THE QUEEN v. FALCONER[1]

INTRODUCTION

A fundamental purpose of the criminal law is to determine when an individual may be held responsible for an unlawful act. Traditionally, the criminal law does not apply to:

(a) an individual whose conduct is involuntary (the principle of voluntariness); or
(b) an individual who lacks the intellectual capacity to understand the signficance of his or her unlawful act (the principle of understanding).

If this distinction was clearcut, it could be said that the law relating to automatism displays the practical operation of the principle of voluntariness and the law relating to insanity shows the principle of understanding in action. An examination of whether or not a criminal act is voluntary, however, often necessitates an exploration of an accused's mental state at the time of the act. Certain mental conditions which may give rise to automatism are often not very obviously distinguishable from 'diseases of the mind' for the purposes of the insanity defence. This has led to the rather artificial distinction between 'sane' automatism which, if accepted by the jury, leads to a complete acquittal and 'insane automatism' which leads to a qualified acquittal, that is, indeterminate detention at the pleasure of the executive arm of government.

In *The Queen v. Falconer* the High Court of Australia examined this overlap between automatism and insanity in some detail. It attempted to outline what conditions should be met in determining what will constitute 'sane' versus 'insane' automatism, particularly in relation to mental conditions generally described as 'dissociative' states.

THE FACTS

The respondent was convicted in the Supreme Court of Western Australia of the wilful murder of her husband on 9 October 1988. The respondent had separated from her husband because he had a history of using violence towards her and because two of their daughters had recently claimed that he had sexually assaulted them. Criminal charges had been preferred against the respondent's husband in relation to these allegations.

According to the respondent, on the day of the shooting her husband had entered her house unexpectedly, sexually assaulted her and taunted her with the suggestion that neither she nor their daughters would be believed in court. He also mentioned a nine year old girl, who had been in the family's care, in such a way as to suggest that he may have dealt with her sexually. He had then reached out, apparently to grab the respondent by the hair, and from that moment on she remembered nothing until she found herself 'standing or crouching' against an archway with her shotgun nearby and the husband dead beside her. The shotgun was kept in a wardrobe. The respondent said she had no recollection of picking it up or of loading it.

At the trial, after the Crown case had closed and the respondent and other defence witnesses had given evidence, counsel for the defence sought to call evidence from two psychiatrists to show that the respondent's conduct was consistent with sane automatism.

The Commissioner presiding at the trial conducted a *voir dire* to test the admissibility of the evidence. Both psychiatrists gave evidence that the circumstances leading up to and surrounding the shooting could have produced a dissociative state where, according to one of the psychiatrists, 'part of her personality would be sort of segmented and not functioning as a whole and she became disrupted in her behaviour, without awareness of what she was doing'.[3] The Commissioner ruled the evidence inadmissable and the respondent was convicted. On appeal by the respondent, the Court of Criminal Appeal held that the evidence was admissable on the issue of voluntariness, allowed the appeal against conviction and ordered a re-trial.[4] The Crown then sought special leave to appeal against that order, seeking restoration of the conviction and of the sentance of life imprisonment which accompanied it.

1 (1990) 171 C.L.R. 30.
2 *Ibid.*
3 *Ibid.* 36.
4 *Falconer v. The Queen* (1989) 46 A. Crim. R. 83.

VOLUNTARINESS AND INSANITY UNDER THE CRIMINAL CODE OF WESTERN AUSTRALIA AND AT COMMON LAW

In Western Australia, s. 23 of the Criminal Code provides that 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will'. This corresponds with the common law requirement that an accused's act must be committed voluntarily to attract the sanctions of the criminal law. S. 27 of the Code relevantly provides:

> A person is not criminally responsible for an act or omission if at the time of doing the act he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

Pursuant to s. 28, a disorder of mind unintentionally induced by intoxication or stupefaction also falls within the ambit of s. 27. There are two questions to be considered in determining whether or not a defence is available under s. 27.

The first question is whether the accused suffered from a mental disease or a natural mental infirmity or a disorder of the mind at the time of the unlawful act. The common law differs slightly as the M'Naghten Rules,[5] which constitute the common law principles of insanity, speak only of a disease of the mind. The members of the High Court did not make an issue of the differences in terminology. In fact, in their joint judgment, Mason C.J., Brennan and McHugh JJ. went as far as to say that there was no reason to hold that the terms connoted different mental conditions.[6]

If either a mental disease, natural mental infirmity or disorder of the mind is established, the second question is whether that condition was such as to lead to one or other of the consequences specified in s. 27. Of those consequences, the capacity of the accused to control his or her actions is not included in the M'Naghten Rules. This particular difference between the Code and the common law was not explored by the High Court.

S. 653 of the Code provides for an acquittal on account of unsoundness of mind and identifies the consequences of such an acquittal, namely that 'the Court is required to order him to be kept in strict custody in such place and in such manner as the Court thinks fit, until Her Majesty's pleasure is known.' This proviso reflects nineteenth century statute law which aimed at ensuring the criminally insane did not remain at large.[7]

Because the Code provisions mirror the common law position on automatism and insanity, the judgment in *Falconer* has repercussions for the criminal law in both the code states and the common law jurisdictions in Australia.

THE DECISION

All seven judges of the High Court agreed that leave to appeal should be granted because the case raised exceptionally important questions of law, but that the appeal should be dismissed because the Commissioner erred in rejecting the evidence of dissociation. All agreed that the evidence led raised no issue of insanity, but it did raise the question of whether the respondent's act of discharging the loaded shotgun was involuntary. Toohey and Gaudron JJ. delivered separate judgments, but showed similar reasoning concerning how sane automatism should be distinguished from insane automatism in cases where the evidence points to a dissociative state. They also reached the same conclusion about the burden of proof where the evidence raises alternative contentions of sane or insane automatism. In a joint judgment, Deane and Dawson JJ. stated that they were in general agreement with the reasoning of Toohey J. and Gaudron J., but added some interesting comments about the burden of proof when the question of insanity is raised. Mason C.J., Brennan and McHugh JJ. delivered a separate judgment in which they set out a slightly different test of distinguishing between sane and insane automatism from that of Toohey and Gaudron JJ. and reached an entirely different conclusion about the burden of proof.

[5] *Daniel M'Naghten's Case* (1843) 8 E.R. 718, 722.
[6] *Falconer, supra* n. 1, 49.
[7] Criminal Lunatics Act 1800 (U.K.) s. 2, as echoed in Criminal Law Consolidation Act 1935 (S.A.) s. 292; Crimes Act (Vic.) s. 402 (1).

THE DISTINCTION BETWEEN SANE AND INSANE AUTOMATISM

All seven members of the High Court were of the opinion that s. 27 of the Code encompasses involuntariness where the automatism resulted from a mental disease, natural mental infirmity or disorder of mind. This is generally termed insane automatism and gives rise to a qualified acquittal. If, however, it is shown that automatism arose from a mental condition which could *not* be classified as a result of a mental disease, natural mental infirmity or disorder of the mind and the act occurred involuntarily because of this mental condition, the accused would be entitled to a complete acquittal. Such automatism is often referred to as sane automatism.

The first question considered by the High Court was how to draw a distinction between involuntariness arising from a mental disease and involuntariness which involved no question of a mental disease. The second question was how dissociative states could be classified under this distinction.

The Internal/External Test

There has developed in recent years an internal/external test of distinguishing between sane and insane automatism. Toohey and Gaudron JJ. and Mason C.J., Brennan and McHugh JJ. considered the cases outlining this test in some detail. The main test is set out by Martin J. in the Canadian case of *Rabey v. The Queen*[8] as follows:

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example, concussion.[9]

The distinction is aimed at placing mental conditions such as those caused by physical blows, hypnotic influences or drugs firmly in the camp of sane automatism. Obviously, there is no useful purpose served in incarcerating at the pleasure of the executive arm of government those suffering from such a mental condition at the time the unlawful act was committed.

This is not, however, an entirely satisfactory test. As Toohey J. observed,[10] the internal/external test is inappropriate when cases of sleepwalking and hypoglycaemia are considered. Both sleepwalking and hypoglycaemia stem from internal malfunctioning and yet have been traditionally treated as examples of sane automatism.

The Test Relating to Dissociative States

When it came to dissociative states, all the judges considering the issue agreed that something more than a simple internal/external test was required. All agreed that automatism could result from a 'psychological' blow and all attempted to work out a test for distinguishing between circumstances where a dissociative state would be considered to be sane automatism and where it would be considered to be insane automatism. No attempt was made to define what is meant by dissociative states. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* provides that the essential feature of dissociative states is 'a disturbance or alteration in the normally integrative functions of identity, memory or consciousness'.[11]

In *The Queen v. Radford*[12] King C.J. set out the test for determining whether mental conditions stemming from 'psychological' blows should be considered to be sane or insane automatism:

> The signficant distinction is between the reaction of an unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress producing factors, on the other hand.[13]

8 (1977) 37 C.C.C.(2d) 461.
9 *Ibid.* 477-8.
10 *Falconer, supra* n. 1, 75.
11 Washington, American Psychiatric Association (1987), 269.
12 (1985) 42 S.A.S.R. 266.
13 *Ibid.* 276.

Toohey J. approved of this test. In looking at the facts, he stated that as both psychiatrists considered the respondent to be sane, the question of whether the respondent's reaction was that of an unsound mind to external stimuli did not arise.[14] Rather, it was a question of whether the respondent's reaction was that of a sound mind to external stimuli and that question should have been left for the jury to decide.

Gaudron J. adopted a test similar to that set out by King C.J. in *Radford*, as she reasoned that dissociative states experienced by a 'normal' or 'healthy' mind were matters of sane automatism. She stated:

> [T]he fundamental distinction is necessarily between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal persons (as, for example and relevant to the issue of involuntariness, a state of mind resulting from a blow to the head) and those which are never experienced by or encountered in normal persons.[15]

In her analysis, the psychiatric evidence showed that a state of dissociation may be experienced by normal persons, albeit only in situations involving intense psychological crisis or conflict. This, therefore, raised the question of sane automatism and went to the question of voluntariness under s. 23 without bringing s. 27 into play.

Mason C.J., Brennan and McHugh JJ. also approved of King C.J.'s test in *Radford* and proposed a standard of the ordinary person similar to that proposed by Gaudron J. They stated:

> [I]f the mind's strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane. This is an objective standard which corresponds with the objective standard imported for the purpose of determining provocation.[16]

They went on to add a rider that a mental condition must be temporary and not prone to recur for it to be a case of sane automatism. They were of the opinion that a mental condition which was prone to recur revealed an underlying pathological infirmity.

This analysis is problematic as sleepwalking and hypoglycaemia are conditions which may recur, yet these have been traditionally considered as cases of sane automatism. The recurrence factor may also lead to the unreasonable result of holding that a serious mental disorder does not constitute a disease of the mind simply because it is unlikely to recur. Recurrence is a factor which appears to confuse the issue of what to do with an accused who may be dangerous in the future and the issue of criminal responsibility and, it is suggested, should not be a factor in distinguishing between sane and insane automatism.

The end result of these judgments appears to be that King C.J.'s test is the one which will be followed if the question of automatism stemming from a psychological blow arises. Furthermore, the standard to be applied will be an objective one, that of the 'ordinary' or 'normal' person.

Critique

When it comes to dissociative states, the test adopted by the High Court is more satisfactory than the internal/external test. The main problem with the test proposed, however, lies in distinguishing between the reaction of an unsound mind and that of a sound mind. The distinction between the two will largely depend upon the susceptibility of the accused to emotional shock and stress. For example, if there is evidence that the accused was not normally affected by stress then he or she may have a good defence if the psychological blow is severe. On the standard of the ordinary, normal person, he or she would be displaying abnormal behaviour which an ordinary person would experience in the same circumstances. On the other hand, if the accused's dissociative state is triggered off by an 'everyday' form of stress, then he or she is to be regarded as having an unsound mind on the basis that the reaction of a normal person would not be so severe. What is the real difference? In the latter case, the accused is simply more susceptible to stress. Should an accused be denied a complete acquittal simply on this basis?

It may be fair to say that dissociative states caused by psychological blows will generally be

[14] *Falconer, supra* n. 1, 78.
[15] *Ibid.* 85.
[16] *Ibid.* 55.

considered to be cases of sane automatism. Nonetheless, there appears to be a real danger that, in the future, raising the issue of automatism on the basis of a dissociative state will give rise to the consideration of whether it arose as the reaction of an unsound mind to external stimuli. This would then bring insane automatism into play and with it, the possibility of a qualified acquittal.

BURDEN OF PROOF

An accused is entitled to rely upon s. 23 in attempting to establish sane automatism. The risk that the accused runs is that there may be evidence pointing to the possible operation of s. 27 and the trial judge may direct the jury in terms of that section, notwithstanding that it has not been raised by the defence.[17] Further, where automatism is raised, there may be evidence pointing to a mental disease and therefore to insane automatism, but other evidence pointing to sane automatism. The accused is then entitled to rely upon both sections 23 and 27. The jury will then have to decide which 'defence', if either, should succeed. The task will be exceptionally difficult because the burden of proof in relation to voluntariness under s. 23 lies with the Crown and the standard is proof beyond reasonable doubt; whereas in regard to 'insanity' under s. 27 the burden lies on the accused and the standard of proof is the balance of probabilities. The same situation occurs with voluntariness and insanity at common law.

Gaudron, Toohey, Deane and Dawson JJ. were all of the opinion that there was no need to modify the ordinary rules as to the onus and standard of proof. In such circumstances, the jury should be directed to reason in the following manner:

(1) Has the Crown negatived beyond reasonable doubt the possibility that the accused was acting involuntarily as a result of sane automatism?
(2) If no, the accused should be acquitted.
(3) If yes, has the accused proved, on the balance of probabilities, insanity within the meaning of s. 27?
(4) If no, the accused should be convicted.
(5) If yes, then the accused should be given a conditional acquittal.[18]

Deane and Dawson JJ. added some interesting remarks about the insanity defence in general, concluding that if there is evidence which would support a verdict on the ground of insanity, the prosecution could rely upon it in asking for a qualified acquittal as an alternative to conviction.[19] They take the realistic approach: it is more often in the interests of the prosecution to raise the question of insanity, rather than in the interests of the accused, because of the attendant consequences of a qualified acquittal. This ties in with the fact that the judge can direct the jury as to insanity where automatism is raised, even if the accused does not raise insanity as a defence. These remarks again indicate the risk an accused may face in raising the issue of automatism.

Mason C.J., Brennan and McHugh JJ. took an entirely different approach to the question of burden of proof. Their analysis of the burden of proof was based on their threefold test of sane automatism. They stated:

> When an accused raises automatism and assigns some malfunction of the mind as its cause, he raises a defence of unsoundness of mind or insanity unless the malfunction of his mind was (1) transient (2) caused by trauma, whether physical or psychological, which the mind of an ordinary person would be likely not to have withstood and (3) not prone to recur.[20]

In their opinion, it was up to the accused to prove that the mental condition satisfied the exempting qualifications on the balance of probabilites. If the accused failed to discharge this burden, he or she would be entitled merely to a qualified acquittal.

Clearly, this analysis is at odds with that of the majority and is therefore unlikely to be followed. Nor, it is suggested, should it be followed. Traditionally, the prosecution must prove beyond

[17] This possibility was recognized by the House of Lords in *Bratty v. Attorney-General for Northern Ireland* [1963] A.C. 386, 411.
[18] *Falconer, supra* n. 1, 62-3 (*per* Deane & Dawson JJ.), 77-8 (*per* Toohey J.), 80 (*per* Gaudron J.).
[19] *Ibid.* 63.
[20] *Ibid.* 56.

reasonable doubt that the act or omission which is said to give rise to criminal responsibility was accompanied by an exercise of the will. It is difficult to justify a departure from that general principle by placing a burden on the accused to prove the existence of a mental condition consistent with sane automatism, particularly since the general approach of the criminal law is to shy away from having an accused 'prove' his or her innocence.

CONCLUSION

The result of the decision in *Falconer* seems to be that the issue of automatism will be raised less often in the future. If an accused chooses to rely on s. 23, he or she runs the risk that the evidence may point to the possible operation of s. 27. The judge can then direct the jury in terms of the latter section, notwithstanding that is has been raised by the defence. Further, when it comes to dissociative states, the sound/unsound mind test means that if a person is more susceptible to stress than an ordinary person, his or her mental condition may be considered to be that of insane automatism. There is therefore a real risk that raising the issue of automatism may lead to the operation of the qualified acquittal rather than a complete acquittal. The prospect of an indeterminate sentence is surely a result which no accused would welcome.

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