, they might be expected to approach critically their task of considering the prisoner's case. The third was a specialist in diseases of the mind of considerable experience. Counsel for the prosecution directed his cross-examination of these witnesses to show, in effect, three things. They were as follows, viz., (1) that, accepting the prisoner's statements to the police officers, they showed that his memory of the events was too great to be consistent with the views expressed by the witnesses; (2) that the witnesses included among the matters upon which they relied their own interrogation and examination of the prisoner, and might have been deceived; (3) that the prisoner's derangement may have been obsessional only, and in succumbing to the obsession he might not lose his power of knowing the nature of his act and that it was wrong.

(1) (1921) 61 S.C.R. (Can.) 608. (2) (1921) 61 S.C.R. (Can.), at p. 621.

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The pursuit of these lines of cross-examination led to its appearing in the end (1) that it was the opinion of the witnesses that the prisoner could not have made his statements to the police officers from an unassisted memory; (2) that it was their opinion that the statements did not contain a complete or correct account of what must have occurred when he committed the homicides, and in particular of what happened after he seized the victim's throat and before she collapsed; (3) that, although he might be able to give an account spontaneously of what occurred before the killing of the girls up to a point and might after they collapsed see and understand all that he had done, he could not when he was bringing about their deaths understand the nature of what he was doing or know that it was wrong. The picture to be collected from their evidence was that of a man of natural instability of mind becoming under temporary influences deranged; his understanding and memory would serve him up to a point, the latter growing blurred as he proceeded; led on by an obsession which allowed no free will, his understanding would become "swamped by his obsession" and he would not know what he was doing or anything of its qualities, moral or otherwise, until his victim lay dead in front of him; that after the event, by reconstruction from what he saw and understood before and after, he would know of necessity what he had done. It is almost unnecessary to say that upon the facts of the case many observations are open as to the probability or improbability of such a picture. It is, for instance, at this point that the omission from his statements of any details of what occurred immediately after he attacked his victims might seem to bear upon the medical view. But, whatever view the jury might in the end take of the picture, it represented the prisoner's true defence and arose upon the evidence given on his behalf. It was therefore essential that it should be submitted to the jury in a manner which would, so far as may be, ensure that they appreciated its weight as well as its nature. It was necessary also that they should be enabled by a proper direction to perceive how the legal criterion of irresponsibility would apply to such a state of things. The task which the circumstances of the case thus imposed upon the learned Judge was peculiarly difficult. It was made no easier by the fact that the medical evidence was

given at the end of the case, and that neither the defence nor the prosecution elicited from the witnesses all the facts, circumstances and considerations forming the basis of the opinions deposed to and affecting their validity. The strength of the case which remained after the cross-examination may not have been so apparent as it becomes on an examination and comparison of the evidence as it is set down. But to whatever the cause may be attributed, his Honour's charge to the jury did not, in my opinion, properly submit for their consideration the matters upon which the case that the prisoner was insane really depended. Repeated consideration of the learned Judge's charge has convinced me that it failed to give the jury an adequate opportunity of appreciating the strength of the prisoner's case, that it did not furnish them with the means of appreciating fully how the legal criterion of irresponsibility might be applied in the prisoner's favour to the precise case made by the medical evidence, and that it was more than likely to lead them to suppose that a burden of proof lay on the prisoner of a much higher degree than the law demands and that the evidence was barely, if at all, sufficient to satisfy it.

His Honour began to deal with the subject of insanity after directing the jury with some fullness upon the question whether the prisoner killed the girl intentionally. He emphasised the burden that lay upon the Crown to prove beyond reasonable doubt every constituent part of the crime charged. In the concluding sentence in which he did so, he said that when they came to a defence of insanity the position was entirely different. He said that the verdict should be guilty if they were satisfied that the accused murdered the girl, unless he was insane in such a way as to make his act not murder under the law; that the prisoner himself had the burden of proving to the jury clearly that insanity did exist; that the burden was no longer on the Crown; that the obligation was his to satisfy the jury that he was insane at the time of committing the offence. At the end of the charge his Honour returned to the burden of proof and said by way of recapitulation that the jury must be satisfied that the accused did intentionally kill the girl and that, if they were, they must then ask themselves the question, had

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the accused satisfied them that there was that degree of insanity which entitled him to a verdict of not guilty on that ground.

I am quite unable to suppose that the jury would understand from the charge to them that the burden upon the prisoner was of an altogether different degree to that which is imposed upon the Crown. The difference between the two opposing degrees of persuasion cannot be regarded as a matter of little or no importance. The daily experience of the administration of justice shows the powerful effect produced by the high degree of certainty which the one demands. It also illustrates how a sensible preponderance of evidence usually suffices to turn the scale when the lower standard prevails. But in the present case the burden of proof upon the prisoner became a matter of much importance in view of the observations which his Honour made in reference to the medical testimony and to the legal standard of immunity from punishment. It is convenient to deal first with the latter. He began by stating the familiar formula from *M'Naghten's Case* (1). Applying it to the homicide he said: "First you must ask yourselves 'has the accused satisfied us that at the time he killed' the girl 'he was labouring under such a disease of mind as not to know that in fact he was strangling a girl, that is, that he did not know the physical character of the act . . . or that if he did know that he was strangling her he did not know it was wrong." This, of course, was quite accurate, but it needed to be brought into relation to the case made by the medical evidence for the accused as I have described it. After speaking of the degrees of insanity possible, his Honour gave one or two illustrations of delusions. He then spoke of strong and irresistible impulses as being quite insufficient, and said that something more was wanted, namely, the inability to know the nature of the act or that it was wrong. Then by way of illustration he gave a number of imaginary instances of acts done under the influence of delusions. Most of them were delusions as to the physical act itself, one as to the moral necessity of doing it. The examples were of the kind of a lunatic mistaking a child for a log of wood, or supposing that he is under a duty of homicide in order to diminish the population. These illustrations necessarily brought into sharp

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

contrast the application of the test of insanity to the prisoner's case and tended to make it appear difficult to see how it could apply. He then turned to the evidence, informing the jury that they must decide the matter by means of their common sense and experience of the world, giving all such respect as they considered proper to any evidence brought before them, but in the end deciding on all the evidence whether the defence had been established. He then referred to the abnormality of the accused's four homicides, of their apparent absence of purpose, and of the extraordinary treatment of the bodies, and suggested to the jury that they were things which stood at the threshhold of the inquiry as indications, at any rate, that the man was not normal. He then dealt with the accused's family history. Coming to the medical evidence he stated in general terms the opinion expressed by the witnesses to the effect that the accused was irresponsible under both limbs of the test he had given the jury from *M'Naghten's Case* (1). He informed the jury that the expert knowledge of the witnesses did not free the jury from the necessity of regarding their evidence with great care and seeing whether they ought to be satisfied; that the value of the evidence depended upon the data on which it was given; that in mental diseases there were not the same means as in other diseases depending on physical condition of forming a conclusion, and a medical opinion must largely depend on material gathered in some such way as seeing and conversing with the subject of such disorders or reading what others have written of their similar examination. He warned them that such opinions, though having their value, must be subjected to the microscope of common sense and experience before they were accepted wholly. He illustrated the observation by one reason given by a medical witness for his opinion, namely, that his experience was that people suffering under an obsession and acting in such a way did not know what they were doing at the time and understand the nature of the act. He said that one would require a wide experience to speak with confidence on such a matter, but that was the way the witness put it. He contrasted this with the reason given by the other two medical witnesses, which, he said, consisted in their observations of or conversations with the accused man.

(1) (1843) 10 Cl. & F. 200; 8 E.R. 718.

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In point of fact I think the fair effect of the medical evidence is that each witness based his conclusion on a combination of considerations, the combination I have already described. His Honour then returned to the necessity which he had before impressed upon the jury of judging of matters of this kind by means of common sense and experience of life. After giving a definition of "obsession," his Honour stated that it was said that the accused had an obsession but that would not be enough; the mere desire, however hard, however strong, however impossible to control, would not be sufficient. But that one doctor, at any rate, went the further step and said that if a man has an obsession, gives way to it, and does that which is always before his mind, then he does not know the quality of his act and does not know whether it is right or wrong. After referring to the basis of the other two opinions which he had before contrasted with the first, his Honour concluded the summing up with the passage to which I have already referred in reference to the burden of proof. The statement in reference to the obsession is the nearest approach which the charge makes to putting what I consider to be the true case for the prisoner arising upon the evidence. But it does not appear to me to be at all sufficient to enable the jury to understand it, nor does it in the least represent its strength. It brings obsession into contrast with the legal standard of irresponsibility, and does not make it clear that in the application of that standard it is always recognized that overpowering obsession arising from mental infirmity provides strong reason for inferring the requisite lack of capacity to know that an act is wrong or to understand its nature and quality. It does not direct attention to the exact way in which the evidence suggests that the requisite understanding of the significance of his acts and their moral bearing was lost and regained. It does not enter upon a consideration of the accused's statements and compare and reconcile them with the explanation or picture of the accused's deeds finally suggested by the medical evidence. It contains no reference to the question whether the prisoner in virtue of his constitutional moral instability was disabled at the time by disease from retaining or gaining such a moderate degree of calmness as to comprehend the considerations affecting the significant features of his acts and their dreadful moral character.

Whilst it may not be necessary as a matter of law to include any such statement in a charge, in the circumstances of this case it was desirable to do so, unless some other means were adopted of bringing home to the jury the possible application of the precise standard of irresponsibility, which the law fixes, to the very peculiar facts of the case. The treatment of the medical evidence invites the jury to use common sense, which they, no doubt, are bound to do. But the invitation has a natural tendency to make them underestimate the importance of the medical testimony, which in such a case as this had perhaps more than usual value. It is a case in which it is scarcely to be denied that the prisoner was constitutionally liable to a disorder or derangement of the mind. His atrocious acts are outside the general experience of ordinary men. There was no likelihood that gaol medical officers would express hasty or ill-considered judgments in his favour. The details of their examination of the prisoner had not been gone into, and the jury were really not in a position to judge of the sufficiency of the data. The general effect of this part of the charge was to increase the likelihood of the jury supposing that a special degree of certainty was needed before the prisoner could be found not guilty on the grounds of insanity.

For these reasons I think there should be a new trial.

EVATT J. I have come to the conclusion that in this case there was a miscarriage of justice upon the ground that in the circumstances the prisoner's defence of insanity was not sufficiently presented by the trial Judge to the jury.

The circumstances surrounding the four killings would naturally arouse such extreme horror and detestation in the minds of a jury that it was essential that their attention should be made to focus upon the precise legal issue to be determined. In my opinion this overriding requirement, vitally necessary for the fearless administration of justice in the face of an overwhelming tendency towards prejudice, was not satisfied.

An outstanding feature of the case is that both the father and the grandfather of the accused had been detained as insane persons. Both had died in asylums, the father as recently as June 1930, the stated cause of death being general paralysis of the insane. The

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inference from this ancestry, rightly called " appalling " by a medical expert, was greatly strengthened by the medical evidence. Two of the three medical witnesses were government officers who had closely observed the accused after the day of his arrest. It may be observed that Lord *Atkin's* committee of 1923, composed of distinguished lawyers, were of opinion that in cases of insanity the most reliable medical evidence came from the prison doctor, " who alone has had opportunities of continued observation that are so valuable in the diagnosis of mental disorder " (Cmd. 2005).

All three doctors gave evidence which satisfied precisely and on both grounds the factual conditions of a finding of insanity at the time of the commission of the offence charged. But the Crown called no medical evidence at all, and the only substantial point made in cross-examination by the prosecutor was that, as the prisoner had given to the police a statement describing generally how he had committed the offence, it should be inferred that he must have " known " the nature and quality of the acts causing the death charged against him. But this suggested inference was rejected by the doctors, who said that the statement of the prisoner represented, not his recollection or memory of his own conduct in causing death, but his mental reconstruction of the preceding events after death had been caused. So little effect had the cross-examination upon the evidence of Dr. Philpot (the Government medical officer) that the trial Judge interrupted re-examination by the counsel for the accused, and it concluded as follows :—

> His Honour : " The doctor made it perfectly plain in answer to my question that he was prepared to say on all the facts and material on which he formed his opinion that at the time, the accused would not, did not, understand the physical character of the act, and what is more, that he did not understand that in doing it, he was doing wrong."
>
> Mr. *Bourke* : " Well doctor, even if the accused knew, even if the accused had given in this statement what was his recollection of the happenings of that evening, in treating the manner in which the girl met her death, what is your opinion as to whether he would know, at that time, the distinction between right and wrong."
>
> His Honour : " The doctor has already answered that question in a most favourable form to you."

In my opinion this amounted to an intimation to counsel for the accused that re-examination need not be pursued further and that the suggestions made in cross-examination had been sufficiently met.

In my opinion it is to be regretted that, during his charge to the jury, the trial Judge endeavoured to discount the effect of the medical evidence. He failed to point out that in substance the medical evidence was uncontradicted. He proceeded to warn the jury that the evidence of the doctors should be regarded " with great care." He deprecated reliance upon expert opinion " where one is dealing, not with the body but with the mind," as though the special difficulty of the subject matter made scientific research into it less, instead of more, valuable. He invited the jury to subject the medical evidence " to the microscope of common sense and experience." What real value " common sense and experience " might have in setting at nought the settled opinions of scientists trained in the study and practice of mental condition, it is difficult to say. This general attitude of distrust of medical and scientific research was accentuated by the implied rebuke of one medical witness " who would come here for a fee and espouse the cause of the accused." In addition, the trial Judge's discussion of " obsessions " and " the work of Satan and his attendant devils," though unimportant in itself, operated as a further invitation to the jury to ignore the scientific evidence.

In striking contrast to this attitude towards scientific evidence was that adopted in 1843 in *M'Naughten's Case* (1) itself, by *Tindal* C.J., *Williams* and *Coleridge* JJ. After medical evidence had been tendered by the accused, *Tindal* C.J. asked the Solicitor-General, who was prosecuting, whether the Crown had any evidence to combat the testimony of the medical witnesses who had been examined,

> " because we think, if you have not, we must be under the necessity of stopping the case ? Is there any medical evidence on the other side ?
>
> Solicitor-General : No, my Lord.
>
> *Tindal* C.J. : We feel the evidence, especially that of the last two medical gentlemen who have been examined, and who are strangers to both sides and only observers of the case, to be very strong, and sufficient to induce my learned brother and myself to stop the case " (2).

Thereupon the Crown did not press for a verdict against the prisoner, *Tindal* C.J. stating that he could not help but remark again that the whole of the medical evidence was on one side (3).

(1) (1843) 4 St. Tri. N.S. 847. (2) (1843) 4 St. Tri. N.S., at col. 924.
(3) (1843) 4 St. Tri. N.S., at col. 925.

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I am of opinion that the facts of the present case imperatively demanded some explanation by the trial Judge of the relation of the proved facts to the general test of legal immunity promulgated by the Judges in *M'Naughten's Case* (1). This necessity was explicitly recognised by those Judges, *Tindal* C.J. pointing out

> " the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to Your Lordships' questions " (2).

In the present case the trial Judge was content with the abstract ruling laid down in *M'Naughten's Case* (3). But it is obvious that it will not always be sufficient merely to repeat to the jury the words used in *M'Naughten's Case* (1), for the jury may not easily understand their import and their application to the facts before them. In addition to the general warning given in that case, *Tindal* C.J. specially emphasized that the statement of the rule should be " accompanied with such observations and explanations as the circumstances of each particular case may require " (3).

In my view, there was not a sufficient application to the facts of the established rule of law. Instead, the only illustrations given by the trial Judge to the jury were quite abstract from the facts in evidence, being related to obvious cases of delusional insanity, a totally different and disparate condition from that suggested by all the medical evidence in the case.

In the same way the curt dismissal in the charge of " irresistible impulse " as a factor in the case was calculated to mislead the jury. " Irresistible impulse " in the sense of incapacity of control *caused by mental disease* was recommended by Lord *Atkin's* committee in 1923 (Cmd. 2005) as a sufficient proof of the defence of insanity. The committee stated that their recommendation gave effect to what was accepted by *Stephen* as the existing law, and was also in accordance with the *Criminal Code* of Queensland and the

(1) (1843) 4 St. Tri. N.S. 847. (2) (1843) 4 St. Tri. N.S., at col. 930.
(3) (1843) 4 St. Tri. N.S., at col. 931.

law of South Africa. The significance of the report is that it evidences Lord *Atkin's* view that such cases of " irresistible impulse " could be brought within the law " by decision " as well as by declaratory statute. The question whether *Stephen's* view went further than *M'Naughten's Case* (1) permitted is answered in the affirmative by the Court of Criminal Appeal in England. But the question is still an open one in this Court. The Court of Appeal in England does not feel itself bound by the decisions of the English Court of Criminal Appeal, the Judges of which are taken from the Divisional Court (*Hardie and Lane Ltd.* v. *Chilton* (2)). And this Court does not consider itself necessarily bound, even by decisions of the Court of Appeal (*Smith* v. *Australian Woollen Mills Ltd.* (3)). There is no decision of the House of Lords or the Privy Council on the present point. It would be unsatisfactory if the common law of England, of which the rule in *M'Naughten's Case* (1) is a part, must be regarded as forever unable to adjust its rules to modern medical knowledge and science, and this merely as a result of the decision of a Divisional Court in England, the rulings of which are not considered necessarily authoritative by the House of Lords.

Apart altogether from the question whether " irresistible impulse " caused by disease of the mind can, consistently with *M'Naughten's Case* (1), be regarded as a complete defence, it is quite obvious that proof of the existence of disease causing such impulse may at least afford evidence in proof of the existence of such a defect of reasoning as may cause the absence of knowledge necessary for establishing the defence of insanity under the rule in *M'Naughten's Case* (1). For this reason it was wrong for the trial Judge to suggest and emphasize an antithesis between diseases of the mind leading to irresistible impulse and the conditions described in *M'Naughten's Case* (1), for the latter might not only accompany, but even be inferred from, a disease of the mind producing an " irresistible impulse." It is quite out of accord with modern research in psychology to assert an absolute gap between cognition and conation.

In the circumstances of this case, advantage might well have been taken of the clear, accurate and elaborate summing up of

(1) (1843) 4 St. Tri. N.S. 847. (2) (1928) 2 K.B. 306.
(3) (1933) 50 C.L.R. 504.

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Dixon J. delivered in February 1933 in the case of *R.* v. *Porter* (1). There the jury were placed in full possession, not only of the general principles of legal immunity upon the ground of insanity, but of their precise bearing upon the facts proved in that case. That summing up accorded with *Stephen's* exposition as to how a jury should determine whether the defect of reason prevented the accused from knowing whether his act was wrong, at the time when it was performed. A similar explanation should have been given here. It is quite impossible to expect juries to understand the rule in *M'Naughten's Case* (2) unless such general terms as "defect of reasoning," "disease of the mind," "know," "the nature and quality of the act," "know what was wrong," are given *some* application to the facts. Merely to read the abstract rule to the jury, without demonstrating to some degree its possible or suggested application to the facts, is not to direct them sufficiently.

I am of the opinion that there was a substantial misdirection as to the accused person's onus of proving the legal defence of insanity.

The common law of England recognises only two forms of onus of proof. In criminal cases the onus of proving guilt must be discharged to the exclusion of reasonable doubt. In civil cases the onus of proof is satisfied if the balance of the probabilities inclines the tribunal in favour of the party who bears such onus. It is established that the onus of proving insanity rests upon the accused person. But that onus is the civil onus and not the criminal onus. In *M'Naughten's Case* (2) the phrase "until the contrary be proved to their satisfaction" is a typical description of the civil onus of proof. It is true that the Judges also used the phrase "clearly proved." But, in so expressing themselves in May 1843, it is impossible to believe that *Tindal* C.J., *Williams* and *Coleridge* JJ. were departing from the opinion expressed by them at the trial of M'Naughten in the previous March where "balancing the evidence" was the expression used to describe onus. The phrase "clearly proved" is not inappropriate to so serious a finding as one of insanity. But it is certainly not an equivalent of the criminal onus, and it is erroneous to direct a jury that, in determining whether the accused

(1) *Ante*, p. 182. (2) (1843) 4 St. Tri. N.S. 847.

has made out a defence of insanity, the onus of proof is the criminal onus so that—against the prisoner—a reasonable doubt would prevail against the probabilities.

At the end of the summing up it was said, in relation to the onus of proof:—

> "You must be satisfied, before you find a verdict of guilty at all in this case that the accused did murder June Rushmer, that is to say, that he did kill her, and kill her intentionally with malice. Having come to the conclusion that, apart from insanity that is the position, then you must ask yourselves the question, has the accused satisfied us that there was that degree of insanity which entitled him to a verdict of not guilty on the ground of insanity"

As the learned Judge previously stated that the criminal onus —proof beyond reasonable doubt—lay upon the prosecution, this last direction was an intimation to the jury that upon the issue of insanity a similar onus of proof rested upon the accused. This was misdirection, the correct view being that expressed by *Dixon* J. in his summing up in *R.* v. *Porter* (1) (See also *Clark* v. *The King* (2); *Woolmington* v. *Director of Public Prosecutions* (3)).

I cannot agree that this misdirection could not have affected the jury's verdict. No Court can act upon such suggestion, for it is quite opposed to established principles of law and practice. It is sufficient to say that the jury *may* have been misled by the erroneous direction. As the House of Lords said in *Woolmington's Case* (4), "We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion." Otherwise, as was pointed out in *Makin's Case* (5), "the Judges are in truth substituted for the jury." To suggest that the result *might* not have been different is true, but immaterial. The error *might* have made the difference between a finding of insanity and a contrary finding. Here that happens to be the difference between life and death.

It should be added that, on applications for special leave to appeal from the State Supreme Courts sitting as Courts of criminal appeal, this Court does not follow the practice of the Privy Council. The contrary view was expounded in *Eather* v. *The King* (6), but was

(1) *Ante*, p. 182.
(2) (1921) 61 S.C.R. (Can.) 608.
(3) (1935) A.C., at pp. 475, 476.
(4) (1935) A.C., at pp. 482, 483.
(5) (1894) A.C., at p. 70.
(6) (1914) 19 C.L.R. 409.

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finally rejected by the Court in the following year (*In re Eather* v. *The King* (1)) in a definitive pronouncement which has never been questioned by the Court (See *Craig* v. *The King* (2), per *Rich* and *Dixon* JJ. (3), and per *Evatt* and *McTiernan* JJ. (4)). As was pointed out in the latter judgment, "When, therefore, it is asserted that this Court 'is not a Court of criminal appeal,' the assertion is only true in the sense that there is no appeal as of right to this Court in criminal matters. If special leave is granted, the functions of the High Court are assimilated precisely to those of the Supreme Court, i.e., the Court of Criminal Appeal."

The position is therefore that, subject to the requirements of the *Judiciary Act*, this Court is in all matters a national Australian Court of appeal from the Supreme Courts of the States. On the other hand the Privy Council, when asked to exercise the prerogative in criminal matters, insists that the case presented should be very much stronger than a case which merely possesses those special features which warrant a review by this Court of the Supreme Court's decision. It seems to me that, before the High Court, one of the circumstances to which some weight must always be accorded is that the case is capital in nature.

In my opinion special leave to appeal should be granted and a new trial ordered.

Special leave to appeal refused.

H. D. W.

PETITION to the Privy Council.

Sodeman presented a petition to the Privy Council for special leave to appeal from (1) his conviction, (2) the decision of the Court of Criminal Appeal of Victoria, and (3) the decision of the High Court of Australia.

D. N. Pritt K.C. (with him *Wilfrid Barton*), for the petitioner. The direction to the jury was to the effect that the burden of proof

(1) (1915) 20 C.L.R. 147.
(2) (1933) 49 C.L.R. 429.
(3) (1933) 49 C.L.R., at p. 442.
(4) (1933) 49 C.L.R., at pp. 443, 444.

of insanity which lay upon the prisoner was as great and onerous as the burden of proof of the crime which lay upon the Crown. The burden is, however, no higher than in a civil case. Even if the *M'Naghten* rule is a complete statement of the law of insanity as an excuse, the Judge's charge was not correct. But the *M'Naghten* rule does not express the whole law, particularly with respect to irresistible impulse (*R.* v. *Fryer* (1) ; *R.* v. *Hay* (2) ; *R.* v. *Davis* (3) ; *R.* v. *Hay* (4) ; *R.* v. *Kopsch* (5)).

[LORD MACMILLAN. Is it your proposition that there may be a state of mind caused by disease by reason of which the prisoner cannot help doing the acts although knowing them to be wrong and that would be insanity ?]

Yes (*R.* v. *Flavell* (6) ; *R.* v. *True* (7)). In any of these cases an application for the Attorney-General's fiat to appeal to the House of Lords would have been proper.

[LORD MACMILLAN. It would be very unwise to lay down that the law for Australia was different from that existing here, would it not ?]

There was a misdirection as to the onus of proof of insanity.

[LORD MACMILLAN. The question here is whether the Judge in his direction did not, so to speak, make the proposition equivalent in the two cases and did not distinguish between the nature of the problem to which the jury were to address themselves. That is the whole thing, is it not ?]

Yes.

[LORD MACMILLAN. I should have thought this was a very good point for a Court of criminal appeal ; but this Board, even on a question of misdirection, will not grant leave unless you can show that the man had not had a proper trial as a matter of law, that is to say, there has been something subversive of the principles of justice. Here the case is in another region altogether. In the Court of last resort the Judges only differed as to whether the form of words really gave the man a fair chance. Here you are in quite

(1) (1915) 24 Cox C.C. 403.
(2) (1911) 22 Cox C.C. 268.
(3) (1881) 14 Cox C.C. 563.
(4) (1899) 16 Cape G.H. 290.
(5) (1925) 19 Cr. App. R. 50.
(6) (1926) 19 Cr. App. R. 141.
(7) (1922) 127 L.T. 561.

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a different region from what you have been up to date. Here it has been accepted by all what the law is. The only question is whether the words used by this Judge were an adequate representation to the jury of what the law is in order to make up their minds in the questions to which they had to apply them.]

I do not suggest that on this point by itself the Board would grant leave, but it is a substantial point and is an additional element.

G. B. McClure, for the respondent, referred to *Woolmington* v. *Director of Public Prosecutions* (1) and *Clark* v. *The King* (2). [He was stopped.]

VISCOUNT HAILSHAM L.C. delivered the judgment of their Lordships, which was as follows :—

In this case, Mr. *Pritt*, on behalf of the petitioner, has put before the Board everything that can be said in favour of the petition for special leave to appeal. There are two principal grounds : First of all, that in the submission of the petitioner the rules in *M'Naghten's Case* (3) are no longer to be treated as an exhaustive statement of the law with regard to insanity and that there has to be engrafted on to those rules another rule that, where a man knows that he is doing what is wrong, none the less he may be insane if he is caused to do so by an irresistible impulse produced by disease. It is admitted by counsel for the appellant that, so far as this country is concerned, the more recent cases, finishing with *R.* v. *Flavell* (4), excluded that addition to the law in *M'Naghten's Case* (3) ; but it was argued that, since there had been earlier decisions which suggested that such a rule existed, this would be a good opportunity for establishing the law beyond doubt. Their Lordships do not think that that is a sound argument. If they were to take a different view of the law from that which prevailed in *R.* v. *Flavell* (4) and *R.* v. *Kopsch* (5), the effect would be that there would be different standards of law prevailing in England and the Dominions ; it

(1) (1935) A.C. 462.
(2) (1921) 61 S.C.R. (Can.) at pp. 616, 621.
(3) (1843) 10 Cl. & F. 200 ; 8 E.R. 718.
(4) (1926) 19 Cr. App. R. 141.
(5) (1925) 19 Cr. App. R. 50.

obviously could not alter the English authorities as laid down by the English Court of Criminal Appeal, and their Lordships do not think that is a ground for granting special leave to appeal in a criminal case.

The other point taken was that the learned Judge in directing the jury as to the burden of proof, having stated that it was for the Crown to establish its case beyond reasonable doubt, went on to say that the burden of proof in the case of insanity rested upon the accused, and the suggestion was that the jury might have been misled by the learned Judge's language into the impression that the burden of proof resting upon the accused to prove insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact, there is no doubt that the burden of proof for the defence is not so onerous; it has not been very definitely defined. The Canadian case of *Clark* v. *The King* (1) was referred to; but even there the learned Judges were not able to find a very satisfactory definition; but it is certainly plain that the burden on the accused in cases in which he has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or a defendant in civil proceedings. That that is the law was not challenged and no Court in Australia has decided otherwise. The only question was whether the definition was sufficiently brought home to the minds of the jury by the language used in the summing up. On that point, the Supreme Court of Victoria took the view unanimously that there was no misdirection, and in the High Court of Australia the opinion of the learned Judges was divided; but the opinion which prevailed was again that there was no misdirection. Their Lordships do not think the question whether or not the language used was enough clearly to bring the matter home to the jury in the particular case—it is not a question of general legal importance, but only a question of the exact turn of the phrase—could, except in a very clear case, be a ground for exercising the very exceptional jurisdiction which is preserved to this Board in criminal cases. Their Lordships are satisfied that there was no doubt in the minds of any of the Courts

(1) (1921) 61 S.C.R. (Can.) 608.

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below as to what the law really was, and they are quite satisfied to accept the view of the Courts below that the language used was not such as would be misunderstood by the jury or was such as to be capable of misleading the jury as to the law.

In those circumstances, it seems to their Lordships that the standard which is required for the grant of special leave to appeal in a criminal case, which has been repeatedly laid down in a series of well-known cases, has not been reached in the circumstances of this case, and their Lordships will therefore humbly advise His Majesty to dismiss the petition.

Solicitors for the applicant, *C. H. Auty*, Melbourne; *Galbraith & Best*, London.

Solicitors for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria; *Freshfields, Leese & Munns*, London.