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Limiting the scope of psychiatric evidence in criminal trials - Case Analysis – R v BRM [2022] EWCA Crim 385

<https://www.bailii.org/ew/cases/EWCA/Crim/2022/385.pdf>

1. **Timothy Raggatt QC and Richard Moss, 4KBW**, appeared *pro bono* on behalf of the Applicant at this renewed application for leave to appeal conviction.
2. In refusing the application the Court has further limited the scope of the admissibility of psychiatric expert evidence in criminal trials.
3. The case related to the murder of Ollie Stephens, the trial of which occurred at Reading Crown Court in June to July 2021 and was widely reported in the national media. Mr Raggatt and Mr Moss appeared on behalf of BRM, instructed by Heather Howe of Andrew Storch Solicitors, a 14 year-old boy, 13 at the time of the killing, with a longstanding diagnosis of Asperger's/Autistic Spectrum Disorder (ASD). An intermediary assisted him throughout the trial and during the giving of evidence.
4. He stabbed the deceased, also 13, twice during an altercation which the deceased had with another boy X. The deceased had been brought to the location by his former girlfriend Y. X and BRM were convicted after trial of Murder. BRM was acquitted of perverting the course of justice in relation to the deletion of phone data having earlier pleaded guilty to a separate count of perverting the course of justice regarding the disposal of clothing. X was convicted of perverting the course of justice re that disposal having earlier pleaded guilty to a similar count re the deletion of phone data.
5. Y had before the trial pleaded guilty to Manslaughter which was accepted by the Crown. She was represented by Kate Lumsden QC, 23ES, and **Nadia Chbat, 4KBW**, instructed by Paul Gilmartin of Albin & Co Solicitors. Her sentence was subsequently increased following an Attorney General's Reference.

Grounds of Appeal

6. There were four grounds of appeal:

- (1) the judge erred in ruling that psychiatric evidence relating to the applicant's diagnosis of Asperger's/ASD was not admissible to the issue of intent;
- (2) the judge erred in ruling that the served psychiatric evidence was inadmissible as to the first limb of self-defence;
- (3) the judge erred in not allowing the defence to adduce through the defendant that he was diagnosed with Asperger's/ASD;
- (4) the judge erred in not granting an adjournment for the defence to obtain a further report from the instructed psychiatrist.

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Ground 3 – Adducing the diagnosis through the defendant

7. The court dealt with ground 3 first. At paragraph 24 it held that questions as to BRM's reaction to stimuli were permissible but that reference by BRM to his own diagnosis was not.

Ground 1 – Psychiatric evidence and intent

8. In relation to ground 1 the Court has further limited the scope to adduce expert psychiatric evidence as to the issue of intent. It appears at paragraph 32 *et seq* that the Court has explained the cases of *R v TS* [2008] EWCA Crim 6 and *R. v Thompson (Andrew)* [2014] EWCA Crim 836, as not relating to intent at all.

9. In *R v TS* the Appellant had been convicted of the indecent assault and rape of his estranged wife. His defence had been that she had consented. The Appellant was subsequently diagnosed with Asperger's and the psychiatrist's evidence was that this impacted on his ability adequately to determine another's intentions or beliefs or desires and understand signs and straightforward indications. The Court held that if accepted, the evidence might have persuaded the jury that the Appellant had indeed believed that the complainant had consented.

10. In ruling that the new psychiatric evidence in that case was admissible the Court stated at paragraph 34 that:

“it would have enabled a defence for the first time to be based on the requirements of *mens rea*.”

11. In *Thompson*, another sex case, the Court stated at paragraph 31:

“We agree with the direction given by Judge Sheridan to the Aylesbury jury that the diagnosis of Asperger's syndrome was relevant to the questions: (1) what the appellant did and (2) with what intention he did it.”

12. In the present matter the Court explains this language in *Thompson* in the following way at paragraph 33:

“On appeal, this court concluded that the issue in relation to which evidence of the appellant's condition was significant was whether the sexual assault in the particular case was sexually motivated. Evidence of the appellant's condition could have explained the nature of the act and its purpose. Again, in our view, intent in the true sense of the word was not the issue.”

13. Despite the use of the word “intent” in *Thompson*, the Court's analysis is that in fact Asperger's in that case was relevant to whether an act was “sexual”. In other words psychiatric evidence may be relevant to whether the defendant's acts had a sexual purpose as defined by section 78(b) of the Sexual Offences Act 2003. The distinction appears to be it may be relevant to purpose but not to intent. The use of the word “intent” in *Thompson* consequently must be wrong.

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14. Similarly the Court's analysis of *TS* at paragraph 32 is:

"In our view that issue was not intent in the true sense. Rather, it was the subjective belief of the appellant"

15. That analysis begs the question what is intent but the subjective belief of a defendant? It appears from the Court's analysis of *TS* that the reference to *mens rea* in that case must be limited to the subjective belief in consent.

16. At paragraph 34 the Court held that there is ample authority that as a general rule expert evidence is not relevant to intent and cited **R v Hassan [2018] EWCA Crim 498**.

17. *Hassan* was a terrorism case and the point on appeal was the admissibility and relevance of psychological evidence of ASD. The Court held at paragraph 20:

"We reject the proposition that the evidence of a psychologist is admissible to assist the jury on the question of what the applicant or indeed any defendant actually intended, in this case when he made and deployed the explosive device. Indeed, Mr Maloney does not suggest that Dr Green can give evidence of what the applicant's intention was, but only how his mind might have operated which itself could impact on the jury's consideration of the issue."

18. Further at paragraph 23:

"The question is what the applicant intended and it is not suggested that he was not perfectly capable of forming an intent to kill or endanger the lives of others. If Dr Green was purporting to answer that question...he is not entitled to do so. If he is not, one could question how the jury would be assisted by what he has said in the context of what the issues identified by the defence case statement are."

19. *Hassan*, however, bears further scrutiny. At paragraph 17:

"...the basic proposition that the question of admissibility and relevance will in each case turn on the nature of the issues arising on the specific facts and the extent to which the particular material in question can assist a jury. Thus, for example, as was the case in *Thompson*, expert evidence may be relevant if it will assist a jury in the interpretation of conduct that to a "neuro-typical mind" may suggest one motive, but in the context of a developmental disorder may appear different."

20. Additionally, at paragraph 26 the court emphasised that the decision as to admissibility was based on the circumstances of that case, "irrespective of what might be the position in other cases."

Ground 2 – The Subjective Element of Self-Defence

21. In relation to Ground 2 the Court followed *Press and Thompson [2013] EWCA Crim 1849* in holding that psychiatric evidence may be relevant to the first limb of self-defence. At paragraph 44 the Court held, however, that the psychiatrist in the present matter had not related the diagnosis of ASD to what BRM had actually done in the fight.

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22. The judgment sets out the difficulties that existed in the obtaining and presentation of the psychiatric evidence and those difficulties will not be rehearsed in this article.

Ground 4 – Obtaining Further Psychiatric Evidence

23. Ground 4 related to the difficulties which were experienced with the instructed psychiatrist and the refusal of the trial judge to allow further time to obtain admissible evidence from an alternative psychiatrist. In essence a 14 year-old boy should not be prejudiced in his defence by the failings of an expert witness.

24. The court held that this ground had “superficial” force at paragraph 48, before concluding, at paragraphs 49 and 50, that notwithstanding the diagnosis of ASD that the case was actually straightforward as to what BRM in fact did before assessing that the case did not necessitate the ordering of a further psychiatric report.

25. At paragraph 50 the Court concluded:

“The fact that he had, and still has, Asperger Syndrome, in our judgment, had no relevance and still has no relevance”

Conclusion

26. Whether the present case firmly shuts the door on psychiatric evidence being admissible as to intent will perhaps have to be the subject of further guidance from the Court. When one scrutinises *Hassan* there may be some scope to argue for such admissibility as all cases turn on their own facts. The present judgment makes that scope, however, vanishingly small. There remains the scope to adduce such evidence in relation to the first limb of self-defence, but the Court has made clear that such evidence must be tethered to a disorder which relates to a particular relevant aspect of a defendant’s reaction as opposed to evidence of general reaction to stimuli.

Richard Moss

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