Neutral Citation Number: [2022] EWCA Crim 341

Case No: 202102058 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WINCHESTER CROWN COURT
Mr Justice Garnham

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 March 2022

Before:

THE RT HON THE LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE THIRLWALL
and
MR JUSTICE MORRIS

- -

Between:

REGINA	**Respondent**
- and -	
JONATHAN ROBERT KEAL	**Appellant**

- -
- -

Andrew Campbell-Tiech QC and Keely Harvey (instructed by **Peter Clarke Solicitors LLP**) for the **Appellant**
Kerry Maylin (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 9 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 18 March 2022.

Lord Burnett of Maldon CJ:

Introduction

1. On 22 June 2021 in the Crown Court at Winchester, before Garnham J, Jonathan Robert Keal ("the appellant") was convicted of three counts of attempted murder. On 11 October 2021 he was sentenced to a hospital order under section 37 Mental Health Act 1983 with restrictions under section 41 of the same act. The appellant appeals against conviction by leave of the Single Judge on the ground that the trial judge erred in law in his direction to the jury in respect of the defence of insanity. The judge directed the jury in accordance with the M'Naghten Rules (*Daniel McNaghten's case* (1843) C & F 200) which have governed the approach to insanity in the criminal courts since the mid nineteenth century.

The Facts

2. At around midnight on 26/27 September 2018 the appellant, then aged 33, attacked his father, his mother, and his 91-year-old grandmother with an array of weapons including knives, scissors, a cricket bat and dumbbells.

3. Count 1 alleged the attempted murder of his father. Mr Keal had fallen asleep on the sofa and woke to find the appellant stabbing him in the neck with a knife. The appellant left and then returned twice: once with a cricket bat with which he hit his father on the head and once with a different knife with which he continued to attack him. Mr Keal suffered serious injury. Mr Keal gave evidence that the appellant was apologetic towards him, but that his actions were ferocious. When he told the appellant to stop it and that he was killing him, the appellant responded, "I know I'm sorry I don't want to, I'm sorry I'm sorry dad".

4. Count 2 alleged the attempted murder of the appellant's mother. She was asleep when he launched a frenzied attack upon her. He left but returned and ripped open the door of the wardrobe where his mother had hidden. He attacked her with a pair of scissors, puncturing her neck. In her evidence, Mrs Keal said that during the frenzied attack the appellant was shouting "I'm sorry this isn't me it's the devil". She too suffered multiple injuries.

5. Count 3 alleged the attempted murder of the appellant's grandmother. She too was subjected to a sustained attack suffering multiple facial injuries, a fracture to the skull and an almost severed thumb. The appellant used a cricket bat or dumbbells on her.

6. The appellant had a history of mental health problems, ADHD and drug addiction. He had struggled with drug addiction from late adolescence. He underwent drug rehabilitation and at times succeeded in becoming drug free. In July 2018 his parents brought him home to live with them in their family home in Hampshire because of a deterioration in his mental health. In the weeks leading up to the attacks on 26 September, the appellant had exhibited increasingly bizarre behaviour. On the day before he had attempted to commit suicide and was taken to hospital.

7. After the attacks, he was found by the police on a country road dressed only in his underpants. He was taken to the police station and later transferred to Ravenswood House Secure Unit. Due to his condition, he underwent enforced Electroconvulsive

Therapy. He has since been transferred to Fromeside Medium Secure Unit where he remains.

The Trial

8. At trial, the prosecution case was that the appellant intended to kill all three victims and that the special verdict of not guilty by reason of insanity was not open to him, because at the time of the attempted murders he knew what he was doing was against the law and wrong. The Prosecution relied on the expert psychiatric evidence of Dr Amos and Dr Sandford.

9. The defence case was that the appellant was insane at the time of the acts and was operating under a multiplicity of delusions, including a belief that he was possessed by the devil. The defence relied on the expert psychiatric evidence of Dr O'Shea and Dr Singh. The defendant was not present for large parts of the trial because of his mental condition. He did not give evidence.

The M'Naghten Rules

10. Central to the determination of the issue of insanity are the M'Naghten Rules. Before turning to the evidence and the directions to the jury, we set out the pertinent parts of the Rules themselves.

11. In *McNaghten's case,* in a procedure then available to the House of Lords as a legislative body, the judges were asked questions about the approach of the criminal courts when it was suggested that a defendant did an act which would amount to a crime, assuming the necessary mental element, but was insane. Three are relevant for our purposes:

> "2nd. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?
>
> 3rd. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?
>
> 4th. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?"

12. Tindal LCJ, giving the majority judgment, answered the second and third questions together in the following terms:

> "… The jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was

> labouring under 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.* The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. *If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable*; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason *to know that he was doing an act that was wrong*: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." (emphasis added)

Tindal LCJ answered the fourth question in the following terms:

> "… the answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely that he labours under such partial delusion only, and is not in other respects insane, we think *he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.* For example,if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." (emphasis added)

The Psychiatric Evidence

13. The four expert psychiatrists produced a joint report which was placed before the jury. In that report they identified areas of agreement and areas of disagreement in the following terms (in line with the questions arising under the M'Naghten Rules):

> "Areas of agreement.

> The defendant was seriously mentally ill at the time of the incident
>
> The defendant was psychotic and deluded at the time of the incident and this impaired his capacity for rational thought
>
> At the time of the incident the defendant was suffering from a disease of the mind that led to a defect of reason
>
> At the time of the incident the defendant knew the nature and quality of his actions
>
> Areas of disagreement
>
> The experts disagree to what extent his disordered mental state impaired his ability to know that what he was doing was wrong
>
> [Dr Amos and Dr Sandford] think that although he may have acted in response to delusional beliefs, his actions and his later explanation do not suggest that he thought he was acting lawfully (on the balance of probability he did know that what he was doing was wrong).
>
> [Dr O'Shea and Dr Singh] think that his mental state was so disturbed that at the time of the offences he was unable to form a rational understanding of right and wrong."

14. In his summing up, after setting out these areas of agreement and disagreement, the judge summarised the evidence of the four psychiatrists. The following further aspects of their evidence are relevant.

15. Dr Amos said that the limit of a psychiatrist's expertise was to express a professional opinion as to whether the appellant was capable of discerning right and wrong, not whether in fact he did so. That was a question for the jury. He said that, on the appellant's own account, when his father shouted at him during the assault, he began to process thought properly again. Dr Amos thought that that was significant.

16. Dr Sandford's conclusion that the appellant did know what he was doing was wrong was based on three features, First, he had been apologising whilst carrying out the attacks. When his father asked him to stop, he was able to reappraise the situation. Secondly, a delusion is a false belief which is held strongly and does not respond to evidence to the contrary. By contrast the appellant's delusion was "budgeable". Thirdly, when arrested he said he was sorry and fell to his knees. Dr Sandford's view was that if the appellant was acting on the instructions of the devil, it was difficult to conceive that he thought that what he was doing was right, let alone lawful. The devil is widely regarded as a malign and evil force. Because the appellant's delusion was that he was acting in accordance with the instructions of the devil, he must have realised that those instructions were wrong. There were different ways to react to delusions. The presence of delusions does not necessarily mean that free will has been removed.

17. Dr O'Shea's view was that the delusions and hallucinations were compelling the appellant to act as he did. The fact that he believed that the devil was compelling him to act in that way did not mean that he knew what he was doing was wrong. He also agreed that some people with a diagnosis of psychosis can distinguish between right and wrong. It depends on the nature of the psychosis and the context. He said that some patients subject to command hallucinations can decline to follow the commands. He was asked about the record of the appellant saying sorry to his parents at the time of the assault. Dr O'Shea said that the psychotic events happened over a period of time and the feeling of compulsion would not necessarily be constant. The intensity of the compulsion can wax and wane over time. The fact that he was feeling sorry for what he was doing did not mean, in Dr O'Shea's view, that he was not compelled to do it. The extent of the appellant's mental illness was such that the rational ability to decide right and wrong was damaged. To apply rational views to episodes of psychosis misses the point. The effect of the psychotic incident is to disorder thoughts.

18. Dr Singh's view supported that of Dr O'Shea.

The Judge's ruling on direction of law in respect of insanity

19. The judge heard argument concerning the legal directions in respect of the defence of insanity, and in particular on the meaning of "wrong" within the M'Naghten Rules. Mr Campbell-Tiech QC for the appellant, then as now, submitted that the defence of insanity is available to a psychotic and deluded defendant who is aware that his act is wrong but believes himself to be compelled to perform it. The prosecution submitted that this argument was an extension of the definition of "wrong", for which there was no legal foundation.

20. The judge gave his ruling orally and then subsequently set out his reasons in writing. He recited Mr Campbell-Tiech QC's arguments, (which are substantially the arguments placed before us). The judge pointed out that there was no suggestion that the appellant believed that, although it was against the law to kill his parents, it was an action he was morally entitled or obliged to carry out. He continued that, in any event, he was bound by authority (*R v Windle* (1952) 36 Cr App R 85 and *R v Dean Johnson* [2007] EWHC Crim 1978) to make the direction that he was about to make. He accepted the prosecution submission that the direction to the jury ought to be that set out in the Crown Court Compendium.

The Judge's directions and route to verdict

21. In his directions to the jury on insanity (given orally and then provided in writing) the judge said:

> "The Defence of Insanity
>
> 8. The defendant has raised the defence of insanity; insanity being a legal term used to describe the effect of a medical condition on the functioning of the mind. Insanity does not have to be permanent or incurable: it may be temporary and curable.

9. In law, a person is presumed to be sane and reasonable enough to be responsible for their actions. But if a person proves that it is more likely than not that, when they did a particular act, because they were suffering from a disease of the mind either they did not know what they were doing or they did not know that what they were doing was wrong, *by the standards of reasonable ordinary people*, the defendant is to be found "not guilty by reason of insanity". *"Wrong" in this context means wrong in law i.e. against the law*.

10. There are two elements to the defence of insanity. First, the defence must establish, on the balance of probabilities, that Mr Keal was suffering from a disease of the mind that led to a defect of reasoning. Second, they must show either that he did not know the nature and quality of his actions *or that he did not know that what he was doing was wrong*.

11. As you know, Mr Keal was examined by four psychiatrists, two for the prosecution and two for the defence. I will say a little about the approach you should adopt to expert evidence in a moment. But for the present, you should note that the four agree that at the time of the incident, Mr Keal was indeed suffering from a disease of the mind that led to a defect of reasoning. But they also agree that he knew the nature and quality of his actions. *Accordingly, the crucial question is whether he knew what he was doing was wrong.*

12. For the defence to be made out in this case the defence must satisfy you that it was more likely than not at the time of the assaults on his parents and grandmother, Jonathan Keal did not know that what he was doing was wrong, *in the sense that it was against the law*. That means that you are concerned with what was or was not in Jonathan Keal's mind at the time.

13. If you conclude that the defendant satisfies that test and accordingly was insane, your verdict on counts 1, 2 and 3 will be not guilty by reason of insanity. … ."

(emphasis added)

22. Question 1 for the jury in the "Route to Verdict" document was:

> "Is it more likely than not that the defendant did not know that his actions on the night of the 26-27th September 2018 were against the law?

> - If "yes", you will find the defendant not guilty on counts 1, 2 and 3 by reason of insanity … your task will end there
>
> - if "no", go to question 2"

Questions 2 and following then asked the jury whether they were sure that the Appellant had the relevant intention to kill.

23. Both the judge's legal direction and question 1 in the Route to Verdict were adapted from the specimen direction and route to verdict contained within The Crown Court Compendium.

The verdict

24. On 22 June 2021 the jury returned their verdicts of guilty on counts 1, 2 and 3.

The Grounds of appeal and the parties' arguments

The Appellant's case on appeal

25. The appellant invites this court to quash the convictions on counts 1, 2 and 3 and substitute verdicts of not guilty by reason of insanity.

26. The submission is that the trial judge misdirected the jury in relation to the issue of insanity. Where a defendant's delusion operates so as to deny him agency, his culpability is the same, whether or not he is conscious that his act is wrong. The defence of insanity is available to a psychotic defendant who is aware that his act is "wrong" (within the meaning of the M'Naghten Rules) but whose delusion is such that he is compelled to perform it or powerless to prevent it.

27. The appellant submits that the trial judge should have directed the jury as follows:

> "It is for me to give you directions as to the meaning of the expression "did not know that what he was doing was wrong", in the context of this case, "wrong" means
>
> i) that at the time he knew he was doing something he should not do; and
>
> ii) he chose nonetheless to do it
>
> If on the balance of probabilities you conclude that his delusion was such that he believed he had no choice, then the defence of insanity is made out."

28. Mr Campbell-Tiech QC puts the appeal in two ways: (1) a narrower approach and (2) broader approach.

The narrower approach

29. First, he submits that in a case such as this the answer to the second and third questions in M'Naghten should be read in conjunction with the answer to the fourth question. Applying the answer to the fourth, the starting point for the assessment of the appellant's criminal responsibility is to treat his delusion as if it were real; in this case that the devil had possessed him. From his perspective, his acts were not his own. Rather they were the acts of the devil. Then the application of the test formulated in the answer to the second and third questions in the Rules ("conscious that the act was one which he ought not to do") should reflect the nature of the accused's delusion. It should therefore have been open to the jury to find that, on the balance of probabilities, the appellant's delusion led him to believe that he himself was not carrying out the act. He was no more than a tool or an instrument of the devil. He believed that he was required to kill his parents. This was a "command delusion", which extinguishes "choice". The appellant believed he had no choice and thus the act was not his act. The specimen direction in The Crown Court Compendium, as broadly adopted by the trial judge, makes no provision for the answer to the fourth question in the M'Naghten Rules.

The broader approach

30. Mr Campbell-Tiech QC's broader approach is that M'Naghten did not change the law, but merely to clarify it. Serious criminal offences, then as now, require proof of *mens rea*. The majority in *M'Naghten* signalled the primacy of this concept to the law relating to insanity by the use of the terms "wrong" and "conscious". These were references to the need for a guilty mind, proof of which made the act consequently punishable. The essence of *mens rea* is agency or choice. Absent the capacity to choose there is no culpability: see Blackstone's Commentaries on the Laws of England 1769, book IV chapter 2 and *R v G* [2004] 1 Cr App R 21 per Lord Bingham at §§32, 39 and per Lord Steyn at §52. Mr Campbell-Tiech submits that there is no public policy in distinguishing between those who are "not guilty by reason of insanity" and those who are "guilty but nonetheless insane".

31. He submits that *M'Naghten* recognised that the accused has agency. The cases of *Windle* and *Johnson* do not establish the contrary. Such an analysis aligns the M'Naghten Rules more closely with contemporary notions of capacity and criminal responsibility. In this regard Mr Campbell-Tiech QC referred to a number of passages from The Law Commission's Discussion Paper: "Criminal Liability: Insanity and Automatism" (23 July 2013) ("the 2013 Discussion Paper") at paragraphs 1.18-1.20, 2.7-2.9, 4.8-4.18, 4.28-4.30, and 4.37-4.41.

32. Restating the overarching importance of "agency" will assist in reducing the extent to which the availability of the defence is determined by inappropriate concepts. The defence should not require a jury to consider whether the defendant had the "right sort of delusion", nor to undertake a case specific examination of the moral aspects of diabolical possession. The guilt or otherwise of a person in the grip of a psychotic delusion should not be determined by which side of the line the delusion falls. The questions as expressed in the M'Naghten Rules are not psychiatric questions and do not reflect the modern approach to mental illness. The M'Naghten Rules should be reformulated in contemporary language.

The Crown's submissions

33. Ms Maylin for the Crown submits that, given the areas of agreement between the psychiatrists, the sole issue for the jury was whether the appellant knew what he was doing was wrong. She further submits that on the evidence of the psychiatrists, the appellant was conscious that the acts were ones that he ought not to do and therefore the only issue was whether the act was contrary to the law of the land. Under the M'Naghten Rules, if the defendant was conscious that the act was one which he ought not to do and was at the same time contrary to law of the land, then the defence of insanity could not be made out.

34. Secondly, on the facts of this case the appellant suffered from a multiplicity of delusions and there was no evidence of the primacy of one over the other. The two principal delusions were, first, that he was possessed by demons and, secondly, that he believed that his parents wanted him to kill them because they had "had enough". The appellant's submission that the direction to the jury on the term "wrong" should have had an additional requirement of agency gives primacy to the former delusion over the other. Furthermore, such a requirement trespasses on the agreed evidence that the appellant knew the nature and quality of his acts.

35. Thirdly, in the light of the cases of *Windle* and *Johnson* here, the word "wrong" in the M'Naghten Rules means "wrong in law" or "contrary to law".

Discussion

36. The central issue in this appeal is whether the trial judge misdirected the jury by failing to direct them that, even if the appellant knew what he was doing was wrong, the defence of insanity would be established if he believed that he had no choice but to commit the act in question. We address this issue in three parts: first, we consider the meaning of "wrong" in the M'Naghten Rules; secondly, whether the M'Naghten Rules themselves include an element of "choice" and thirdly is the law on insanity to be interpreted as including such an element of "choice".

(1) The meaning of "wrong" in the M'Naghten Rules

37. The meaning of "wrong", and the leading cases on that question, *Windle* and *Johnson were* relied upon by the trial judge and have featured in the arguments before us.

38. In *Windle* the appellant killed his wife. There was evidence that he was suffering from a defect of reason from a disease of the mind. The medical evidence was that he knew that he was doing an act which the law forbade, but it was possible that when he did so he believed that he was putting her "out of her sufferings". It was argued that the word "wrong" meant "morally wrong". The defence could be established where the defendant thought he was doing a beneficial act, even though he knew it was wrong in law. Lord Goddard LCJ rejected that argument: he held that the word "wrong" in the M'Naghten Rules means "contrary to law".

39. In *Johnson*, the Court of Appeal revisited the position where the defendant knows that what he did was wrong as a matter of law but did not consider that what he had done was wrong in the moral sense. As in *Windle*, it was common ground that the appellant knew what he was doing was against the law, but one of the doctors took the

view that the appellant did not consider that what he had done was wrong in the moral sense. At §§17 to 20 Latham LJ cited the views expressed in the then current editions of Archbold, Blackstone's Criminal Practice and in Smith and Hogan on Criminal Law. He concluded, at §23, that the strict position remained as stated in *Windle* and in the passages of those three textbooks to which they had referred. Finally, at §24, Latham LJ observed that there is room for reconsideration of rules which have their genesis in the middle years of the 19th century but "it does not seem to us that that debate is a debate which can properly take place before us at this level in this case". The Court of Appeal certified a question of public importance for consideration by the House of Lords. The House of Lords refused to grant leave to appeal.

40. The passage in Blackstone's Criminal Practice expressly approved by Latham LJ is now found (in substantially the same terms) in the 2022 edition at paragraph A3.33. Addressing the issue of not knowing that the act was "wrong", the authors state:

> "This is an alternative to not knowing the nature and quality of the act and is the only sense in which an insane person is given a defence when none would be available to the sane (knowledge of moral or legal wrongness as opposed to knowledge of the facts which render it wrong, being generally irrelevant to criminal responsibility). The major question debated here is whether 'wrong' means legally wrong or morally wrong. It is suggested that the key to a proper understanding of this question is to recognise that the question is a negative one. If D **does** know **either** that his act is **morally** wrong (according to the ordinary standard adopted by reasonable men, per Lord Reading in Codere (1916) 12 Cr App R 21) **or** that it is **legally** wrong then it cannot be said that 'he does **not** know he was doing what was wrong'. In two leading decisions on the matter (Codere and Windle [1952] 2QB 826), it was only necessary to hold that it was correct to tell the jury that D could not rely on the defence if D knew that his act was legally wrong. Both were murder cases and it was not seriously suggested in either that D did not know his act was legally wrong and yet knew that it was morally wrong. (On the contrary, Windle thought he was morally right to kill his suicidal wife and yet knew it was legally wrong since he said, 'I suppose they will hang me for this'.) The ruling in Windle that '"wrong' means contrary to law' has now also been applied in Johnson… to a case where there was some evidence that D did not know that his act was morally wrong; it was held that this could not avail him as it was agreed that he knew that it was legally wrong. A converse case would be that of a D who does not appreciate that his act is legally wrong but who does realise that it is morally wrong, where arguably the defence would again not be made out." (original emphasis)

41. We endorse this analysis of the authorities. In order to establish the defence of insanity within the M'Naghten Rules on the ground of not knowing the act was "wrong", the defendant must establish both that (a) he did *not* know that his act was

unlawful (i.e. contrary to law) and (b) he did *not* know that his act was "morally" wrong (also expressed as wrong "by the standards of ordinary people"). In our judgment, "wrong" means both against the law and wrong by the standards of ordinary reasonable people. Strictly a jury must be satisfied that the defendant did not know that what he was doing was against the law nor wrong by the standards of reasonable ordinary people. In practice how the jury is directed on this issue will depend on the facts and issues in the particular case.

42. The focus in *Windle* (and *Johnson*) on "wrong" meaning "contrary to law" flowed from the nature of each case. On the facts of both, each defendant knew what he was doing was "contrary to law", but there was evidence that he did not consider that the act was "morally wrong". The defence failed because the defendant could not establish (a) above. Equally, in the reverse, and likely rare, case, where the defendant did not know what he was doing was "contrary to law", but did know it was "morally wrong", the defence is not available; and indeed that is situation which Tindal LCJ had in mind when distinguishing between "knowledge of the law of the land" and knowing what "he ought not to do" in his answer to the second and third questions (set out in paragraph 12 above).

(2) Do the M'Naghten Rules themselves include an element of "lack of choice"?

43. This is the question posed in Mr Campbell-Tiech QC's narrow approach. Whilst, in accordance with the answer to the fourth question in the Rules, it is necessary to assess the defendant by reference to the facts as perceived through the delusion, in our judgment, that does not obviate the need to consider the primary question of knowledge of "wrongdoing" (under the answer to the second and third questions).

44. First, we do not accept that, in principle, the concept of knowledge (or being conscious) of wrongdoing necessarily imports "choice" (or "agency" in Mr Campbell-Tiech QC's terms). Nor do we accept that, unless the M'Naghten Rules comprise an element of "choice", the availability of the defence will depend upon the nature of the delusion.

45. Secondly, the principle advanced by Mr Campbell-Tiech QC is contrary to established authority. In *R v Kopsch* (1927) 19 Cr App Rep 50 there was evidence that the defendant, when he murdered the victim, was acting under the "direction of his sub-conscious mind". He contended that the judge should have directed the jury that a person who commits an act under an impulse which, by mental disease, he cannot control, is not criminally responsible at all. Lord Hewart LCJ rejected the contention that, under the M'Naghten Rules, the judge misdirected the jury by failing to direct them that "a person charged criminally with an offence is irresponsible for his act when it is committed under an impulse which the prisoner is by mental disease in substance deprived of the power to resist". Such a proposition neither represented the law as it, nor as it ought to be. Lord Hewart described it as "the fantastic theory of uncontrollable impulse".

46. Thirdly, the Law Commission in the 2013 Discussion Paper recognised that the defence of insanity *as it presently stands* does not include an element reflecting lack of capacity to control one's action i.e. a defence of irresistible impulse. The Commission recommended the inclusion of such an element in its proposed reform of

the existing law, noting that previous proposals for such reform in 1924 and in 1953 had not been adopted (see §4.42 and fn 38 and §4.43).

47. Finally, the direction proposed by Mr Campbell-Tiech QC (set out in paragraph 27 above) is, as a matter of language, confused and confusing. In his modified definition of "wrong", sub-paragraph i) the word is defined by reference to knowledge of wrongdoing; whilst in sub-paragraph ii) it is defined by reference to "choice" (positively to do the act.) The fact that the proposed direction is difficult to understand is indicative of the underlying conceptual difficulty in the appellant's case of fitting the element of "choice" into the concept of "wrongdoing" and knowledge of wrongdoing.

48. For these reasons, we conclude that under the M'Naghten Rules, the defence of insanity is not available to a defendant who, although he knew what he was doing was wrong, he believed that he had no choice but to commit the act in question.

(3) Should the current law on insanity be interpreted as involving an element of "choice"?

49. This is the question posed by Mr Campbell-Tiech QC's broader approach It invites us substantially to develop the law of insanity as it has been understood in the criminal law of England and Wales for over a century and a half. We are doubtful whether sitting in the Court of Appeal we could do so properly in the light of the authorities that bind us. Such was the view of Latham LJ in *Johnson*. Nothing has changed. But there are more profound reasons why this matter is not suitable for judicial rewriting.

50. First, we are dealing with the facts of a single appeal without the wide-ranging exploration of the issues which should underpin significant law reform of the sort which informed the Law Commission work to which we have referred. An individual case does not provide an apt vehicle for the reconsideration of the "wrongdoing" elements of the M'Naghten rules.

51. Secondly, this is an area of criminal law in which Parliament has been active. It has legislated in the past recognising that insanity is a defence to a criminal charge on the basis that the M'Naghten rules govern the underlying question: e.g. Criminal Procedure (Insanity) Act 1964. In the context of murder Parliament has introduced the partial defence of diminished responsibility: section 2 of the Homicide Act 1957 as amended by section 52(1) of the Coroners and Justice Act 2009 which at the least has some overlap with reform of the law of insanity in crime. In our judgment significant changes to an aspect of our criminal law that has remained undisturbed for so long, laden with policy choices as they would be, are more properly for Parliament.

(4) This case: the direction and the evidence

52. Finally, we are satisfied that, in the light of the evidence presented to the jury, the judge's direction of law in the present case was appropriate. The jury were directed to consider whether the appellant knew that what he was doing was "wrong". On that issue, the competing opinions of the psychiatrists were placed before the jury. Two experts took the view that the he did know; the other two considered that he was unable to decide that it was wrong. On the basis of that evidence, and the judge's direction, the jury could have found that the appellant did not have relevant knowledge of wrongdoing and thus that the defence of insanity was established. They

chose not to do so, but instead reached verdicts consistent with the evidence of the prosecution experts. On any view, the convictions are safe.

53. In the result, the appeal is dismissed.