Privy Council Appeal No. 49 *of* 1959

The Attorney-General for State of South Australia - - *Appellant*

v.

John Whelan Brown - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH, 1960

Present at the Hearing:

VISCOUNT SIMONDS
LORD RADCLIFFE
LORD TUCKER
LORD JENKINS
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD TUCKER]

On the 20th March, 1959, the respondent was found guilty of the murder of Neville Montgomery Lord on 23rd November, 1958, after a trial before Abbott, J., and a jury in the Supreme Court of South Australia at Adelaide. He was sentenced to death. From this conviction he appealed to the Full Court of the Supreme Court of South Australia (Napier, C.J., Mayo and Piper, J.J.), who dismissed his appeal. From that judgment the respondent appealed to the High Court of Australia (Sir Owen Dixon, C.J., McTiernan, Fullagar, Kitto and Taylor, J.J.), who allowed his appeal, quashed the conviction and ordered a new trial. The Attorney-General for South Australia obtained special leave by Order in Council dated 12th August to appeal from this decision of the High Court and the appeal was heard by the Board on 25th, 26th, 27th and 28th January, 1960.

The following summary of the facts relating to the killing of Mr. Lord which were not in dispute are taken from the judgment of the High Court.

Shortly before 20th November, 1958, he (i.e. the respondent) was engaged in Adelaide as a stationhand for Pine Valley which is a sheep station about sixty-five miles north of Morgan. Mr. Neville Montgomery Lord was a member of a family to whom the station belonged and he had been the manager of the station for some years. He was thirty-two years of age and lived at the homestead with his wife and two young children. There was a station cook, a woman whose room was adjacent to but not part of the main building. The men station hands, of whom there was only one other, lived in the men's quarters perhaps 75 to 100 yards away. On the morning of Thursday, 20th November, 1958, Brown was picked up in Adelaide by a car proceeding to Pine Valley and taken to his new job. He met Mr. Lord on arrival at the station that afternoon. He was given his room in the men's quarters and made the acquaintance of the other station hand and the cook. The latter saw him at meal-times during the next three days and he helped her with the drying of dishes. Nothing occurred to excite comment. Brown seemed quiet and well-behaved. Mr. Lord saw little of him and all were sure that nothing had passed between them that could excite any hostility in Brown to Mr. Lord. The other station hand went off for the weekend In his room

there stood visible from the door a .303 rifle and there were some cartridges in the room with soft-nosed bullets for shooting kangaroos. On Sunday night, 23rd November, Mr. Lord went to bed about a quarter past nine. Mrs. Lord busied herself for a little longer and went to the children's room between which and the bedroom there was a communicating door. She was attending to a child when, as she says, she heard the electric light go on in the bedroom. Then there was a shot. She ran through the communicating door and saw her husband lying on the bed shot—shot through the head. She threw herself on the bed. Brown came back through the passage door. She screamed and he told her to be quiet, and after trying to quieten her he ran out of the bedroom door into the hall or passage. That led to the front door, about a yard distant, and also to the back door. She described him as looking bewildered and explained that she meant that she thought he might have been taken aback that she had come from the next room, not knowing there was a door between. She did not see him again. She found the cook in her bedroom and they telephoned for help. A doctor and a policeman arrived two or three hours later. Her husband was dead. Brown had disappeared. A search for him extended over the next four days. On the morning of Friday, 28th November, he came from some disused buildings some twenty-five miles from the homestead of a station named Canegrass and gave himself up. Canegrass homestead itself is twenty-four miles south of Pine Valley homestead. As Brown gave himself up he asked "Is he dead?" He had carried the rifle for a time but had abandoned it at a place about six miles from Pine Valley homestead. He answered the questions put to him by the police then and thereafter without any apparent reservation. According to his answers he had gone to bed in his quarters at about half-past eight on the Sunday night. He remained awake thinking and then got up and got the rifle from the room of the other station hand and there tested the loading of the rifle on the bed. He took the rifle and cartridges; the magazine was full. He went across to the house, wearing socks but no boots or shoes. The lights were on and through the window he could see Mrs. Lord in another room. He walked in the front door, went to the bedroom, put the rifle up, aimed it at Mr. Lord and shot him. He was under the blanket and appeared, so Brown thought, to be asleep. He said he went out of the room to see where Mrs. Lord was. She went into the bedroom and he then returned. He tried to quieten her and then ran out the back way. He went to the cook's quarters to see where she was. In answer to a question why he did so, Brown answered "Because I thought that she might have rung up and given the alarm." Her light was then on but he could not see her through the window. He then returned to his quarters and took his hat, the rifle, and a pair of boots from the other station hand's room, and set off. He said that neither Mr. Lord nor any other person there had given him any reason to bear malice or had any argument with him.

The only real issue in the case was whether the defence had discharged the onus of proving on balance of probability that the respondent was legally insane when he shot Mr. Lord. This issue was further narrowed since the medical witnesses for the defence and for the prosecution agreed that the respondent was (1) what psychiatrists refer to as a schizoid personality, (2) that neither before nor after the shooting was the respondent suffering from any disease or disorder of the mind, and (3) that at the moment of shooting he knew the nature and quality of his act. Where they differed was that Dr. Forgan for the defence testified that in his opinion at the time of the shooting the respondent had lapsed into a temporary state of simple schizophrenia in which he did not know that what he was doing was wrong.

Dr. Shea on the other hand was of opinion that the respondent never at any time had schizophrenia and that even if he did he not only knew the nature and quality of his act but also that it was wrong as the respondent had told him when he examined him in prison.

Dr. Forgan's process of reasoning shortly stated appears from the following questions and answers in cross-examination :—

Cross-examined : Q.—I will see if I can set out in a series of simple steps the process by which you arrive at your opinion. The first thing is you discover a schizoid personality?

A.—Yes.

Q.—The next, you find an unexplained and to you, unexplainable outburst of violence, you deduce from that that the man was suffering for those few minutes from schizophrenia?

A.—Yes.

Q.—You deduce from that in turn that he would be unable to appreciate that his act was wrong?

A.—Yes.

Q.—That's the whole process of your diagnosis?

A.—Yes.

Dr. Shea on the other hand was of opinion that there was no such thing as schizophrenia of five minutes' duration which was roughly the period during which Dr. Forgan considered the attack in the present case must have lasted.

It will be convenient at this stage to set out certain questions and answers which appear in Exhibit " G " which is the statement of the respondent made to the police in the form of questions and answers. No objection to this statement being used in evidence on the ground of unfairness or for any other reason has been raised before any of the four tribunals before which this case has come. They are as follows :—

I said. " You have told me that neither Mr. Lord nor any other person had ever given you any reason to bear him any malice."

He said. " Yes."

I said. " Is there any reason you wish to offer for your conduct? "

He said. " Even though I do recall everything and I did it, I don't think that I was responsible for my actions."

I said. " You knew that the rifle was loaded? "

He said. " Yes."

I said. " You knew that when you pulled the trigger it would discharge a missile? "

He said. " Yes."

I said. " And that if the missile hit anyone it would at least maim them and probably kill them? "

He said. " Yes."

I said. " Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them? "

He said. " Yes. But I couldn't help myself."

I said. " Do you think that you would have pulled the trigger of that rifle if there had been a policeman standing by you? "

He said. " No."

In order to follow their Lordships' opinion in this case appearing hereafter it is necessary to set out at some length certain passages in the summing up of the learned trial Judge as well as the passages in the judgment of the High Court in which they are criticised.

The passages in the summing up are as follows :—

" On the night of the shooting the accused says that he had gone to bed early and that he got up and got the rifle and ammunition just before he went into Mr. Lord's bedroom. The accused himself owned no firearms and probably, had he never seen the rifle and ammunition in Dave's room he might never have thought of shooting anybody. You will remember Mr. Elliott drawing your attention to the fact that there was no motive for this alleged crime. Gentlemen, throughout the centuries of civilization, crimes have repeatedly been committed without any apparent or discoverable motive. That is one of the reasons why, in our childhood, we were taught never to

put temptation in anybody's way and what would be temptation for another man, might be no temptation whatsoever to us. You may, perhaps, remember the words of Shakespeare—" How oft the sight of means to do ill deeds makes ill deeds done ". There, standing before his eyes in Dave's empty room was the rifle and ample ammunition and there were the means to do ill deeds. Do you think that perhaps those means to do ill deeds made the ill deeds done in this particular case? You may, perhaps, think that on the 23rd November, the accused, when he shot Neville Lord was acting on an uncontrollable impulse—a dreadful impulse which arose suddenly and which he was unable to control. If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law, and if that, in your considered view, is the only explanation of the death caused by the accused on the 23rd November, it is your duty to bring in a verdict of guilty of murder.

You may, if you choose, when you go into the jury room, take with you the statement of the accused signed by him as John Stone. It comprises about 7 pages of foolscap. You will recall that he was asked by Detective Lenton whether he knew anything about the shooting of Lord on the Sunday night and he said, " Yes " ; and he was asked " What do you know about it?" and his reply was, " I don't know how to put it," whereupon Lenton asked him a number of questions all of which he seemed to answer perfectly sensibly and plainly. On page 2 of the statement the accused describes very plainly what he did when he shot Lord and how he followed Mrs. Lord into the room when she was singing out, as he put it, and he then ran out the back way. On page 4 he was asked, " After you shot Lord why did you go looking for Mrs. Lord?" and his reply was " Because I got scared," and when asked what he meant by that he said, " I don't know ". He was asked whether when he went to look for Mrs. Schiller the rifle was freshly loaded, and he said that it was, and he was asked why he went looking for Mrs. Schiller and the accused said, " I just wanted to see where she was," and he was asked " Why?" and his answer was, " Because I thought that she might have rung up and given the alarm ".

Well gentlemen, you may ask yourselves why the accused should think that anyone should be wanting to give an alarm about him. Might I suggest to you that he then knew that what he had done was wrong. He did not tell Detective Lenton what he would have done, or whether he would have done anything if he had found Mrs. Schiller, or found that she had given an alarm by telephone. Perhaps, gentlemen, she may think now that she was a fortunate woman that the accused did not find her.

On pages 5 and 6 of the signed statement, Exhibit " G ", Detective Lenton said, " Is there any reason you wish to offer for your conduct?" to which the accused replied, " Even though I do recall everything and I did it, I don't think I was responsible for my actions ". The detective said, " You knew that the rifle was loaded?" He replied, " Yes ". Lenton said " You knew that when you pulled the trigger it would discharge a missile?" and he replied " Yes ", and Lenton then asked, " And that if the missile hit anyone it would at least maim them and probably kill them?" to which the answer was, " Yes ". The accused was then asked what you may think was a vital question, in view of the course the defence has taken—" Did you know at the time that it was wrong to point the loaded rifle at a person and shoot at them?" The answer you may regard, if it so appeals to you, as the answer to the problem you have to solve. The answer by the accused to that question, " Did you know it was wrong?" was " Yes, but I couldn't help it ".

Now gentlemen, if you accept the evidence in that statement Exhibit " G ", it does not matter whether you think that the accused during that pregnant five minutes on the night of November

23rd was or was not suffering from schizophrenia as Dr. Forgan thinks, if he did know, as he told Detective Lenton he did, that it was wrong to point the loaded rifle at a person and shoot at them. If you accept Dr. Shea's evidence you may have no doubt that the accused was not suffering from any mental disease and did know that he was doing wrong. If you will look at Exhibit " G " on page 6, you will see that after saying " Yes " to that question, the accused went on to say " But I couldn't help myself. I knew it was wrong but I couldn't help myself ". These words, gentlemen, may suggest to you that the accused was thereby setting up the defence of " uncontrollable impulse " which you may think is the true explanation of what he did. But, as you will remember gentlemen I have directed you, if that be the true explanation of what the accused did, that is no defence, and he is guilty in law, of the crime charged. You may not like gentlemen, to convict a man of murder who " couldn't help himself ", but if you are satisfied beyond reasonable doubt of the truth of that answer, that may be your duty.

Detective Lenton's next question was, " Do you think that you would have pulled the trigger of that rifle if there had been a policeman standing by you?" To that the accused answered, " No ". Now, if you accept that answer, you may infer if you think proper that the reason the accused answered " No " is because, again, he knew that pulling the trigger was wrong.

Mr. Chamberlain points out that if you acquit him, gentlemen, the accused may ultimately kill someone else. Well, Gentlemen, you are not to concern yourself with the consequences of your verdict, and if you are satisfied he was not guilty of this crime because of temporary insanity, then the future must take care of itself. Mr. Elliott tells you that if you find him not guilty because of insanity, I must commit him to gaol to await the Governor's pleasure. How long the Governor may be prepared to detain a man whom no one will now say is insane may be problematical but again that is no concern of yours. Even if you find him guilty, the Executive Council may refuse to allow him to hang, but that again is no concern of yours."

The passages in the High Court's judgment are the following :—

" After setting out the facts relating to this and recalling Brown's statement that he had gone to bed on the Sunday night and had then got up and taken the rifle, the charge to the jury proceeded in a manner which we think very much open to objection. It is desirable to set out the passage in full. " The accused himself owned no firearms and, probably, had he never seen the rifle and ammunition in Dave's room he might never have thought of shooting anybody. You will remember Mr. Elliott " (who was counsel for Brown) " drawing your attention to the fact that there was no motive for this alleged crime. Gentlemen, throughout the centuries of civilisation, crimes have repeatedly been committed without any apparent or discoverable motive. That is one of the reasons why, in our childhood, we were taught never to put temptation in anybody's way and what would be temptation for another man, might be no temptation whatsoever to us. You may, perhaps, remember the words of Shakespeare—' How oft the sight of means to do ill deeds makes ill deeds done '. There, standing before his eyes in Dave's empty room was the rifle and ample ammunition and there were the means to do ill deeds. Do you think that perhaps those means to do ill deeds made the ill deeds done in this particular case? You may, perhaps, think that on the 23rd November, the accused, when he shot Neville Lord was acting on an uncontrollable impulse—a dreadful impulse which arose suddenly and which he was unable to control. If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law, and if that, in your considered view, is the only explanation of the death caused by the accused on the 23rd November, it is your duty to bring in a verdict of guilty of murder ".

At a later point in his charge to the jury the learned Judge returned to the answer that Brown had given to the question of the police officer whether he knew at the time that it was wrong to point a loaded rifle at a person and shoot him, namely the answer " Yes. But I could not help myself ". His Honour said, " These words, gentlemen, may suggest to you that the accused was thereby setting up the defence of ' uncontrollable impulse ' which you may think is the true explanation of what he did. But, as you will remember gentlemen I have directed you, if that be the true explanation of what the accused did, that is no defence, and he is guilty in law, of the crime charged ".

The objections to these passages which of course must be taken together are, we think, very serious. The foundation of the case in support of the plea of insanity was that Brown's act in shooting Mr. Lord as he lay asleep lacked any motive actuating a sane mind. Upon this the evidence was entirely one way. Irresistible impulse as such had not been raised as a defence and no one had suggested that it could amount to a defence. The manner in which the first of the foregoing passages discounted the importance or effect of the absence of ascertainable motive put this cardinal matter, to say the least of it, in a false light. It was not at all unlikely to produce an adverse effect upon the jury with respect to that very element in the case for Brown which if one were guided by the evidence there was no reason to doubt. What follows immediately concerning temptation and the sight of the means to do ill deeds might not carry any very clear meaning to the jury but its tendency could hardly be anything but prejudicial. For it might be taken by them as suggesting that the prisoner, finding a weapon available, was prompted to use it to shoot Mr. Lord, for a reason which existed but was not ascertainable. Then the possibility is introduced of the jury thinking it was uncontrollable impulse. The result is a direction about uncontrollable impulse which, if understood literally, is clearly erroneous in point of law. For it is a misdirection to say that if the jury think that the true explanation of what the accused did was that he acted under uncontrollable impulse, that is no defence and he is guilty in law of the crime charged. It is a misdirection the operation of which might be to exclude the prisoner's defence and to determine the verdict. Whatever the learned Judge may have had in mind in using the word " only " when he first gave the direction about uncontrollable impulse the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder and they must convict the prisoner. It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him. But to treat his domination by an uncontrollable impulse as reason for a conclusion against his defence of insanity is quite erroneous. *On the contrary it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The law has nothing to say against the view that mind is indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. This was put succinctly by Greer, J., during the argument of the case of* R. *v.* Ronald True *1922 16 C.A.R. 164 at p. 167, in stating how in an earlier case he had directed the jury. His Lordship said, " What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in McNaughton's Case, but that men's minds were not divided into separate compartments, and that if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of*

knowing what he was doing, or of knowing that it was wrong. 'Uncontrollable impulse' in this event would bring the case within the rule laid down in McNaughton's Case". For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree.

It is not outside the province of a judge at a criminal trial to put to the jury a view which he may take of a piece of evidence or of facts. How far he should go must depend upon circumstances. But if he does so and puts views adverse to the prisoner it increases the importance of his putting clearly and in its true light the case made for the prisoner, or for that matter the case for him that fairly arises on the evidence, however little validity in fact the judge may be inclined to ascribe to it. It is difficult to resist the impression that the position taken up by Dr. Forgan was not placed before the jury by the summing-up in a way which could be understood and appreciated. Perhaps that arose from the evident difference between the view expressed by the learned Judge about the absence of known motive and the central significance the witness placed upon the motiveless character of the act. Doubtless it is true, as the learned Judge pointed out, that the jury might reject the views of the experts but this possibility leaves untouched the defect in the summing-up. Nor did the rejection of the view that Brown had suffered from schizophrenia necessarily dispose altogether of the question whether there had existed a disease or disorder of the mind which might satisfy the prerequisite condition required by the formula. In all the circumstances we think that the cumulative effect of the positive objections to those passages in the charge which we have discussed is such that the conviction ought not to be allowed to stand."

It is the concluding lines of the penultimate paragraph beginning with the words "on the contrary" now printed in italics which in their Lordships' view give rise to questions of great importance and far reaching consequences in the administration of the criminal law. They would naturally be read by the Judge who presides over the new trial and by all Judges in similar cases in States where the English common law prevails as requiring them to tell the jury *as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which although not preventing the patient from knowing the nature and quality of his act yet does prevent him from knowing that it is wrong.

The words "the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree" must imply that the law knows and recognises uncontrollable impulse as a symptom of legal insanity within the meaning of the rule in McNaughton's case and, in conjunction with the language used at the beginning of the passage in question, that it is the Judge's duty to instruct the jury that it may afford strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. Furthermore this direction is required not only in a case where there may have been no medical evidence but even in a case, such as the present, where the medical evidence for the defence was to the effect that the prisoner when he committed the act was suffering from a specific disease or disorder of the mind known as schizophrenia which, although not preventing him knowing the nature and quality of his act, did prevent him from knowing it was wrong, but of which it was never suggested that irresistible impulse was a symptom or that it played any part in helping the medical witness for the defence to arrive at his diagnosis. So much so that counsel for the respondent on the present appeal far from relying on irresistible impulse contended that the trial Judge should never have mentioned the subject in his charge to the jury as it formed no part of the case for the defence.

Their Lordships can find no support for the view that this accurately represents the criminal law.

At various times in the past attempts have been made to temper the supposed harshness or unscientific nature of the McNaughton rules. These attempts were supported by the high authority of Sir James Fitzjames Stephen but in the end the rules remain in full force and their harshness has in this country been to some extent alleviated by the recent legislative enactment affording the defence of diminished responsibility. While the High Court, of course, fully recognise the binding force of the McNaughton rules their Lordships' think that the directions which they have indicated as appropriate for use by trial Judges would in effect make a very considerable inroad into those rules as hitherto interpreted. Moreover unless the law is presumed to take cognisance of irresistible impulse as a symptom of legal insanity, whence does the Judge derive his knowledge of these matters, it not being permissible for him to make use of what he may have learned from evidence given in other cases?

Their Lordships must not, of course, be understood to suggest that in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong it would not be the duty of the Judge to deal with the matter in the same way as any other relevant evidence given at the trial.

Sodeman v. *The King* (1936) 55 C.L.R. 192 is an Australian example of such a case. The actual decision in that case related to the burden of proof in cases where the defence of insanity is raised and to the sufficiency of the trial Judge's direction thereon, but in the course of the judgments references were made to " irresistible impulse " and its possible bearing on the defence raised by the medical evidence in that case to the effect that if a man has an obsession and 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. (Vide lines 8–14 on page 203 of the judgment of Latham, C.J.). At page 205 the learned Chief Justice used these words:—" 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 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.*"

This passage must be read in the light of the concluding sentence now italicised. So read their Lordships would not question it. But if the word " recognises " in the first sentence is construed to mean that the words which follow are matters of law which must or may be accepted and acted upon by juries without evidence it would not in their Lordships' opinion be an accurate statement of the law. The word " recognises " would seem to have been used in contrast to the rejection of irresistible impulse per se and means no more than that the law will not refuse to listen to evidence to the effect stated whereas it will refuse to listen to evidence of irresistible impulse per se.

The presumption that the law takes note of such matters without evidence is implicit in the language of the High Court's judgment in the present case. It is this that their Lordships with great respect feel unable to accept.

It may be observed in passing that in the case of *The King* v. *Porter* (1933) 55 C.L.R. 182 the charge to the jury by Dixon, J. (as he then was)

in which he dealt with the workings of the human mind appears to have been based upon the medical evidence given in that case. (Vide page 189, line 18, and page 190, line 18, " the medical evidence included explanations of the course of mental conditions in human beings generally ".)

This distinction between what the law presumes and what the law will listen to is of the first importance in the present case since counsel for respondent has disclaimed any reliance on irresistible impulse either per se or as an element in the particular kind of mental disease relied upon to support the defence that the respondent, although aware of the nature and quality of his act, did not know that it was wrong, and submitted that the trial Judge should never have referred to it in his charge to the jury.

Their Lordships do not derive much assistance from the interlocutory observations of Greer, J., during the argument in the case of *Rex* v. *True* 16 C.A.R. 164 at 167. He was speaking from recollection of his summing up in a case which he had tried two years earlier and in which no medical evidence had been given. No reference was made to his observations by the other members of the Court and no authority has been cited in which the Court of Criminal Appeal has given its approval to such a direction. In none of the leading cases in recent years such as *Rex* v. *Kopsch* 19 C.A.R. 50 and *Rex* v. *Rivett* 34 C.A.R. 87 where the defence of insanity was raised has there been any suggestion that although irresistible impulse affords no defence per se the law will recognise it as a symptom from which the jury may without evidence infer insanity within the McNaughton rules. In the latter of these cases the defence of insanity was based on evidence almost identical with the medical evidence in the present case. (See page 92 of the report.) It may perhaps be observed in passing that if such matters were left to a jury without the assistance of medical evidence there would seem to be two possible views which a layman might take as to the relevance of irresistible impulse to the McNaughton tests. Some might think that before an impulse becomes irresistible there must have been some attempt to resist it and that the attempted resistance might well be due to knowledge of the wrongness of the act to which the prisoner felt himself impelled. Others might think that the irresistible impulse might impair the reasoning power to such a degree that it would no longer be able to appreciate the wrongness of the act. Why should the law prescribe that one of these views must be presumed to be correct rather than the other without medical evidence as to which is to be preferred with reference to the particular form of mental disease or disorder from which a prisoner is said to have been suffering?

Their Lordships are not of course suggesting that legal insanity cannot be sufficiently proved without medical evidence. The previous and contemporaneous acts of the accused may often be preferred to medical theory. But where the whole case for the defence is based upon the accused having a particular form of mental disease such as schizophrenia the nature and symptoms of which are known to psychiatrists but knowledge of which cannot be attributed to a jury the law will not step in to instruct a jury in the absence of medical evidence as to the " true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree."

In arriving at a conclusion different to that of the High Court on a matter of this kind their Lordships may perhaps derive some comfort from the fact that they have had the advantage of a very full and helpful argument from both sides on this aspect of the case whereas they are informed that this particular matter not having been raised by the defence either in the Full Court or the High Court but having been taken by the Court in the course of argument in the High Court, counsel may not have developed their arguments quite so fully or had so much opportunity of considering the matter as they have now been afforded. Moreover they could not of necessity address their minds to the language in which the High Court eventually expressed its considered judgment.

Their Lordships now turn to other matters, which, though no doubt of great importance in the present case, are not of such a nature that their Lordships would normally investigate on appeal from the High Court. As, however, the Board has seisin of the appeal and as they are relied upon by the respondent as alone sufficient to justify the High Court in quashing the verdict and judgment at the trial they must be dealt with.

They are as follows:—

1. It was contended by counsel for the respondent: (1) That the Judge should never have mentioned irresistible impulse at all. This criticism is not to be found in the judgment of the High Court and is indeed contrary to its tenor, but it was strongly pressed by counsel for the respondent.

2. That the Judge's references to irresistible impulse were so worded that the jury would or might infer that even if they were satisfied that the respondent did not know that what he was doing was wrong they must nevertheless find him guilty of murder if they thought he was acting on an irresistible impulse.

3. That the Judge misdirected the jury in his references to the absence of motive.

4. That there was misdirection in the Judge's reference to the consequences of the jury's verdict.

5. That there was misdirection in the Judge's reference to Mrs. Schiller.

6. That the case for the defence was not sufficiently or fairly placed before the jury.

Points 2 to 6 inclusive were relied upon by counsel before the Board and appear in the judgment of the High Court. Points 1, 2, 3 and 5 were not raised by counsel on the appeal to the Full Court of the Supreme Court of South Australia or on appeal to the High Court. Numbers 2, 3 and 5 emerged in the course of the High Court hearing and No. 1 appeared for the first time before the Board. Their Lordships are not for one moment suggesting that the High Court were not entitled and indeed bound to take and act upon these points if they considered they amounted to serious misdirections, but the result has been that neither the High Court nor the Board have had the advantage of the views and experience of the Full Court of South Australia on four out of six of the matters now complained of and which had apparently escaped the notice both of counsel, who had been astute to draw the Judge's attention after the jury had retired to what he submitted were defects in his summing up and to remedy one of which the Judge had re-called the jury, and of all three members of the Full Court of South Australia.

It will be convenient to deal first with Nos. 4 and 5.

There is no reason to suppose that the High Court would have considered these matters by themselves as justifying quashing the verdict and judgment of the trial court. It would seem probable that the High Court, being minded to order a new trial by reason of what they considered serious misdirections with regard to the law of insanity, referred to them in order that they should not be repeated at the trial. Their Lordships feel bound, however, to say that in their opinion the observations of the trial judge on these matters were not open to criticism. With regard to No. 4 the Board were informed that it is common practice for counsel in South Australia in their addresses to juries in murder trials to refer to the consequences of their verdict. If such a practice is permitted it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine. Their Lordships do not regard the language which the trial judge used on the present occasion as open to criticism. It was as follows:—"Mr. Chamberlain points out that if you acquit him, gentleman, the accused may ultimately kill someone else. Well, gentlemen, you are not to concern yourself with the consequences of

your verdict, and if you are satisfied he was not guilty of this crime because of temporary insanity, then the future must take care of itself. Mr. Elliott tells you that if you find him not guilty, because of insanity, I must commit him to gaol to await the Governor's pleasure. How long the Governor may be prepared to detain a man whom no one will now say is insane may be problematical, but again that is no concern of yours. Even if you find him guilty, the Executive Council may refuse to allow him to hang, but that again is no concern of yours".

No. 5 concerns the judge's reference to Mrs. Schiller. The respondent in his statement to the police had said that after having shot Mr. Lord and after Mrs. Lord had gone into the bedroom where Mr. Lord was he (the respondent) had gone to see what the cook (i.e. Mrs. Schiller) was doing. He was asked "Why did you go looking for Mrs. Schiller?" He replied "I just wanted to see where she was". He was asked "Why?" and replied "Because I thought she might have rung up and given the alarm". In the written statement which he read from the dock he said: "On the Sunday evening when it happened I seemed to be acting in a dream. I do not remember why I chose Mr. Lord rather than Mrs. Lord or the lady cook." The judge's reference in his summing up to the respondent's answers to the police on this matter have already been set out.

The conduct of the respondent immediately after the shooting was relevant to the state of his mind at the time of the shooting, and the observation with regard to Mrs. Schiller's good fortune would seem to have been fully justified on any view of the case having regard to the respondent's statement from the dock.

The more serious criticisms of the judge's summing up involved in Nos. 1, 2, 3 and 6 above must now be dealt with.

No. 1, viz. that the judge should never have referred at all to irresistible impulse, was, as already stated, a point taken by counsel for the respondent before the Board. It could not have been taken at an earlier stage, because the possible significance of irresistible impulse only emerged on reading the judgment of the High Court. Their Lordships do not consider it valid. It is true that it formed no part of the respondent's defence of insanity on the medical evidence adduced in support of this plea, nor was it relied upon by his counsel as having any relevance to his defence, but the respondent in his statement from the dock and in his answer "Yes, but I could not help myself" to the police officer's question "Did you know at the time it was wrong to point a loaded rifle at a person and shoot at them" fully justified the judge in explaining to the jury in appropriate language that the criminal law of South Australia does not recognise the defence of insanity on the ground of irresistible impulse.

This leads to question No. 2 viz. whether the language used by the judge was appropriate or whether, as the High Court thought, it might lead the jury to infer that even if satisfied that the respondent did not know that what he was doing was wrong they must find him guilty of murder if they thought he was acting under an irresistible impulse.

The passages in the summing up dealing with this matter and the High Court's criticism thereof have already been set out in full and it is not necessary to repeat them. They must, of course, be considered in the context of the summing up taken as a whole and the course which the trial had taken. The sole issue had been whether the respondent had discharged the onus which lay on the defence of satisfying the jury that on balance of probability at the time when he shot Mr. Lord he was labouring under a defect of reason due to disease of the mind by reason of which he did not know that what he was doing was wrong. The greater part of the evidence and the summing up and it may be supposed almost the whole of counsel's addresses to the jury would have been quite irrelevant if the short answer to the case had been: "Well he says he could not help it, and if so he is guilty of murder whether he knew it was wrong or not". Their Lordships do not consider that the language used by the judge could have been so interpreted

by a jury who had listened to the whole case and in particular to the summing up which occupies nine pages of the printed record and in which in no less than seven different passages the judge in the clearest possible language correctly instructed the jury as to the issues they had to decide and the onus of proof. It will suffice to set out the first and last of these passages. The first is as follows: "If after careful consideration of the evidence that has been put before you, you are satisfied on the balance of probabilities that the accused was on 23rd November labouring under a defect of reason due to disease of the mind by reason of which he either did not know the nature and quality of his act in killing Neville Lord, or did not know that that killing was wrong then, and then only, your verdict should be not guilty on the ground of insanity". He then went on to explain that in the present case all the medical evidence was to the effect that the respondent knew the nature and quality of his act and that the real issue was whether he knew that his act was wrong. His last reference to this matter is to be found in the final passage of his charge. It reads as follows: "You may find him not guilty on the ground that he was insane at the time he shot the deceased, which would mean that you are satisfied beyond reasonable doubt that he killed Lord, but that at that time he was suffering from the mental disease of schizophrenia and did not know that he was doing wrong and that therefore he is not criminally responsible for his acts. Finally if not satisfied on the probabilities that he was insane you may find him guilty of murder."

The passages complained of have so far been dealt with in their general setting, but even taken in isolation—though no doubt in the light of the criticism to which they have now been subjected they might have been better worded—their Lordships do not think that they would be interpreted by a jury in the way suggested. The statement in the judgment of the High Court that "whatever the learned judge may have had in mind in using the word 'only' when he first gave the direction about uncontrollable impulse the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder and they must convict the prisoner", seems to their Lordships unjustified. The passage in the summing up starting on page 65 of the record at line 13 and ending at line 44 has to be read as a whole and shows that the judge was referring to the series of questions and answers in the respondent's statement to the police officer (Exhibit G) and in particular to the question "Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them" and the answer "Yes, but I could not help myself". When the learned judge said "These words, gentlemen, may suggest to you that the accused was thereby setting up the defence of uncontrollable impulse which you may think is the true explanation of what he did. But as you will remember gentlemen I have directed you if that be the true explanation of what the accused did that is no defence and he is guilty in law of the crime charged", the "true explanation" refers to the whole answer "Yes, (meaning, Yes I knew it was wrong) but I could not help myself" and is not confined to the words "I could not help myself". The respondent's answer if accepted by the jury in terms negatived the defence of insanity. Their Lordships are accordingly of opinion that these passages dealing with irresistible impulse read together did not amount to misdirection.

No. 3 deals with the direction with regard to the absence of motive. The passage complained of has been set out earlier in this judgment. It is true that what the judge said was more appropriate to a case where it is necessary to instruct a jury that it is not necessary for the prosecution to prove motive in order to establish a case of murder. There was no such need in the present case as the killing had been established beyond doubt and it was common ground that the respondent had no conscious motive for his act. None the less the reference to Shakespeare's words "How oft the sight of means to do ill deeds make

ill deeds done" was not wholly inappropriate in the present case. The medical witness for the defence was asked the following questions in cross-examination and gave the following answers:—

"Q.—I suppose any action such as shooting a man could be traced to some sort of impulse or emotion?

A.—Yes. All human action is the result of some cause. Something led to the impulse in this man to shoot Mr. Lord.

Q.—It's really traceable to his feelings of inferiority and guilt associated with his masturbation which produced an outburst of violence?

A.—Yes.

Q.—And one of the predominant and conscious characteristics of the human mind is to justify oneself in one's own eyes?

A.—Yes.

Q.—There would be an element of 'playing big' in front of himself in this instance wouldn't there? In such an instance as this, an unmotivated crime of this sort, it is 'playing big stuff' in his own eyes?

A.—That could be.

Q.—It could also be influenced by the sight of a happily married attractive young couple in contrast with his own view of his own inadequacy?

A.—That is the thing."

In the light of this evidence it would seem highly probable that the sight of the rifle and cartridge might have lit up these subconscious motives. However this may be the absence of conscious motive was and had been common ground throughout the trial and their Lordships do not consider that the judge's observations on this matter could have misled the jury. Moreover when the jury were re-called in order that the judge might correct the words "the wholly insufficient reason which the accused has given" which he had used in his summing up and substitute in their stead the words "and wholly failed to give any reason for so doing" he added "You may think he was mad for having killed the deceased and wholly failed to give any reason for so doing". The original language had been used with reference to madness in the popular sense of the word as distinguished from legal insanity and the substituted words must be read in the same context, but the whole passage at page 69 of the record tends to emphasise the motiveless nature of the crime.

Finally it is said that the summing up did not put the case for the defence and the medical evidence fairly or sufficiently before the jury. On this aspect of the case the Full Court of the Supreme Court of South Australia subjected the judge's charge to the jury and the evidence at the trial to a careful and detailed scrutiny, they referred to the authorities which have stated the principles—if they can properly be so called—upon which an appellate court in a criminal case will quash a conviction on the ground of misdirection or nondirection with regard to the evidence given at the trial or the presentation of the defence, and came to the conclusion to quote their words—"In the present case it is manifest that the point upon which Mr. Elliott relied was before the jury from first to last through the whole hearing. Applying the rule laid down in the case of *Immer and Davis* we think that the summing up of the learned trial judge was sufficient".

Their Lordships have gone through the same process and are content to adopt as their own the words quoted above.

In the result for the reasons indicated their Lordships after anxious consideration of the questions raised in this appeal, some of which are of great importance in the administration of justice in murder cases involving the defence of insanity, are of opinion that no sufficient grounds have been established in this case to justify an appellate court

in quashing the verdict and judgment of the trial court. In conclusion their Lordships may perhaps permit themselves to refer to the concluding words of the judgment of the Full Court of the Supreme Court of South Australia:—"While we really have no doubt that the verdict was right in point of law (in so far as the appellant must be taken to have known what he was doing and that it was wrong) nevertheless we think that there is ground for surmising that the appellant may have suffered from some such abnormality of mind as might, under the recent amendment of the law in England, be held to diminish his responsibility. That opinion is based very largely upon the evidence of Dr. Shea", and, without expressing any view one way or the other with regard to the correctness of the verdict which they think would be outside their province, to express their concurrence in the concluding words of the observations quoted above.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the High Court set aside and the verdict and judgment of the trial court restored.

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In the Privy Council

THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

v.

JOHN WHELAN BROWN

DELIVERED BY LORD TUCKER

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