10, 1960

No. 49 of 195

In the Privy Council

On Appeal from the High Court of Australia

BETWEEN

Her Majesty's Attorney-General
for the State of South Australia
APPELLANT

AND

John Whelan Brown
RESPONDENT

CASE FOR THE RESPONDENT

RESPONDENTS CASE

CASE FOR THE RESPONDENT

Record.

1. This is an appeal by special leave from a judgement dated the 20th day of May 1959 of the High Court of Australia. The respondent had been convicted of murder and sentenced to death by the Supreme Court of South Australia on the 20th day of March 1959. An appeal to the Full Court of the Supreme Court of South Australia was dismissed on the 15th day of April 1959. The High Court of Australia in its judgement granted special leave to appeal, allowed the appeal, quashed the conviction and sentence and ordered a new trial. Pp. 81-91. Pp. 72-80.

2. The trial of the respondent before a Judge and jury had lasted from the 17th day of March until the 20th day of March 1959 when the respondent had been found guilty of murder contrary to Section 11 of the Criminal Law Consolidation Act 1935-1956 (South Australia) which reads: "Any person who is convicted of murder shall suffer death as a felon". What constitutes murder is a matter of general law.

3. The only defence of the respondent was insanity. What constitutes insanity is a matter of general law. There is no local legislation defining insanity. Section 292 of the Criminal Law Consolidation Act provides:

> "(1) Where it is given in evidence that any person charged with an indictable offence was insane at the time of the commission of the offence, and the person so charged is acquitted, the jury shall be required to declare whether he was acquitted by them on the ground of insanity.
>
> (2) The Court shall order any person found not guilty on the ground of insanity to be kept in strict custody in such place and in such manner as it thinks fit, until the Governor's pleasure be known.
>
> (3) On such an order being made, it shall be lawful for the Governor to order the safe custody of the person so found, during his pleasure in such place and manner as he thinks fit."

4. The evidence for the prosecution, which was not challenged, was that on Thursday the 20th day of November 1958 the respondent was brought to Pine Valley Station to work as a stationhand.

DONALD VIVIAN LORD, a cousin of the deceased, saw the respondent en route to Pine Valley Station. Respondent was in his company over an hour. He testified of respondent. "I noticed he was very quiet. Had hardly anything to say . . . The only thing I noticed about him apart from being quiet, was that he sort of hung his head. He was sitting forward most of the time looking down." P. 10, ll. 18-28.

Arriving at Pine Valley Station the respondent was assigned to men's quarters about 100 yards from the station homestead.

JOHN RAYMOND STOKES, the other stationhand (known as "Dave") had a room in the quarters adjoining the respondent's room. Of the respondent he testified: "I didn't see a great lot of him. I got on all right with him. I didn't see anything peculiar or unusual about him, other than he was a quiet P. 10, ll. 40-44.

P. 11, ll. 17-18. shy kind of person . . . I noticed he was quiet and shy. I noticed he seemed to be well-behaved, he was polite to Mrs. Schiller (the station cook)."

Stokes left that station on the morning of Saturday the 22nd November and did not return until Tuesday the 25th November. On his return he found the station rifle with nearly a full clip of ammunition and some 20 or 30 rounds which he had left openly in his room, were missing. Also a pair of his elastic sided boots.

P. 8. MARIAN ELLEN MAUD SCHILLER, the station cook occupied quarters quite close to the homestead. She saw the respondent when he arrived P. 9, ll. 1-4. at the station on the Thursday and at meals thereafter. Occasionally he wiped the dishes for her. Of the respondent she deposed, "He was a quiet man, I thought he was a very quiet type of man. He seemed a shy person. When he helped me dry the dishes, that was not at my suggestion, he volunteered. P. 9, ll. 6-10. As far as I could see he was just a quiet ordinary sort of man" . . . "The last time I saw the accused before the shooting was about quarter to seven, round about that time, in the kitchen. That was after tea when he was drying the dishes for me. I didn't notice anything odd about his demeanour, nothing at all. Nothing to suggest he was disturbed or upset. As far as I was concerned just the usual self he had shown at meals".

P. 6. GILLIAN JUDITH CHAPMAN LORD, widow of the deceased, lived at the station with her two young children and the deceased who managed the station. She first saw the respondent on the Friday morning when he brought in the milk and Mrs. Schiller introduced him. She said "Good day" to him and he made some reply as he went out of the door. That was all the conversation she had with him till the Sunday night.

On the Sunday night the deceased went to bed about a quarter to nine and Mrs. Lord was attending to the children in the next bedroom. The bedrooms had a communicating door. Suddenly she heard the light switched on in the deceased's bedroom and then a shot. She ran through the communicating door and saw her husband had been shot. She threw herself on the bed. The respondent re-entered the room holding a rifle. He said, "Be quiet". He then ran out. Mrs. Lord went to Mrs. Schiller's room for help. Mrs. Lord said that when she was on the bed with the deceased, the respondent P. 7, ll. 47-50. came within a foot of her. She said, "His expression on his face, I would describe it as a bit bewildered. That was the expression when he told me to P. 8, ll. 1-3. be quiet. Otherwise he seemed to be fairly calm . . ." "By bewildered, I mean, that I thought he may have been taken aback that I had come from the next room, not knowing that there was a door between. He just seemed P. 8, ll. 4-7. surprised to see me . . ." "I am almost sure there had been no unpleasantness between my husband and the accused. We had been talking a fair bit that week end and he would have told me if there had been. My husband usually got on very well with his hands."

P. 10. DONALD VIVIAN LORD the cousin arrived at the station in answer to the telephone call of Mrs. Lord. He in turn telephoned the police.

P. 9. ERNEST ARTHUR SPARROW, Police Constable arrived and found the body lying on the bed shot through the head. He then commenced a search for the respondent.

DR. MILLER arrived shortly after and found that deceased had died from gunshot wounds to the head. P. 9.

A detachment of the search party that was organized the same night encountered the respondent on the following Friday the 28th November.

MILTON ERMINE MITCHELL deposed that from a disused shed in a scrub area about 25 miles from the nearest station the respondent came up to him and Mitchell asked him who he was. P. 12.

Respondent said, "Stone. Is he dead?" (Stone was the name of respondent's foster mother. He often used that name.) P. 12, ll. 17-18.

Mitchell had the respondent despatched in a utility to Canegrass Station where respondent was briefly interrogated by CONSTABLE KELLY. P. 12.

Constable Kelly: "What is your full name?" P. 12, ll. 47-48.

Respondent: "John, well it is like this my name is John Whelan Brown but I always use the name of John Stone." P. 13, ll. 1-6.

Constable Kelly: "On Sunday the 23rd November 1958 you were employed on Pine Valley Station?"

Respondent: "Yes."

Constable Kelly: "At about 9.30 p.m. on Sunday the 23rd November 1958 were you employed on Pine Valley Station and at that time did you go to the bedroom of Neville Montgomery Lord and shoot him through the head?"

Respondent: "Yes."

Constable Kelly cautioned the respondent and asked him if he understood the caution. P. 13, ll. 6-13.

Respondent: "Yes."

Constable Kelly: "Did you shoot him with a .303 calibre rifle?"

Respondent: "Yes."

Constable Kelly: "I want you to come with me to Pine Valley Station where you will be later arrested and charged with the murder of Neville Montgomery Lord."

Respondent: "Yes I know."

In answer to questions as to the whereabouts of the rifle respondent led Constable Kelly to a place about 8 miles south-west of Pine Valley homestead where the rifle cocked and loaded was leaning against a dead tree trunk. A number of live .303 bullets were on the ground nearby.

Constable Kelly did not ask respondent why he had shot Mr. Lord. He noticed respondent spoke very little. He did not see anything odd or strange about him.

DETECTIVE LENTON questioned the respondent and the questions and answers thereby elicited were typed and the respondent signed each page "John Stone". P. 14. Pp. 95-100.

In his answers he said that he was 25 years old and was brought to the station on the Thursday and met the deceased on arrival. He occupied quarters with the other hand Stokes who left on the Saturday. On the Sunday about 8.30 he went to Stokes' room and took the rifle and bullets and went to the front of the homestead. He saw Mrs. Lord in the other room.

P. 96, ll. 46-49. Respondent said "I walked in the front door. I went into the bedroom. I put the rifle up and aimed it at him and shot him. I went out of the room and I went to see where Mrs. Lord was. She went to the bedroom. I followed her in and she was singing out and I ran out the back way".

He went to Mrs. Schiller's quarters to see where she was. Being unable to see her he went to the men's quarters and from Stokes' room took a pair
P. 97, l. 11. of boots and a packet of bullets "and then took off like. I got scared and ran away".

He said he did not know where he was when he loaded the rifle but the deceased was in bed and appeared to be asleep. He did not speak to the
P. 97, l. 44. deceased. He went looking for Mrs. Lord "because I got scared". He worked the bolt of the rifle on the way out. He went looking for Mrs. Schiller
P. 98, ll. 16-17. "Because I thought she might have rung up and given the alarm". He had tested the loading of the rifle before he went into the house. In answer to further questions he said he had never met the deceased before coming to the station. He had not had any argument with him. Neither deceased nor any member of the deceased's family had given him any cause for malice. He had spoken to Mrs. Lord once when he had met her.

P. 99, ll. 8-24. Detective Lenton: "Is there any reason you wish to offer for your conduct?"

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

Detective Lenton: "You knew that the rifle was loaded?"

Respondent: "Yes."

Detective Lenton: "You knew that when you pulled the trigger it would discharge a missile?"

Respondent: "Yes."

Detective Lenton: "And that if the missile hit anyone it would at least maim them and probably kill them."

Respondent: "Yes."

Detective Lenton: "Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them?"

Respondent. "Yes. But I couldn't help myself."

Detective Lenton: "Do you think that you would have pulled the trigger of that rifle if there had been a policeman standing by you?"

Respondent: "No."

Respondent further said that he had been in bed at the time thinking about nothing in particular: he had not been depressed: had not seen a doctor: had not had treatment for nerves or a mental condition: he was in Grade 6 when he left school: he had been brought up by a foster mother: he knew nothing of his parents.

P. 14, ll. 39-41. Next morning Detective Lenton said to him, "You realize you are going to be charged with murder."

Respondent said: "Yes I know that I did it, but all the time I was hoping it was only a dream." He described his flight into the bush lands. He later confirmed his movements in the homestead on a ground plan of the station.

Detective Lenton found him very frank. From all his enquiries the Detective said he was unable to find any apparent reason for the killing. It is significant that the Detective never asked him, "Why did you do it?" P. 15, ll. 48-50. P. 16, ll. 2-3.

Photographic and ballistic testimony completed the prosecution case.

5. In the Crown case the facts and circumstances of the killing were clearly and precisely proved and proved along with the other circumstances just as clearly as was the absence of any motive.

6. By way of defence the respondent made an unsworn statement from the dock and called witnesses.

In his unsworn statement the respondent said, "I shot Mr. Lord but I do not know why. I had no reason to shoot him—He was practically a stranger to me. I went to work at the Pine Valley Station on Thursday the 20th November and I think I had only one conversation with him from the Thursday to the Sunday when it happened. I had no cross words with him. I hardly knew him, but I liked him. On the Sunday evening when it happened I seemed to be acting in a dream. I do not know why I chose Mr. Lord rather than Mrs. Lord or the lady cook. I can remember taking the gun and going to the house and the bedroom door and firing the gun. I knew what was happening but my mind did not seem to be working in other ways. P. 55, ll. 4-20.

"In my mind there was no reason for what I was doing. In my mind there was no idea, that I was doing wrong, or that there would be any consequences, or that I would be punished afterwards.

"I seemed to be doing things without my mind coming into it. Just as if my body was doing things without my mind, just as if some strange person was doing it and I was watching it. Afterwards when I was in the bush I was not sure at first whether I had really done it, or was dreaming."

In his statement the respondent dealt with his life as a foster child of unknown parents: his experiences after he left school: the occasions when without work and food he had committed offences: how the habit of masturbation had preyed on his mind and how for some years he had suffered fits of depression and abnormal feelings that he might do something bad had come over him: that he had left his last job at midnight because of the access of such a feeling.

He stated that on the night of the shooting at Pine Valley his mind started to work again as he left the house and "my mind kept saying to me over and over again, 'Do you realize what you have done? Do you realize what you have done?' But I could not believe it. I doubted it. It was when the planes started coming over that I felt sure I had done it." P. 57, ll. 34-38.

AUDLEY MUIR STONE aged 59 a draftsman, who was the natural son of the respondent's foster mother, testified that he had known respondent from respondent's infancy. Of the respondent he deposed: "He was dull and very shy: he was very non-communicative. He didn't have a temper, in all the time I have known him I have not seen him in a temper of any shape or form. He was very obedient in the home, we never had any trouble with him at all. I would describe him as docile." P. 16. P. 16, ll. 44-47. P. 17, ll. 1-3.

Mr. Stone said that the fortnight before the respondent left for Pine Valley Station he seemed to be quieter and less communicative than ever. Since

his arrest Mr. Stone on visits to respondent at the gaol had been astounded by the absence of any sign of remorse.

P. 18, ll. 11-12. In cross-examination Mr. Stone said, "I never would think of him being locked up in a mental institution."

P. 19. ELLEN MARTHA EVERETT had worked for 3 months on the same farm as the respondent in 1958. She had found him always very polite, very

P. 20, ll. 21-22. quiet. "The last thing I would say that he showed signs of aggressiveness. He was very fond of the children up there". She regarded him as a quiet

P. 20, ll. 36-37. shy diffident young man but otherwise normal. "The last thing I would consider would be for him to be locked up in a mental institution." 10

P. 21. SYDNEY BAILEY FORGAN, Psychiatrist, deposed that he found respondent to be a shy retiring well shut-in type of person. He possessed the "schizoid" personality, *i.e.*, the type of personality which may develop

P. 22, ll. 11-51. into schizophrenia and in the witness's opinion the respondent had at the time of the shooting lapsed into a temporary state of simple schizophrenia. This

P. 23, ll. 1-9. opinion was based on—

(*a*) the commission of a completely purposeless and motiveless act of violence

(*b*) which was quite out of keeping with his normal character and

(*c*) afterwards he had no adequate realizations of what he had done, 20 and subsequently lacked adequate feelings about the act

(*d*) he lacked all understanding of his own act, and

(*e*) he had been prey to excessive feelings of guilt over his habit of self-abuse.

In his evidence Dr. Forgan described the trance-like state of a schizophrenic attack in which the patient seems to be two people and in Dr. Forgan's opinion the respondent in such a seizure would be unable to know that he was doing wrong. In cross-examination the witness agreed that it was

P. 23, ll. 40-41. an attack of only about 5 minutes duration.

P. 31, ll. 45-51. In further cross-examination he agreed that the impulse to shoot the 30

P. 32. deceased was traceable to subconscious feelings of inferiority, guilt, envy, self-

P. 33. aggrandisement, feelings which became distorted into a delusion. In this delusion the patient condemned himself but used another person to expiate his own self-condemnation.

Pp. 34-37. 7. In rebuttal BRIAN JOSEPH SHEA, Psychiatrist, deposed that he had examined the respondent on 3 occasions. He found no evidence of mental disorder, in particular schizophrenia. In his opinion the respondent knew that he was doing what was wrong when he shot the deceased. He said respondent was a schizoid personality. He disputed that there could be a transient 5 minute spell of schizophrenia. 40

P. 38, ll. 3-22. He stated that in his opinion respondent brooded over his habit of masturbation and inadequacy and suffered some instinctive jealousy and felt inferior and these feelings combined in him to produce a subconscious impulse. But Dr. Shea reiterated his opinion that the respondent still knew that what he was doing was wrong.

P. 50, ll. 9-21. In cross-examination Dr. Shea agreed with Dr. Forgan's description of the trance-like state of a person in a schizophrenic attack.

Dr. Shea said that the respondent's conduct on the night of the shooting was a culmination of his anxiety in which his emotions finally became dominant. But he rejected the idea that the respondent was unable to control these emotions. P. 50, ll. 22-45. Pp. 51-52-53.

Question: "He told the police he couldn't help himself?" P. 53, ll. 4-8.

Answer: "I remember that."

Question: "You don't accept that."

Answer: "I don't accept he could not control himself. All I say is he did not."

8. The learned trial Judge then summed up. The respondent was convicted by the jury and sentenced to death. P. 69.

9. The respondent's appeal to the Full Court of the Supreme Court of South Australia was dismissed. The grounds set out in the notice of appeal were the first four grounds set out in paragraph 1 of the notice of motion to the High Court of Australia. P. 70.

The notice of motion to the High Court of Australia set out the following grounds: Pp. 82-83.

1. "That the learned trial Judge misdirected the jury in that he—

(*a*) failed to instruct the jury, or to instruct the jury adequately as to the test in law to be applied by them in determining the issue of insanity as raised by the (respondent's) case;

(*b*) failed to put the case for the (respondent) to the jury;

(*c*) in regard to the (respondent's) unsworn statement from the dock warned the jury to be careful 'in accepting it in its entirety';

(*d*) in directing the jury that the penalty was not their concern instructed them in such terms as were likely to deflect the jury from a calm and dispassionate determination of the issue of insanity.

2. That the Full Court of the Supreme Court of South Australia in accepting as sufficient the direction of the learned trial Judge was wrong in dismissing the appeal of the said John Whelan Brown against his conviction.

3. That the Full Court of the Supreme Court of South Australia should have allowed the said appeal and entered a verdict of not guilty on the grounds of insanity or alternatively ordered a new trial.

4. That the learned trial Judge did not at any stage of his direction present to the jury the defence made by the respondent himself.

5. That the learned trial Judge did not sufficiently nor accurately present to the jury the effect of the evidence of the expert witness called for the defence nor its bearing upon the defence presented by the (respondent)."

10. The judgement of the Full Court of the Supreme Court of South Australia dealt with the objections seriatim and also "what seems to us to be the real complaint that underlies the specific objections, namely, that the charge taken as a whole, was so adverse as to be unfair to the (respondent)" and decided against the respondent. P. 75, ll. 16-19.

P. 91, ll. 30-33.

11. The High Court of Australia took a contrary view and said in its judgement: "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".

There were four passages in the summing up referred to in this finding by the High Court.

P. 62, ll. 36-51.
P. 63, ll. 1-4.

The first passage reads: "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 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".

P. 65, ll. 36-44.

The second passage reads: "These words, ('Yes. But I could not help myself') 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".

These passages had been objected to before the Full Court of South Australia and again before the High Court on the ground that the defence had not been put.

The main and clearly proven facts upon which the defence rested were—

(*a*) that the act of shooting the deceased was a motiveless act of violence

(*b*) by a person of shy withdrawn non-aggressive character, and

(*c*) that the diagnosis of Dr. Forgan that this was an attack of schizophrenia was based largely on these (and lesser) undisputed facts.

The only references in the summing up to the motiveless nature of the crime were:

P. 60, ll. 49-50.
P. 61, ll. 1-3.

(i) "It is possible that if you were asked to decide whether the accused was insane in the sense in which the word is commonly used among laymen, you might feel very strongly that no-one

but a lunatic would have killed Neville Lord on the 23rd November for the wholly insufficient reason that the accused has given."

(Later upon a request for re-direction the learned trial Judge altered the last phrase to "and wholly failed to give any reason for so doing".) P. 69.

(ii) "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 civilisation, crimes have repeatedly been committed without any apparent or discoverable motive . . ." P. 62, ll. 37-40.

(iii) "Mr. Elliott stressed to you the peculiar and almost unexplained fact of this shooting and put it to you that everybody would at once say when they considered it—'The man must be mad'. Well gentlemen of course that would not solve this thing." P. 63, ll. 35-39.

These were the only references to the first striking fact on which the respondent's defence rested and about which the evidence as the High Court expressed it "was all one way". Far from putting that fact fairly to the jury the learned trial Judge invited the jury to regard the motiveless conduct as manifesting an uncontrollable impulse. P. 89, ll. 9-10.

As to the second fact that this motiveless act of violence was committed by a person of quiet withdrawn non-aggressive character this the learned trial Judge never mentioned. The nearest and only approach to mentioning this fact was in this passage: "Mr. Elliott has placed before you the evidence of Audley Stone, a son of Mrs. Stone, the foster mother of the accused, who has known him since childhood, and the evidence of Mrs. Ellen Martha Everett, who has also known the accused for many years, but I think, gentlemen, that you may perhaps feel that their evidence is not of very much help on the question of whether the accused had this disease of schizophrenia. They undoubtedly help to prove that he was a schizoid character. There is no question about that, but whether that mere fact of being a schizoid character would lead him to kill Lord as he did, there is no evidence before you". P. 64, ll. 29-38.

As to the third main fact on which the defence rested that it was largely on the above facts that Dr. Forgan based his opinion that the respondent had suffered an attack of schizophrenia the learned trial Judge made no mention. Yet the last four pages of the summing up were largely devoted to facts upon which the Crown case in rebuttal of the defence of insanity relied.

Dissected the summing up falls into the following departments:— P. 58.

The definition and elements of the charge of murder. P. 59.

The onus and the Crown evidence in support of the charge. P. 60.

Reasonable doubt and the jury's duty. P. 61.

The defence of insanity, and onus. P. 62.

Further reference to Crown evidence leading up to the shooting.

The passage relating to uncontrollable impulse and further directions upon the defence of insanity. Pp. 62-63.

An extensive consideration of the Crown facts negativing insanity which occupies a third of the summing up. Pp. 64-66.

Nowhere in his summing up did the learned trial Judge even in one short paragraph state briefly the facts upon which the defence rested (and they were not disputed facts).

The defence, *i.e.*, the main facts on which the defence depended were never put to the jury. The only fact, namely that the crime was without apparent motive was put—as the High Court decided—"in a false light".

P. 91, ll. 13-22. The High Court expressed the law in these terms: "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 importances 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".

In this passage the High Court clearly held that the summing up violated that long line of authorities commencing with Dinnick's case (3 C.A.R. 77) requiring the defence, however weak it might be, to be fairly put before the jury.

The Full Court of the Supreme Court of South Australia treated the case of Immer and Davis (13 C.A.R. 22) as distinguishing Dinnick's case. In fact it affirmed it, though it expressed the rule somewhat negatively rather than positively in the words, "A summing up is sufficient if it is not unfair to the accused and if points are not withheld which it is reasonable to suppose are not already before the jury . . ."

In many cases the Court of Criminal Appeal has discussed the effect of this principle. From these cases the following rules emerge: The evidence for the prisoner must be put as carefully as that for the prosecution Keating 2 C.A.R. 61. The substantial defence must be put to the jury but not every part of it Trueman 9 C.A.R. 20. It is enough if the issue is properly presented to the jury and the jury directed on the evidence relating to that issue Duncan 30 C.A.R. 70 at 76. The defence means the facts on which the defence is based Marriott 18 C.A.R. 74. As Lord Denning put it in argument on the application to the Board for leave in this case "You have not got to tell the jury everything; you have to tell them what is material to the issue". In the course of this year the Court of Criminal Appeal has strongly reaffirmed and applied the principle Lankford January 12th (unreported), Colletti and Oliva February 10th (unreported), Scott April 13th (unreported). In Immer and Davis 13 C.A.R. 22 at 25 it was laid down that a summing up is sufficient (*a*) if not unfair and (*b*) if points are not withheld which it is reasonable to suppose are already before the jury.

If the Judge deals with facts neither for the prosecution nor the defence it may be that this is in accordance with the principle, but it is submitted that

P. 80, ll. 24-27. the Full Court of the Supreme Court of South Australia was manifestly in error when it said. "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 the summing up of the learned trial Judge was sufficient".

It is submitted that it is patently a breach of the principle in Dinnick's case to devote pages of the summing up to recapitulating the facts upon which the Crown relies without even formulating in one meagre paragraph the main facts upon which the defence depends. A fortiori so to deal with some of the facts as to place them in a false light conflicts with that principle.

It will be noticed that the learned trial Judge in his references to the motiveless nature of the crime never once conceded that it might be evidence of some significance upon a plea of insanity. The three references he made all discounted its effect.

When he spoke of there being throughout the centuries of civilisation crimes repeatedly committed without any apparent or discoverable motive, he did not go on to point out that upon inquisition many were found to have been committed by insane persons, others by persons in drunken frenzy, others were crimes in which the act itself was denied and it had been proven by circumstantial evidence which fell short of supplying a motive. Nor did the Judge point out that even the theory of Dr. Shea the Crown psychiatrist did not supply any conscious motive, but only offered possible subconscious motives for the act.

As the High Court of Australia said this central factor was discounted in the summing up and put in a false light. P. 89, ll. 11-14.

It had been objected before both appellate Courts on behalf of the respondent that the portion of the summing up devoted to uncontrollable impulse had been unfair to the respondent. It had been objected that the learned trial Judge postulated the probable behaviour of the respondent (behaviour on which defence relied to show derangement) and invited the jury to regard that behaviour as the manifestation of an uncontrollable impulse without pointing out that it equally could have been the manifestation of an insane seizure.

The Full Court of the Supreme Court of South Australia conceded that this passage *inter alia* was "less pointed—less helpful to the defence" than it might have been. Pp. 78-43-45.

The High Court of Australia took a more serious view and saw in it a misdirection in law, as it undoubtedly is. P. 89, ll. 23-29.

Deranged conduct alone *may* be accepted by a jury as proof of insanity. Dart 14 Cox' Crim Cases 143 (Abramovitch 7 C.A.R. 145). Even without medical evidence Dart (*supra*) Even against medical evidence Layton 4 Cox' Criminal Cases 149. Haynes 1 Foster & Finlayson 666 and Stokes 111 Carrington & Kirwan's Reports 185 simply say it is not necessarily proof of insanity. Behaviour may properly be regarded as more decisive than medical evidence Rivett 34 C.A.R. 87. This would only accord with commonsense because insanity as distinct from physical maladies may have no apparent organic origin and the laymen doctor and jury needs must look to abnormality of behaviour as indicia of its existence.

Uncontrollable impulse was never raised as a defence. Dr. Forgan never mentioned it, and it was never put to him as a possibility. Dr. Shea the psychiatrist called by the Crown did not mention it but towards the end of his cross-examination when questioned about the theory that the respondent had been overcome by a building up of subconscious feelings said that he did

P. 53, ll. 4-8. not accept the truth of the respondent's statement to Detective Lenton "I couldn't help myself". He said he acted not on an impulse which he could not control but on an impulse which he simply did not control.

The learned trial Judge asked neither medical expert any question on the possibility. Therefore the words, "I couldn't help myself" were an entirely inadequate foundation on which to import into the case a defence which was not the defence and which could not amount to a defence. The respondent had not been asked "Why could you not help yourself". Had he been in the trance-like state which he described in his statement it would have been quite natural for him to explain it in those words. They were just as consistent with a description of a schizophrenic attack (as explained in the medical evidence) as with any uncontrollable impulse. In introducing it as he did for the first time in summing up the learned trial Judge put to the jury a possible explanation of the crime inconsistent with the defence and which neither defence counsel nor prosecution counsel had dealt with or even directed their minds to. It was the High Court Judges who discerned in the passages a misdirection in law.

In the course of argument on the application for leave in this case Mr. Chamberlain was asked by Lord Tucker whether there was any medical evidence as to the part uncontrollable impulse might play in the question of insanity, and whether or not such a possibility must depend upon medical evidence. There was no medical evidence that uncontrollable impulse motivated the respondent's conduct. Indeed the only medical evidence was that it did not.

If its implications depend on medical evidence then a fortiori its very existence must. But it is submitted that the view of the Judges of the High Court is demonstrably accurate when one comes to analyse the position. It all lies in the fact that the learned trial Judge *chose* to use the phrase "uncontrollable impulse" as a possible interpretation of the respondent's behaviour. Before he introduced this possible explanation he said, "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 . . ."

In other words the learned trial Judge graphically pictured for the jury the probable physical behaviour of the respondent on the night in question, behaviour which was clearly that of a deranged person, and then invited them if they construed it as the result of an uncontrollable impulse to return a verdict of guilty of murder.

Now the Judge might have invited the jury to regard this behaviour as the result of an emotional paroxysm, or as Dr. Shea said the culmination of anxiety. But he chose to offer as its possible form a phrase which had been used to describe a third mental condition outside the range of the McNaughton rules, and which had been rejected as a defence to homicide, and as an extension to the rules. He might equally have used the phrase deranged behaviour.

The High Court however perceived the error in this reasoning. Whatever label the learned trial Judge chose to invite the jury to ascribe to this behaviour he was still referring to the behaviour which he had described and that behaviour was clearly material which a jury might, if so minded, regard as very valuable material in determining that the respondent was insane. Had he used these other suggested phrases it would have been quite demonstrably inaccurate to say that if the existence of such conditions was the only explanation of the death caused by the respondent it would be their duty to find him guilty of murder.

They would have had to go on and enquire as Viscount Simonds remarked in the argument on the application for leave, why did he have such a seizure? Was it associated with the schizophrenia claimed in this case? Was it the result of it? Was it a symptom of it? Dr. Forgan's evidence of course was that it was the manifestation of that very thing. So that simply by calling it uncontrollable impulse the discredited defence, that was not disposing of the issue.

The only way the learned trial Judge could have properly "cleared away uncontrollable impulse" by itself as a defence would have been to add to his introductory phrase, "If that in your considered opinion is the only explanation of the death caused by the accused," something like the following "that is to say, if you think that he acted on an uncontrollable impulse, whether it arose from a disease of the mind or not, but which did not disable him from knowing that what he did was wrong, then that is no defence, etc.". The way the learned trial Judge put it to the jury was in itself a violation of the McNaughten rules for in effect he said, if this is uncontrollable impulse only, he is guilty of murder. Whether he had a disease of the mind, affecting his reason to the extent that he did not know what he was doing is wrong, do not have to be considered. He is guilty. In dealing with the remarks on this topic the High Court said. "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." P. 89, ll. 34-41.

This would be an equally true and commonplace observation of any deranged behaviour whether it was attributed to "uncontrollable impulse" or called by any other name, and that is what the High Court obviously meant when they later referred to the "true operation of 'uncontrollable impulse' ".

As Lord Reid said in arguendo on application to this Board for leave "It is extremely difficult to believe in uncontrollable impulse if there is no evidence otherwise of mental abnormality." In other words the mere imagining of a man of the character of the respondent suddenly out of uncontrollable impulse killing a stranger for nothing involves a picture of such deranged conduct as to offer strong ground for the inference of insanity.

Any grossly irrational conduct may afford strong ground for the inference of insanity whether it is thought that the conduct may proceed from an impulse that cannot be controlled or otherwise.

It is not suggested by the High Court that it is *necessarily* conclusive. It was in Sodeman's case in 1936 (55 C.L.R. 192) that the Judges of the High Court of Australia first had to consider uncontrollable impulse not as a defence to a charge of murder or as a third condition of irresponsibility within the McNaughten rules but as a possible symptom of insanity.

There as in this case they had to deal with patently deranged behaviour. The prisoner strangled little girls and went through a ritual in the arrangement of the corpse and the clothing in a senseless manner. Medical evidence detailed how the obsession of the prisoner could lead to his being unable to know what he was doing or that it was wrong. In the judgement of the then Chief Justice Sir John Latham at page 203 *et sequitur* appears the reasoning of the High Court in allowing that deranged conduct which might answer to the name "uncontrollable impulse" might be associated with or result from a disease of the mind leading to the requisite incapacity within the McNaughten rules.

It is emphasised that there, as in the case now before the Board, what was being dealt with was not the concept "uncontrollable impulse" but behaviour which might or might not be susceptible of that description. The High Court in this case had to use the same title for the respondent's behaviour as the learned trial Judge had used. It is clear that behaviour is most important if not the most important material for the determination of sanity or insanity. So that if one substitutes the words "deranged conduct" or "irrational behaviour" for the phrase "uncontrollable impulse" in the following paragraph of the High Court's judgement its accuracy becomes self-evident. "For that reason, even if no more had been said than that uncontrollable impulse (deranged behaviour) 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 (deranged behaviour) as a *possible* symptom of insanity of the required degree and kind."

The High Court has not elevated "uncontrollable impulse" into the McNaughten rules at all as was contended for on the application for leave in this case. It has simply affirmed what Mr. Justice Grieve said in arguendo in True' case 16 C.A.R. 164 at 167—it may be a symptom of insanity within the Rule. As may any other grossly abnormal behaviour. Its mere existence is no answer to the defence of insanity.

Behaviour susceptible of being accounted for by the access of an "uncontrollable impulse" is not necessarily evidence of sanity, or insanity, or insanity falling short of the degree required by the McNaughten Rules. Even if one looks at the behaviour *per se*. Because an uncontrollable impulse may co-exist with a disease of the mind leading to the defect of reason that disables the person from knowing what he is doing is wrong. In this case there was no positively unequivocal evidence suggesting uncontrollable impulse. Neither counsel had considered or dealt with such a view. The Judge had asked no questions on the possibility.

The vital words in the High Court judgement correctly interpret the words of Mr. Justice Greer in True (1922 16 C.A.R. 164 at 167) when they say,

"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." P. 89, ll. 41-45.

Judges for practical reasons may generally direct the juries to approach the issue from the ordinary starting point

(*a*) has he a defect of the reason

(*b*) through disease of the mind

(*c*) disabling him from knowing that his act is wrong

but that does not mean that they cannot by looking at the accused's behaviour infer

(*a*) that he did not know his act was wrong

(*b*) because he had a disease of the mind

(*c*) which had affected his reason to the required extent.

The direction to the jury that "it is your duty to bring in a verdict of murder" . . . and "he is guilty in law of the crime charged" are both unfortunate phrases in a summing up of which this Board disapproved in Joshua 1955 1 A.E.R. 22 at 25. This criticism it must be at once conceded is expressed for the first time now. P. 63, ll. 34. P. 65, ll. 39-41.

Where as in this case there was evidence upon which a jury could find insanity in the conduct of the respondent alone (leaving out his statement from the dock and the medical evidence) it was a misdirection to say "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". P. 65, ll. 39-44.

For a person *legally insane* may yet commit an act by reason of an impulse which he is unable to control. He may well be unable to control an impulse by reason of the very fact that his capacity to know what is wrong has been destroyed. All cases in which uncontrollable impulse has been dealt with and *rejected* by English Courts have been cases where uncontrollable impulse not producing the degree or incapacity required by the McNaughten Rules, has sought to be raised.

Where, as in this case there was not only behaviour on which a jury might find, if so minded, legal insanity, but also a statement by accused and medical evidence in support, it was not correct for the learned trial Judge to tell the jury that if the behaviour arose from an uncontrollable impulse and that was the only explanation for that behaviour then the accused was guilty of murder. Because the jury might have well thought the behaviour was the result of an impulse that the respondent was unable to control, but that behaviour alone was not the only matter requiring their consideration. That behaviour whether they regarded it as proceeding from an impulse beyond the respondent's capacity to control, or not, had to be examined and tested according to the McNaughten rules. At the time of the behaviour, whether resulting from an impulse beyond control or not, was the respondent suffering from a disease of the mind which in fact had caused a defect of reason disabling him from knowing the wrongness of his act.

It is submitted that the High Court of Australia has correctly stated the present law in clear propositions:

1. Behaviour possibly committed under an uncontrollable impulse is in itself no defence to a charge of murder.

2. Such behaviour in itself is not recognized as creating a third condition of irresponsibility within the McNaughten Rules.

3. But the fact that such behaviour might proceed from an uncontrollable impulse does not *rebut* a defence of insanity.

Without medical evidence what would the phrase be understood by a jury to mean? Surely unlike insanity "uncontrollable impulse" needs medical evidence for its introduction.

12. The next passage to which the High Court upheld the respondent's objection was in relation to penalty: "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 that 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 again that is no concern of yours." This passage speaks for itself. The Judges of the High Court point out that the Judge himself questioned the doctor for the defence about the possibility of the respondent killing someone else.

P. 66, ll. 14-23.

In Visick 2 C.A.R. 277 before the Court of Criminal Appeal, the Lord Chief Justice said, "Upon some of the observations made at the conclusion of the summing up to which counsel has referred we express no opinion, but we must not be taken to endorse them. In some circumstances it may be proper to tell the jury that the death sentence will not be carried out. It depends on the way the case is conducted. I have tried cases in which counsel defending has exaggerated the consequences of an adverse verdict. Here the appellant has already been reprieved . . ."

It would seem that therefore the extent to which counsel adverts to penalty is important. In this case counsel for the respondent never mentioned the death penalty to the jury except to say "You know what the penalty is and I shall not refer to it again". And in regard to the finding of not guilty on the grounds of insanity, counsel for the defence stated the effect of the section.

Counsel for Her Majesty the Queen said that in regard to the Governor's powers of detention these had never been tested in law and the day might one day arise when the question of how long a person whom everyone agreed was sane could be kept in detention under the section might have to be decided. The section however confers a power of detention so absolute and unqualified that one really wonders how the learned counsel could have entertained such a doubt. Counsel for the Queen *did not* say as the learned trial Judge told the jury he said, "if you acquit him he may ultimately kill someone else'". The whole of the passage was most unfortunate in its trend and the High Court upheld the respondent's counsel's objection to it.

Linked with this passage was another passage (not complained of by respondent's counsel) but which the High Court felt might have fortified the impression conveyed by the passage about penalty.

13. In regard to the evidence of Detective Lenton that the respondent had told him that after the shooting he went looking for Mrs. Schiller because he thought she might have rung up and given the alarm the learned trial Judge said, "Well gentlemen, you may ask yourselves why the accused should think P. 65, ll. 6-12. 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."

The petitioner on the application for leave in this case criticised two passages of the Judgement of the High Court of Australia as importing a dangerous extension of the McNaughten rules in regard to disease of the mind.

After dealing with Dr. Shea's evidence as to the subconscious feelings, which in the doctor's view led to the respondent's behaviour, the High Court said: "Dr. Shea was not asked whether the condition of mind he described P. 87, ll. 24-30. amounted to a psychosis but it may be assumed that he would not have regarded it as within the category. Nevertheless it appears to involve an abnormality of mind and an irrationality of conduct. That, however, could affect only the first element or elements to be made out in support of a plea of insanity, namely that there was a defect of reason from 'disease' of the 'mind'. One may suppose that is why Dr. Shea said that it did not qualify his view that Brown still knew what he was doing was wrong". The important words are "*could affect*". Abnormality of mental processes and irrational action are obviously proper matters for a jury to consider in deciding the question of insanity. In other words as to whether the man was insane in the medical sense. A jury does not have to depend on medical evidence to find insanity within the McNaughten Rule.

The last passage linked with this to which the petitioner took exception was towards the end of their judgement when the High Court said "Nor did the P. 91, ll. 27-30. 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". It is simply repeated that it is a matter for the jury to decide whether the respondent was insane within the legal use of the word. The High Court rightly points out that if the jury accepted Dr. Shea's view of the mental processes of the respondent which led to this irrational conduct, they could be satisfied that the condition of legal insanity was present even though they did not think Dr. Forgan was right in diagnosing it as schizophrenia.

15. The High Court's appellate jurisdiction is derived from the Commonwealth Constitution and regulated by the Judiciary Act 1903-1955. Section 73 of the Commonwealth of Australia Constitution (63 & 64 C.12) reads:

> "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgements, decrees, orders and sentences—

. . . (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

The Parliament "otherwise provided" by the Judiciary Act 1903-1955—

Section 35. "(1) The appellate jurisdiction of the High Court with respect to judgements of the Supreme Court of a State, or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council shall extend to the following judgements whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely:

(*b*) Any judgement whether final or interlocutary and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal.

(2) It shall not be necessary in any case, in order to appeal from a judgement of the Court of a State to the High Court, to obtain the leave of the Court appealed from.

Power of Court.

36. The High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial in any cause in which there has been a trial whether with or without a jury.

37. The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgement appealed from, and may give such judgement as ought to have been given in the first instance . . ."

In dealing with applications for special leave in criminal cases the High Court first adopted the principal laid down by this Board in Dillett 12 A.C. page 459 at 467 as governing the conditions on which this Board would grant leave but in 1915 the Chief Justice of the High Court on behalf of all the Justices except one who was absent stated that the High Court had an unfettered discretion to grant leave in every case but a *prima facie* case showing special circumstances must be made out Eather *v.* R. 20 C.L.R. 147.

This has been affirmed and acted on ever since. See Ross *v.* the King 30 C.L.R. 429, Craig *v.* the King 49 C.L.R. 429.

As Isaacs J. said in Ross *v.* the King the High Court "is not in any way limited to the practise of the Privy Council in criminal cases acting by way of grace under the prerogative and not as a statutory Court of criminal appeal".

It is for the High Court itself to decide what constitutes the special circumstances in which it should grant leave.

16. The respondent submits that the judgement of the High Court of Australia was right and that this appeal ought to be dismissed for the following (amongst other)

REASONS

1. BECAUSE the learned trial Judge failed to put the respondent's defence, or put it fairly, to the jury.
2. BECAUSE the learned trial Judge misdirected the jury by telling them that if they thought the respondent acted under an uncontrollable impulse he was thereby guilty of murder.
3. BECAUSE the learned trial Judge directed the jury in regard to penalty in a way that was unfair to the respondent.
4. BECAUSE taken as a whole the summing up was unsatisfactory.

L. J. ELLIOTT