DIRECTOR OF PUBLIC PROSECUTIONS v LUKWOSHA (1966) ZR 14 (CA)

COURT OF APPEAL

BLAGDEN CJ, DENNISON AND WHELAN JJ

16th FEBRUARY 1966

Flynote and Headnote

[1] Criminal law - Insanity - Diminished responsibility - Not provided for in Penal Code, s. 13.

Although diminished responsibility may be relevant to a criminal charge in the sense that it influences the accused's intentions or knowledge, diminished responsibility does not form part of Penal Code s.13's definition of insanity as a defence to a criminal charge.

[2] Evidence - Presumption - Accused intends natural and probable consequences of his acts - Rebuttable.

In the criminal law there is a rebuttable presumption that a man intends the natural and probable consequences of his acts.

[3] Criminal law - Presumption - Accused intends natural and probable consequences of his acts - Rebuttable.

See [2] above.

[4] Criminal law - Murder - Malice aforethought - Subjective rather than objective test.

In a charge of murder, it is the malice of the perpetrator of the deed, and not that of some hypothetical reasonable man, that must be proved, although, in evaluating the evidence, it is often useful to consider what a reasonable man would have intended or foreseen.

PER BLAGDEN CJ

[5] Criminal law - Insanity - Inability of accused by reason of disease of mind to form intent to kill or to cause grievous bodily harm - 'Incapable of understanding what he is doing' in s. 13 of Penal Code interpreted.

The language 'incapable of understanding what he is doing' in s.13 of the Penal Code refers not merely to the accused's knowledge of what physical act he is performing but also to his knowledge of the probable consequences of that physical act; accordingly, when a disease of the mind renders the accused incapable of foreseeing these probable consequences, he is legally insane within the meaning of s.13 of the Penal Code.

PER WHELAN AND DENNISON JJ

[6] Criminal law - Murder - Malice aforethought - Relationship between disease of accused's mind and accused's ability to appreciate the consequences of his acts.

See[5] above.

PER WHELAN AND DENNISON JJ

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Cases cited:

(1) *DPP v Smith* [1961] AC 290; [1960] 3 All ER 161; 105 SJ 105.

(2) *Hardy v The Motor Insurers' Bureau* [1964] 2 QB 745; [1964] 2 All ER 742; 108 SJ 422.

(3) *White v White* [1950] p. 39; [1949] 2 All ER 339; 93 SJ 576.

Statutes construed:

Penal Code (1965, Cap. 6), ss. 13, 180.

Court of Appeal Ordinance (19 Cap 12) s. 12 (2)

D P P, for the appellant

No appearance for the respondent

Judgment

Blagden CJ: The respondent to this appeal, Evaristo Lukwosha, was charged before the High Court, Lusaka, with the murder of his father, Lukwosha Kasongoloka, on the 4th February, 1963, at Chikoti Village in the Abercorn District. He was convicted of manslaughter and sentenced to six years' imprisonment with hard labour. The Director of Public Prosecutions appeals against that conviction under the provisions of s.12 (2) of the Court of Appeal Ordinance (Chapter 12 of the Laws) contending that the respondent should have been convicted of murder. The DPP appeared in person to argue this appeal, but the respondent was not present and was not represented.

For the purposes of the appeal the facts of the case, which were not in dispute, can be reduced to a very narrow compass. About the 1st February, 1963, the respondent, who is a villager living on his own farm in Chikoti Village, began exhibiting symptoms of being mentally unbalanced. On the 4th February he had a quarrel with his wife. His father and his uncle, Henry Kasongoloka, intervened and restrained him. Later that day, at about 6 p.m., the respondent came running up to the house where his father and uncle were, carrying a pounding stick and shouting: 'I am going to chase you away from this village'. His actions and demeanour frightened his father and uncle who ran off with the respondent in pursuit. The respondent overtook his father and struck him to the ground with the pounding stick. As he lay on the ground the respondent struck him again on the mouth with the stick. The deceased's skull was fractured and extensively bruised, and he died as a result. The medical evidence was that a considerable amount of force must have been used to inflict these injuries.

Subsequently the respondent made a number of confessions, and on being charged at Abercorn Police Station on the following afternoon, he said: 'I admit the charge that I killed my father because he found a witch doctor who gave me medicine then my heart arose. When killing him I did not know what I was doing, from when I was born I have never fought with him.'

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The respondent first appeared before the High Court at Fort Rosebery on 21st May, 1963, when he was found to be of unsound mind and incapable of making his defence. On 17th November 1964, he was found fit to plead and his trial commenced before Charles, J on 21st February, 1965.

The defence put forward on behalf of the respondent was that he was insane at the time that he killed his father within the meaning of s.13 of the Penal Code, that is to say, that by reason of a disease affecting his mind at that time, he was incapable of understanding what he was doing or of knowing that he ought not to do it. The respondent did not give evidence or make a statement, and the defence relied on evidence elicited in cross - examination from the prosecution witnesses and the testimony of Dr Haworth, who was called for the defence.

On the evidence before him the learned trial judge found that the defence of insanity failed. He said: 'While I am satisfied by the evidence, on the balance of probabilities, that at all relevant times the accused's mind was diseased, in the proper sense that his brain was not functioning normally, as a result of it, or another organ, or the nervous system, being afflicted by a malady, I am not satisfied on the balance of probabilities, that that affliction caused him to be incapable of knowing what he was doing or that he ought not to do what he was doing.'

He found it proved that the respondent had caused the death of the deceased by striking him in the exercise of his volition with a heavy implement without legal justification or excuse, so that he was at least guilty of manslaughter. The judge then turned his attention to the question of malice aforethought, and here he said he entertained a reasonable doubt. He expressed it in this way:

' My doubt arises thus: The accused's mental disorder appeared to have resulted from a belief, which commonly and unreasonably besets persons of the accused's walk of life, in poisoning or witchcraft or both: there is evidence that under the influence of such a belief he initially threatened to chase the deceased and others out of the village: and, consequently it may well be that when he did this and hit the deceased, he acted with that intention only and without realisation of the nature of the blow or blows which he was inflicting or of their possible effect notwithstanding that he realised the effect as soon as it occurred.

' The accused, therefore, will be found not guilty of murder as charged but of manslaughter, contrary to s.176 of the Penal Code.

It is this, and substantially only this portion of the judgment about which the DPP complains. He advanced two grounds of appeal; first that the learned trial judge had misdirected himself as to

the effect and scope of s.13 of the Penal Code: and secondly, that he had erred in law 'in reducing the charge on conviction to that of manslaughter'. These two grounds are closely inter - related and can conveniently be taken together. Section 13 of the Penal Code is in these terms:

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' Insanity 13. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.

But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.'

Clearly the learned trial judge was of the opinion that this was a case falling within the last paragraph of this section.

[1] The first point I would like to make about s.13 is that it does not itself introduce any concept of diminished responsibility *in law*: but that of course does not mean that in any particular case a state of diminished responsibility cannot exist *in fact*, and if it does, it may have considerable influence on the intentions or knowledge of the person subject thereto. But so far as s.13 alone is concerned it is all or nothing. There is *no* criminal responsibility where the accused person is suffering from a disease of the mind and the effect of that disease is such as to render him incapable of understanding what he is doing or incapable of knowing that he ought not to do it. There *is* criminal responsibility although the accused person is suffering from a disease of the mind, if the effect of that disease falls short of inducing one or other of those incapacities.

In the former case the defence of insanity succeeds, in the latter it fails. In consequence, where the charge is murder, I cannot see that there is any room for a verdict of manslaughter within the purview of s.13.

But that is not to say that an accused person whose defence of insanity to a charge of murder has failed, cannot be convicted of manslaughter. It may still appear that although the accused understood what he was doing and knew he ought not to do it, nevertheless he was not actuated by malice aforethought as defined in s.180 of the Penal Code. It may still appear, in other words, that he did not intend to cause the death of or grievous harm to anyone, and that he did not know that what he was doing would probably cause either of those effects.

[2] [3] It is for the prosecution to prove that there existed in the accused the intention or knowledge which constitute malice aforethought. Intention and knowledge are not susceptible of direct proof. It is not possible to look into a man's mind and see the intention and knowledge therein. Sometimes a man may declare his intentions or state his knowledge. That is about as near as one can get to direct evidence of intention and knowledge. More usually intention and knowledge are matters of inference to be drawn from proved conduct and actions. There is a

presumption that a man intends the natural and probable consequences of his acts. It is a presumption of good sense; but, of course, it is readily rebuttable.

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BLAGDEN CJ

What was the evidence here? It came mainly from the witness Henry Kasongoloka. It was he who described how the respondent came running after him and the deceased with a pounding stick, saying: 'I am going to chase you away from this village.' There was an expression of intention. But what the respondent then proceeded to do rather belied that his intention was so limited. For although the witness and the deceased continued to run away, the respondent overtook the deceased and struck him at least one blow with a very heavy implement of such severity that it proved fatal.

What is the natural inference to draw from such conduct? Surely that the respondent intended to cause the deceased grievous harm at least; and even if that was not his intention, then surely he must have known if he struck the deceased in that fashion, with that weapon, he was bound to cause him grievous harm.

The learned trial judge, however, did not draw either of these two inferences. He entertained doubts and appears to have accepted, as a reasonable possibility, that the respondent's intention was only to chase the deceased out of the village, and that he acted 'without realisation' - that is to say, without knowledge - 'of the nature of the blows which he was inflicting or of their possible effect, notwithstanding that he realised the effect as soon as it occurred'.

What was it that led the learned trial judge to make this assessment? Undoubtedly it was the respondent's mental state. The judge had already found that at all relevant times the respondent's mind was diseased. The effect of the judge's finding in regard to the respondent's mental state may be summarised in this way:

(1) At all relevant times the respondent was suffering from a disease of the mind;

(2) The effect of that disease of the mind was *not* such as to render him incapable of understanding what he was doing, or of knowing that he ought not to do it;

(3) But the effect of that disease of the mind *might* reasonably have been such as to prevent him from knowing that what he was doing would probably cause grievous harm to someone.

The main question which is posed by this appeal is: having regard to the finding in (2), is there room for the finding in (3)?

Once it is accepted that a man is suffering from a disease of the mind, but the effect of that disease is not such as to prevent him from understanding what he is doing or knowing that he ought not to do it, there is obviously little room for finding that the effect of that disease was such as to prevent him from knowing what the probable consequences of his actions would be. But I do not think that that possibility can be ruled out.

A reasonable man, understanding what he was doing and knowing that he ought not to do it, would undoubtedly be certain also to

know what the probable consequences of his action would be. But a man suffering from a disease of the mind cannot be accounted a reasonable man.

Section 177 of the Penal Code reads: 'Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.'

[4] I would observe that the malice that has to be proved is the malice of the perpetrator of the deed and not that of some hypothetical reasonable man.

The DPP's answer to this line of reasoning was to refer us to the well - known case of *DPP v Smith* [1]. I take the facts and the summary of the findings in that case from the digest of it which appears in CLY 739. Smith was driving a motor car containing stolen property and was ordered to stop by a police constable. Instead of doing so he accelerated and the constable jumped on to the car. Smith then drove faster and made the car swerve violently so that the constable fell off and was killed by an oncoming car. Smith's defence was that he had no intent to kill or to cause grievous bodily harm. He was convicted of capital murder, but on appeal to the Court of Criminal Appeal a verdict of manslaughter was substituted. The prosecutor appealed further to the House of Lords who restored the verdict of capital murder. The main reason for the House of Lords' decision according to the reports of the case was that Smith's actual intention was not material since as a reasonable responsible man, he must be taken to have intended the natural and probable consequences of his acts. This decision came in for some criticism and was expressly disavowed in Australia, but in the case of *Hardy v The Motor Insurers' Bureau* [2], it was explained by Lord Denning, M.R (who was a party to the decision in the House of Lords) and Pearson, LJ, and their explanations show it in a somewhat different light.

In *Smith*'s case the trial Judge had directed the jury in these terms:

' . . . if you are satisfied that . . . (the accused) must as a reasonable man have contemplated that grievous bodily harm was likely to result . . . and that such harm did happen and the (deceased) died in consequence, then the accused is guilty of capital murder.'

Commenting in *Hardy*'s case on this direction, which he described as a direction 'in the time - honoured way', Lord Denning, M.R said at p.745:

' When you analyse that direction, it means that, in judging of intent, the jury should regard the accused (in the absence of evidence to the contrary) as a " reasonable man". That means, in this context, an ordinary man capable of reasoning who is responsible and accountable for his actions. So regarding him, the jury should ask themselves:

"Is the evidence so strong that we are satisfied that he, the accused man, must himself have been aware that grievous bodily harm was likely to result?"

BLAGDEN CJ

' If so, he is guilty of murder. That test is clearly subjective, not objective. "Must *he, the accused man*, have been aware?" It is a test which has been used by the judges of England for well over one hundred and twenty years . . . He is undoubtedly guilty of manslaughter, but may it not also amount to murder? And how do you distinguish between them? Only by reason of his state of mind at the time. If the thought flashed through his mind . . . " I am determined to escape and will run him down if he does not get out of the way", and in consequence the man is killed, the driver is guilty of murder. And how can you find out whether such a thought passed through his mind? Only by asking whether, an ordinary responsible person, he must have been aware that grievous bodily harm was likely to result. Such a state of mind, if death results, makes him guilty of (murder).'

Pearson, LJ said at p.748:

' First, it is important to note that the phrase "reasonable man" is used in a special sense. Normally in legal mythology the reasonable man is an idealised average man, behaving always as the average man behaves in his good moments. The average man may have his bad moments when, for no sufficient reason, he loses his temper or suffers from panic, or when he becomes careless, or when he is stupid or biased or hasty in his judgments. The reasonable man, as normally understood, has no such bad moments. But in *Smith*'s case the "reasonable man" was defined quite differently.'

Pearson, LJ then went on to quote from the speech of Viscount Kilmuir, L.C. in *Smith's* case, where the Lord Chancellor said ([1960] 3 All ER at 169; 1961 AC at 331):

' My only doubt concerns the use of the expression " a reasonable man", since this to lawyers connotes the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury.'

Pearson, LJ continued:

' There is also an important passage in these words [1960] 3 All ER at 167; [1961] AC at 327):

". . . provided he was in law responsible and accountable for his actions, i.e. was a man capable of framing an intent, not insane within the McNaughton Rules and not suffering from diminished responsibility."

It follows, I think, that the reasonable man referred to in *Smith's* case may not only have bad moments, but also be of less than average intelligence, morality and judgment, so long as he is not insane or of diminished responsibility and is responsible and accountable for his actions. Any accused who is not putting forward a defence of insanity or diminished responsibility can

BLAGDEN CJ

be assumed to be a "reasonable man" in that very limited sense. Then this is the syllogism. No reasonable man doing such an act could fail to foresee that it would in all probability injure the other person. The accused is a reasonable man. Therefore, he must have foreseen, when he did the act, that it would in all probability injure the other person. Therefore he had the intent to injure the other person. That syllogism, however, uses the objective test as a means of ascertaining by inference the actual intention of the accused. It would be natural to take into account on the other side any evidence given by the accused by way of explaining his act and stating what was his intention, or, perhaps his absence of intention. The jury would come to their decision on the totality of the evidence, having regard both to the result of applying the objective test (that is to say, inferring the intention from the act) and to the subjective evidence given by the accused. It is at this point that the difficult problem arises. The reasoning in *Smith's* case might seem to require that any subjective evidence given by the accused as to his intention should be eliminated or disregarded. Therefore, it is important to note that the passage is introduced by the words "in such a case as the present". That passage should be read *secundum subjectam materiam* in relation to the facts of *Smith*'s case, where there was apparently an overwhelming probability that the acts of Smith would cause serious injury to the police officer, and Smith if he was a "reasonable man" even in the most limited sense, must have realised what the probability was. When a case is of that character, the result of applying the objective test, namely, the inference from the act, may be so clear and certain as to be decisive and to render any subjective evidence manifestly worthless so that it should be left out of account.'

I have quoted these *dicta* at some length because it seems to me that they assist in putting *Smith's* case in its proper perspective.

But we are concerned here with the interpretation and application of s. 180 of the Penal Code - what is meant by malice aforethought and how it may be proved.

The malice aforethought that has to be established to convict of murder is, in my view, clearly subjective malice. I would repeat that what has to be proved is that the accused - not some hypothetical reasonable man - was actuated by malice. But in evaluating the evidence to see whether it establishes malice in the accused, it is logical to make use of an objective test; must a reasonable man, doing what the accused did, have foreseen that the probable result would be grievous harm to someone?

The objective test is naturally only applicable to such of the evidence as cannot be evaluated by more direct means. The totality of the evidence must be considered and the subjective elements in it may well weaken and displace any inference arising from the objective test.

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BLAGDEN CJ

Now what was the respondent's position here? On an objective view of his actions he was clearly guilty of murder, because no reasonable man could have failed to foresee that if he struck blows with a pounding stick, as the respondent did, he would cause grievous harm to someone. But the

respondent could not be accounted a reasonable man because he was suffering from a disease of the mind; true, that disease was not so severe as to render him insane within the meaning of s. 13 of the Penal Code, but might it not be sufficient to prevent him from knowing that his actions would probably cause grievous harm to someone? For myself I readily concede that I would regard that possibility as minimal, but I do not think it can be ruled out.

I have referred earlier to the fact that s. l 3 of the Penal Code does not recognise diminished responsibility in law. But diminished responsibility may exist in fact; and its effect might conceivably be such as to prevent a man who knows what he is doing and that he ought not to do it, from knowing what the probable consequences of his actions will be.

The Court cannot ignore this possibility; and it is a possibility which does not have to be established by the defence, but negatived by the prosecution - and that to the standard of proof beyond reasonable doubt.

I have come to this conclusion not without difficulty. I am aware of the contrary opinion expressed by Prof. Glanville Williams in his *Criminal Law: The General Part*, 2nd ed., at 521 - 627 (para. 166) and in particular at 525 - 526, where the cases of *Davies*[1858] 175 ER 630 and *Bingham* (1951) *Lynn News and Advertiser*, 2nd February 1951 are discussed. But we are concerned here with the interpretation of a Zambian statute, not with the interpretation of British Common Law; and our interpretation must conform strictly to the meaning of the words used, even although, as here, those words constitute a codification of the British Common Law.

By s.13 of the Penal Code, the Legislature limited the application of the defence of insanity to two classes of case - first, insanity which produces in the accused an incapacity to understand what he is doing; and secondly, insanity which produces in the accused an incapacity to understand that he ought not to do it. Had the Legislature intended that the defence of insanity should be applicable to a third class of case - insanity which produces in the accused an incapacity to know that what he is doing will probably have certain consequences such as the causing of grievous harm to someone - the Legislature would surely have said so.

Where it appears from the evidence that an incapacity to appreciate consequences might reasonably exist although the two types of incapacity referred to in s.13 do not, the defence of insanity would fail, but the position would be that the prosecution, too, would fail - fail, that is, to establish the incidence of malice aforethought beyond reasonable doubt.

1966 ZR p23

WHELAN J

That was the position the judge found here. Malice aforethought in the respondent was not established to his satisfaction. Murder was not proved. This was a position which judging by the recorded evidence I do not think I would have found myself if I had been trying the case. But I cannot say that the learned trial judge, who had the great advantage of seeing and hearing the evidence given before him, was wrong in coming to the conclusion he did; and for these reasons I would dismiss this appeal. In this I differ from my brethren whose judgments are about to be delivered. The order of this Court will be that this appeal is allowed. There will be no further

order since in accordance with the *proviso* to s. 12 (2) of the Court of Appeal for Zambia Ordinance, the judgment and orders of the High Court still stand.

Judgment

Whelan J: On the 4th February, 1965, the respondent, Everisto Lukwosha, was convicted by the High Court, Lusaka, of manslaughter contrary to s. 176 of the Penal Code on his trial on an information alleging murder contrary to s. 177 of the Penal Code.

The Director of Public Prosecutions appeals to this court against the respondent's conviction of manslaughter on the following grounds:

(i) that the learned trial judge misdirected himself in law as to the effect and scope of s. 13 of the Penal Code; and

(ii) that the learned judge was wrong in law in reducing the charge on conviction to that of manslaughter contrary to s. 176 of the Penal Code.

The respondent had struck his father on the head and mouth with a pounding stick fracturing his skull and so causing his death. The respondent's defence to the charge of murder was insanity. The learned trial judge on the evidence before him found that at all relevant times the accused's mind was diseased, in the proper sense that his brain was not functioning normally as a result of it, or another organ, or the nervous system, being afflicted by a malady, but stated that he was not satisfied on the balance of probabilities, that that affliction caused him to be incapable of knowing what he was doing or that he ought not to do what he was doing and that the defence of insanity failed. The learned trial judge then went on to consider the question of malice aforethought and came to a conclusion in this regard in the following words:

' On the question whether the accused struck the deceased with intent to kill or inflict grievous harm, in which case he would be guilty of murder in the absence of legally recognised provocation, I have what I regard as a reasonable doubt. My doubt arises thus: the accused's mental disorder appears to have resulted from a belief, which commonly and unreasonably besets persons of the accused's walk of life, in poisoning or witchcraft or both: there is evidence that under the influence of such a belief he initially threatened to chase the deceased and others out of the village: and, consequently, it may well be that

when he did chase and hit the deceased, he acted with that intention only and without realisation of the nature of the blow or blows which he was inflicting or of their possible effect, notwithstanding that he realised the effect as soon as it occurred.

' The accused, therefore, will be found not guilty of murder as charged but of manslaughter, contrary to s. 176 of the Penal Code.

The argument of the Director of Public Prosecutions against this conclusion is that the learned trial judge, having found that the respondent was suffering from a disease of the mind but that

the effect of that disease was not such as to render him incapable of understanding what he was doing or of knowing that he ought not to do it, and thereby rejecting the respondent's defence of insanity, it was not possible to reduce the charge on the basis that the respondent was unable to form an intention to kill or inflict grievous harm because of a disease of the mind.

Section 13 of the Penal Code reads thus:

' A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.

But a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.'

[1] There is no doubt that the defence of diminished responsibility has no place in s. 13 of the Penal Code. It is because of this that the Director of Public Prosecutions argues that the learned trial judge having rejected the respondent's defence of insanity he was bound to treat him as a reasonable man and as such, in view of the fact that a reasonable man would, in striking another about the head with a pounding stick, as did the respondent strike the deceased, undoubtedly be certain to know that his action would probably result in death or grievous harm, the respondent should have been convicted of murder. In support of this proposition the appellant refers to the decision of the House of Lords in the case of *DPP v Smith* [1960] 3 All ER 161 (1). That case in my view clearly laid down that in the circumstances of that case the test of the mental element in murder was an objective one, the test of what a reasonable man would contemplate as the probable result of his acts and therefore would intend. In *Hardy v Motor Insurers' Bureau* [1964] 2 All ER 742 (2) in the Court of Appeal Lord Denning put forward the view that *Smith's* case did not lay down an objective test: 'That test is clearly subjective, not objective. "Must he, the accused man, have been aware".' For myself, I find this difficult to reconcile with the judgment in *Smith*'s case but as Lord Justice Pearson said in *Hardy's* case, 'The reasoning in *Smith's* case might

seem to require that any subjective evidence given by the accused as to his intention should be eliminated or disregarded. Therefore, it is important to note that the passage is introduced by the words, "In such a case as the present".' But *Smith's* case was one dealing with an apparently ordinary man. Viscount Kilmuir had stated ([1960] 3 All ER 167B),

' The jury must of course in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, i.e., was a man capable

of forming an intent, not insane within the McNaughten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.'

Now in the instant case the learned trial judge found that the respondent was suffering from a disease of the mind. It was a fact found by the learned judge that the respondent was incapable by reason of such disease of forming an intent to kill or cause grievous harm. The respondent was not, therefore, in the words of Lord Kilmuir which I have just quoted, a man capable of forming an intent, and the objective test of the reasonable man cannot be applied to him. [5] [6] That does not, however, in my view justify finding that the respondent was not guilty of murder but guilty of manslaughter, and the error of making such a finding comes from putting too narrow a construction on the words in s. 13 of the Penal Code, 'Incapable of understanding what he was doing'. The learned trial judge obviously took the view that these words simply posed the question, 'Did the accused know that he was striking his father on the head with a pounding stick?' I take the view that the question posed is wider, that is to say, 'Did the accused know that he was striking his father on the head with a pounding stick with the probable consequence that death or grievous harm would result?' As Asquith, LJ, said in *White v White*[3], when discussing the McNaughten Rules, 'The more obvious consequences of an act are incorporated in the act itself. An act in the narrowest sense of the word means, as Holmes, J... pointed out, merely a muscular contraction, e.g., a contraction of my forefinger. But if my forefinger is on the trigger of a gun, and I know the gun is pointed at X, the obvious consequences of the muscular contraction is that X will be killed or injured; the act is then the act of shooting X'.

1966 ZR p26

DENNISON J

The learned trial judge found that the respondent knew that he was striking the deceased on the head but that he did not know - as any reasonable person would - that the obvious consequence of his act would be that the deceased would be killed or suffer grievous harm. As that lack of knowledge as to the consequences of his immediate physical act was, as found by the learned trial judge, due to a disease of the mind the respondent's action fell within the provisions of s. 13 of the Penal Code in that he did not know what he was doing and the proper finding should have been that the respondent was guilty of the murder of the deceased but was insane at the time he committed it.

I would therefore allow this appeal.

Judgment

Dennison J: I have had the advantage of reading in advance the judgments of my brethren, and I will not review the evidence again or go over their learned reviews of all the law involved.

The decision, the subject of this appeal, cannot have been an easy one to reach on the evidence adduced at the trial, the trial of a man who has undoubtedly been mentally disordered at some stage or stages of his life.

The learned trial judge was dealing with a charge of murder, laid against a man who had struck his father a fatal blow with a pole in February, 1963, had been found of unsound mind and incapable of making his defence when before the High Court in May, 1963, and was eventually arraigned and tried in February, 1965. To a reader of the record today the evidence of the very unsophisticated witnesses from the village concerned seems unusually vague and, certainly to me, the evidence of the psychiatrist witness, an acknowledged expert in his field, was of comparatively little help because most of the views which he offered as to the mental states of the respondent were based on suppositions. He was pressed by court and counsel with hypothetical circumstances which were not in all cases clearly related to circumstances revealed in the evidence of the villagers. He had only seen the respondent during visits to the Livingstone Prison prior to the actual trial and had certified that he was then fit to plead. But he made some significant comments in reply to rather more relevant inquiries posed by the learned trial judge When he was asked if he was able to say ' whether it is positive that the prisoner had any mental illness at the time of his offence' the doctor said:

' Well by accepting the information he gave me, which because of the coherence of the story and because of the way it corresponds with my own experience in similar cases, I have no doubt, I still have no doubt that he was mentally disordered at the time.'

Asked further by the learned judge if he was able to express an opinion as to whether the prisoner knew what he was doing at the time, the doctor replied:

' I think that he - it is very difficult - he may have known what he was doing, but in these states you sometimes get a condition known as clouding of consciousness in which the patient is not fully aware of what is happening to him for a brief period.'

Asked by the learned judge if that meant that while he was doing some act he would not know what he was doing, the doctor said that it was quite possible for that to happen.

The evidence of the villager eye - witnesses and relatives showed that the accused man was in an odd mental state before and after the fatal blows had been struck.

In considering the respondent's disease of the mind, the learned trial judge seems to have placed great weight on the prisoner's confessions as proof that he knew what he was doing at the time when he struck and killed his father. The learned judge said of that:

' While I am satisfied by the evidence, on the balance of probabilities, that at all relevant times the accused's mind was diseased, in the proper sense that his brain was not functioning normally as a result of it, or another organ, or the nervous system, being afflicted by a malady, I am not satisfied, on the balance of probabilities, that that affliction caused him to be incapable of

knowing what he was doing or that he ought not to do what he was doing. It follows that I must presume that the accused's confessional statements were made with knowledge of what he was doing. It also follows that the defence of insanity fails'.

The learned judge went on to place great weight on these confessional statements on that basis.

I would have said, with respect, that it was wrong to reason so strongly that the respondent's confessions were based on a knowledge of what he was doing at the stage when he struck his father. Of these confessions, at five o'clock in the morning, after the killing, he had merely said to a sister, 'I have killed your father', a fact which must have been obvious to many other people in the village. On the forenoon of the same day, the 5th February, when arrested, the respondent said to the police officer who had described the alleged offence: 'I admit that I have killed my father because I have done it.' Here, too, was a knowledge of what was by then common talk about the village, with no real indication as to the respondent's state of mind at the time of the killing. The remaining alleged confession came at mid - afternoon that day, the 6th February, when he was formally charged and said:

' I admit the charge that I killed my father because he found a witchdoctor who gave me medicine, then my heart arose. When killing him I did not know what I was doing. From when I was born I have never fought with him.'

There, indeed, was a stated reason for the killing, but it could equally be read as an allegation that the witchdoctor's medicine interfered with his heart or emotions, leading to the event of which

the sole piece of direct evidence on the vital question of his state of mind was his own - 'When killing him I did not know what I was doing.'

[5] [6] I find myself in general agreement with my brother Whelan as to what the verdict should have been.

The learned trial judge, having been satisfied that the prisoner's mind was diseased at all relevant times, was *not* satisfied that his disease 'caused him to be incapable of knowing what he was doing'.

But here I discern a *non sequitur* in the findings and reasoning of the learned judge. In the penultimate paragraph of the judgment, having referred to his reasonable doubt whether the respondent struck with malice aforethought, he went on to refer to the prisoner's belief in witchcraft and his wish to chase his father out of the village, after which the learned judge went on:

' . . . and, consequently, it may well be that when he did chase and hit the deceased, he acted with that intention only and without realisation of the nature of the blow or blows which he was inflicting or of their possible effect . . .'

I would have said that if the respondent did not realise the nature of the blow or blows inflicted or their possible effect, then he was incapable of understanding what he was doing and fell clearly within the contemplation of s. 13 of the Penal Code. I would only add that such a finding seems to me to accord better with the evidence, scanty though it was, of the villagers as to the respondent's odd behaviour and of the psychiatrist as to the more relevant suppositions which were put to him.

The views expressed in this court are of academic interest only so far as the effect on the respondent is concerned, having regard to the terms of the *proviso* to s. 12 (2) of the Court of Appeal for Zambia Ordinance.

I would like to think that this convict is already receiving all the medical attention necessary for his physical and mental health but would recommend now that the Registrar of this court should bring the decisions of the court to the attention of the Ministry concerned, in summary form only, with a view to some extra attention being paid to this convict's mental health.

I would allow this appeal to the extent stated by my brother Whelan.

Appeal allowed