

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2016-004-11508
[2019] NZHC 1004**

THE QUEEN

v

KIRI PAUL PATIRA BRACKENRIDGE

Hearing: 6 May 2019

Appearances: S L McColgan and S S McMullan for the Crown
M J Dyhrberg QC and N P Chisnall for Mr Brackenridge

Judgment: 6 May 2019

Reasons: 9 May 2019

**JUDGMENT OF JAGOSE J
[Reasons for Ruling No 1]**

This judgment was delivered by me
on 9 May 2019 at 2.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Crown Solicitor, Auckland
Counsel: M Dyhrberg QC, Auckland

[1] On 6 May 2019 I ruled “drug-induced schizophrenia is a ‘disease of the mind’ for the purpose of s 23(2)” of the Crimes Act 1961, such being my subsequent direction to the jury. These are my brief reasons for that ruling.

[2] The expert psychiatric evidence in this case was schizophrenia syndrome is characterised (untreated) by persisting and profound delusions, hallucinations, and disordered thought in people so affected. While scientific research into its precise and complete aetiology is incomplete and indeterminate, genetic predisposition to schizophrenia is a necessary (but insufficient) condition for its occurrence.

[3] Significant use of high potency cannabis derivatives and/or methamphetamine can produce permanent changes in a person’s brain which lead to schizophrenia. New Zealand Ministry of Health data suggest such use probably increases the rate of schizophrenia in those genetically predisposed to its onset. The rate of schizophrenia among such users of either cannabis or methamphetamine is five or six times the rate among non-users. The rate doubles again for significant users of both drugs. As such, schizophrenia can be drug-induced in the genetically predisposed.

[4] Section 23 of the Crimes Act 1961 provides:

23 Insanity

- (1) Every one shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
- (2) No person shall be convicted of an offence by reason of an act done or omitted by him or her when labouring under natural imbecility or disease of the mind to such an extent as to render him or her incapable—
 - (a) of understanding the nature and quality of the act or omission; or
 - (b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.
- (3) Insanity before or after the time when he or she did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.
- (4) The fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not affect the question whether any other person who is alleged to be a party to that offence is guilty of that offence.

[5] Section 23(2)'s 'disease of the mind' is not defined, and any precise or comprehensive judicial definition is thought undesirable.¹ Rather the question is whether the state of the defendant's mind at the time of the offending is affected divergently from what is presumed 'normal' – "the ability to understand, to reason and to think rationally".²

[6] The quality of that effect also has received judicial attention in New Zealand and elsewhere in the Commonwealth: whether it is enduring or transient, externally or internally produced, or presenting danger to the defendant or others.³ These are said to reflect policy concerns underlying the section.⁴ The Crown urges my adoption of the "individualised contextual analysis" articulated by the Supreme Court of Canada in *R v Bouchard-Lebrun* for such policy reasons.⁵ Its counsel, Sam McMullan, argued Mr Brackenridge thus was "undeserving of the defence" afforded by s 23(2), as the state of his mind "predominantly results from the self-induced effect of a drug".

[7] I do not find the Canadian approach particularly helpful here. That is because its Supreme Court, noting the appeal's purpose "is not to identify a rule to be applied to every case of toxic psychosis", expressly confined *Bouchard-Lebrun*'s scope to toxic psychosis "that resulted *exclusively* from a single episode of self-induced intoxication".⁶ The Court was considering the definition of 'disease of the mind' drawn from the leading Canadian case, *Cooper v R*:⁷

... any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

[8] Section 23 concerns matters of "excuse" rather than "justification" under Part 3 of the Act, 'excuse' being to "protect from criminal responsibility", meaning "not

¹ *R v Cottle* [1958] NZLR 999 (CA) at 1011.

² *R v Dixon* [2007] NZCA 398, (2003) 23 CRNZ 911 at [29], and [39] in approving trial direction.

³ For example, *R v Dixon*, above n 2; *R v Lipsey-McCarthy* CA237/04, 28 October 2004; and as summarised in *Police v Bannin* [1991] 2 NZLR 237 (HC) at 242. Similar considerations arise in the United States; see Thomas Hafemeister *Criminal Trials and Mental Disorders* (New York University Press, New York, 2019) at ch 8.

⁴ Law Commission *Mental Impairment, Decision-Making and the Insanity Defence* (NZLC R120, 2010) at [1.14].

⁵ *R v Bouchard-Lebrun* 2011 SCC 58, [2011] 3 SCR 575 at [66]-[77].

⁶ At [76], original emphasis, 'toxic psychosis' being "psychosis caused by the consumption of toxic substances" (at [13]).

⁷ *Cooper v R* [1980] 1 SCR 1149 at 1159.

liable to any proceedings except a civil proceeding”, while ‘justification’ means “not guilty of an offence and not liable to any civil proceeding”.⁸ As may be seen from s 23(3), the materiality of ‘a disease of the mind’ is:

... that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.

[9] By “irresponsible”, the section is indicating principled concern for offenders’ “capacity to be held responsible for the crime they commit”.⁹ Hence, where the issue is open on the evidence, the excuse should be assessed by a jury,¹⁰ even if disclaimed by the offender.¹¹ The ‘deserving’ nature of the offender for exercise of such discretion, if a discretion at all,¹² is not a relevant consideration for determination of offenders’ “capacity” to be held responsible.

[10] Capacity (or ‘incapability’, in s 23(2)’s words) is to be determined at the second limb of s 23(2), in turning to the considerations at paragraphs (a) and (b), as the consequence of the particular ‘disease of the mind’. Schizophrenia facilitates a state of mind that may affect an offender to the extent s/he is incapable of the requisite knowledge or understanding. That schizophrenia may be drug-induced is immaterial, because the operative state of mind is schizophrenic, however induced. That is quite distinct from an exclusively drug-induced state of mind, which seems indistinguishable from intoxication (which may not provide excuse or justification).¹³ Such only may render the offender ‘unable’, rather than the qualifying “incapable”.

⁸ Crimes Act 1961, s 2 (definition of ‘justified’ and ‘protected from criminal responsibility’).

⁹ *R v Chand* [2012] NZHC 2745 at [19].

¹⁰ *R v Tavete* [1988] 1 NZLR 428 (CA) at 431.

¹¹ Criminal Procedure (Mentally Impaired Persons) Act 2003, s 20(4).

¹² *R v Cottle*, above n 1, at 1011 and 1013 per Gresson P; 1029 per North J; and 1034 per Cleary J.

¹³ Rees Tapsell “Forensic Psychiatry and the Law: A Judicial Update” (paper presented at the Institute of Judicial Studies Higher Courts Update on Mental Health Issues, Wellington/Auckland, November 2005), and Warren Brookbanks “Insanity” in Warren Brookbanks and Sandy Simpson (eds) *Psychiatry and the Law* (LexisNexis, Wellington, 2007) 123 at [6.4.4]; cf, Simester and W J Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [10.3.3(1)].

[11] For those reasons, I held drug-induced schizophrenia is a “disease of the mind” for the purpose of s 23(2).

—Jagose J