Diminished responsibility: s 304A

Legislation

304A Diminished responsibility

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.

Commentary

Section 304A (Diminished responsibility) provides a limited defence to murder reducing murder to manslaughter. It is a true defence (as opposed to an exculpation) in that the onus of proving the defence falls upon the accused.

If the jury are satisfied beyond reasonable doubt of all the elements of murder and are satisfied it's more probable than not the defendant killed under circumstances constituting the defence of diminished responsibility then the defendant is guilty of manslaughter but not murder.

The elements of diminished responsibility are:

(1) at the time of the killing the defendant was in a state of abnormality of mind; and

(2) the state of abnormality of mind impaired one or more of the defendant's capacities:

  (i) to understand what he/she was doing; or

  (ii) to control his/her actions; or

  (iii) to know that he/she ought not do the act or make the omission; and

(3) the impairment was substantial.

Section 27 of the Code (Insanity) provides that:

(1) A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of [one of three capacities]. (emphasis added)

The capacities identified in s 27 are the same three capacities which are identified in s 304A.

Section 27 has application to all offences including the offence of murder. Section 304A only applies to an offence of murder. Although s 27 is contained in Chapter 5 of the Code, the onus of proving insanity falls upon the defendant – see *R v Porter* (1933) 55 CLR 182. That is because there is a presumption of sanity by force of s 26 of the Code, and to make out a s 27 defence a defendant must rebut the presumption.

If a defendant raises both ss 27 and 304A the onus of coming within either falls upon the defendant. If the defendant proves a total impairment the defendant will be not guilty of murder and not guilty of manslaughter. If the defendant proves a substantial impairment then the defendant will be guilty of manslaughter but not guilty of murder and if the defendant proves neither the defendant will be guilty of murder.

The concept which has caused issues is that of "substantial impairment".

Invariably there will be psychiatric evidence. The doctors often, in s 27 cases, state that the impairment is total. In diminished responsibility cases doctors often give evidence swearing to an opinion as to the ultimate issue, that is whether the impairment is "substantial". It will often be preferrable not to allow the doctors to swear the ultimate issue in that way – see *R v Biess* [1967] Qd R 470 at 477, *R v Miller* [2016] QCA 69 at [61], [64] and *R v Smith (aka Stella)* [2021] QCA 139.

The meaning of the word "substantial" in s 304A is a matter of law, not a matter for the doctors. Whether the impairment was "substantial" is a matter of fact and is therefore a jury question. The doctor's evidence should be restricted to admissible opinions as to:

1. The abnormality of mind being suffered;

2. How that impaired the relevant capacity – see *R v Chayna* (1993) 66 A Crim R 178 at 188.

It is then a jury question as to whether the impairment is "substantial".

The legal meaning of "substantial" in s 304A is at least partially informed by s 27. A "substantial impairment" is not a total impairment because a total impairment would provide a defence under s 27. The ordinary meaning of the word "substantial" excludes the trivial so what is a "substantial"

impairment must, in any particular case, fall between trivial and total – see *R v Biess* [1967] Qd R 470.

The authorities suggest that it is necessary to direct the jury that:

1. The relevant impairment must be "substantial";

2. "Substantial" means more than trivial but less than total;

3. Substantial is an every day word which has its every day meaning – see *R v Lloyd* [1967] 1 QB 175 and *R v Smith (aka Stella)* [2021] QCA 139.

In *R v Lloyd* [1967] 1 QB 175 the following direction was approved which has since been adopted in Queensland – see *R v Boss* [1967] Qd R 470:

> "Fourthly, this word 'substantial', members of the jury. I am not going to try to find a parallel for the word 'substantial'. You are the judges, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?"

However, the following direction which seeks to explain the nature of a substantial impairment by reference to its causative effect upon the defendant doing the act which killed was approved by the Court of Appeal in Hong Kong in *HKSAR v Jutting* [2018] HKCA; approved in *R v Smith (aka Stella)* [2021] QCA 139:

> "**Substantially impaired** means just that. You would have to conclude that his abnormality of mind was a real cause of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it but he must show that it was more than a merely trivial one which made no real or appreciable difference to his ability to control himself."

It is preferable, depending on the particular case, to give a simple direction such as was given in *Lloyd*. If it is necessary, either in the summing-up or in answer to any request for a redirection to descend into further explanation, then *Jutting* is an appropriate model.

The jury will be faced with psychiatric evidence which may be complicated. No doubt the psychiatrists will identify the alleged abnormality of mind and the particular capacity which is said to be substantially impaired. It is necessary to fashion a direction identifying the abnormality of mind

and the mental capacity which is relevant to the case, direct the jury to the relevant evidence and any particular issues that fall from the medical evidence – see *RPS v The Queen* (2000) 199 CLR 620 and *R v Mogg* (2000) 112 A Crim R 417 at [54].

Suggested Direction:

Diminished responsibility is a partial defence to murder in that if diminished responsibility is established the accused is not guilty of murder but is guilty of manslaughter.

Diminished responsibility only arises for your consideration if you are satisfied beyond reasonable doubt of all of the four elements of murder which, as I have already directed you are that:

1. **[X] is dead;**
2. **the defendant caused [X's] death;**
3. **the defendant did so unlawfully;**
4. **the defendant intended to kill or do grievous bodily harm to [X].**

If you are left in a reasonable doubt as to any of elements 1, 2 or 3, then the defendant is not guilty of murder and not guilty of manslaughter so there is no need for you to consider a defence such as diminished responsibility which reduces murder to manslaughter.

If you are satisfied beyond reasonable doubt of elements 1, 2 and 3 but not element 4, namely intention to kill or do grievous bodily harm, then you would acquit of murder and convict of manslaughter so again there would be no need to consider diminished responsibility.

If you are satisfied beyond reasonable doubt of each of the four elements of murder, then you would convict only of manslaughter and acquit the defendant of murder if the defendant satisfied you of each of these elements:

1. **At the time of the doing of the act which killed [X] namely** [identify the punch, stabbing, shooting, etc] **the defendant was in a state of abnormality of mind.**

2. **That state of abnormality of mind impaired the defendant's capacity to** [identify the particular capacity(s) identified by the evidence. There is no need to refer the jury to all three capacities unless all three are in issue].

3. That impairment was substantial.

Unlike each of the elements of murder which the Crown must prove to your satisfaction beyond reasonable doubt, the onus falls upon the defendant to prove each of the three elements of diminished responsibility but the defendant needn't prove those elements beyond reasonable doubt. The elements of diminished responsibility need only be proved on the balance of probabilities, a term meaning more likely than not. If you are satisfied it is more likely than not that the three elements were present at the time of the act which killed, you must acquit the defendant of murder and convict the defendant of manslaughter.

The first element concerns an abnormality of mind. The psychiatrists gave evidence on this aspect. The abnormality of mind was identified by Dr [Y] as [specify the abnormality of mind; often the fact of an abnormality being suffered is agreed between the psychiatrists. Disagreement between the psychiatrists more often arises in relation to the other two elements. If there is agreement that there is an abnormality of mind, the jury should be told that and should be told that element 1, while a matter ultimately for them, might be thought not to be a real issue].

The capacity of thought that is said to be impaired by the abnormality of mind is [identify the capacity or capacities if that is the case. Again, often that is not contentious and what is really contentious is whether the impairment is substantial. If element 2 is not really an issue, the jury should be told that].

The third element is that the capacity was impaired substantially.

The word substantial is an everyday word with an everyday meaning. A trivial impairment is not a substantial impairment. On the other hand, an impairment may be substantial without it being a total impairment. It is for you to determine whether the impairment of the defendant's capacity(s) [set out the relevant capacities] **was substantial.** [Then identify the relevant evidence, and distil the real issues which will, in a practical sense be where the opinions of the respective doctors differ.]