

CITATION: *Steven Flynn v KW [2018] NTLC030*

PARTIES: Steven FLYNN
v
KW

TITLE OF COURT: Local Court

JURISDICTION: Criminal

FILE NO(s): 21800914

DELIVERED ON: 21 November 2018

DELIVERED AT: Darwin

HEARING DATE(s): 2 August 2018 & 17 October 2018

JUDGMENT OF: Chief Judge Lowndes

CATCHWORDS:

CRIMINAL LAW – MENTAL IMPAIRMENT DEFENCE – STATUTORY
PRECONDITIONS FOR DISMISSAL OF CHARGES UNDER SECTION 77 OF
THE MENTAL HEALTH AND RELATED SERVICES ACT – EXPERT
MEDICAL EVIDENCE – LACK OF KNOWLEDGE THAT CONDUCT WAS
WRONG

Mental Health and Related Services Act, s 77
Evidence (National Uniform) Legislation Act s 79
Porter v R(1933) 55 CLR 182 applied
O’Neill v Lockyer [2012]NTSC 10 followed
Police v Bradley Moore followed
Holloway v McFeeters (1956) 94 CLR 470 applied

REPRESENTATION:

Counsel:

Complainant: Mr D Dalrymple
Defendant: Mr M Aust

Solicitors:

Complainant: Director of Public Prosecutions (DPP)

Defendant:	NT Legal Aid Commission (NTLAC)
Judgment category classification:	B
Judgment ID number:	[2018] NTLC 030
Number of paragraphs:	85

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21800914

BETWEEN:

Steven Flynn
Complainant

AND:

KW
Defendant

REASONS FOR JUDGMENT

(Delivered 21 November 2018)

CHIEF JUDGE LOWNDES

THE NATURE OF THE PROCEEDINGS

1. The defendant was charged with the following offences:
 - a. Driving a motor vehicle on a public street at a speed and in a manner dangerous to the public (contrary to s 30(1) of the *Traffic Act*);
 - b. Entering an intersection against a red traffic signal (contrary to s 59(1) of the *Australian Road Rules*) x 2;
 - c. Driving a motor vehicle which was involved in a crash and leaving the scene of the crash (contrary to Regulation 19 (1)(a) of the *Traffic Regulations*);
 - d. Driving a motor vehicle with a medium range breath alcohol content (contrary to s 22(1) of the *Traffic Act*);

- e. Driving a motor vehicle whilst not the holder of licence to do so (contrary to s32(1) of the *Traffic Act*);
 - f. Being the driver of a motor vehicle which was involved in a police pursuit failed to comply with a direction to stop and drove the vehicle dangerously while being pursued (contrary to s 174B of the *Criminal Code*);
 - g. Engaged in conduct that gave rise to a danger of serious harm to another person and who was reckless as to such danger, with circumstances of aggravation (contrary to s 174D and 174G of the *Criminal Code*) x 6;
2. The defendant applied to the Court to have all the charges dismissed pursuant to s77 of the *Mental Health and Related Services Act* on the grounds of mental impairment.
3. A s 77 (3) certificate was provided to the Court stating that:
- a. at the time of carrying out conduct constituting the alleged offences the defendant was suffering from a mental illness; and
 - b. the mental illness is likely to have materially contributed to the conduct.
4. The hearing of the application commenced on 2 August 2018 and was concluded on 14 November 2018. On the first date Dr Gregory Lysenko, a psychiatric registrar for the Mental Health Access Team, gave evidence. On the second occasion Mr Tim Jacobs, a registered nurse and designated mental health practitioner with the Forensic Mental Health Team, Top End Services, gave evidence.
5. At the conclusion of the hearing, including the hearing of submissions, I reserved.

THE STATUTORY PRECONDITIONS FOR A DISMISSAL OF A CHARGE

6. Section 77(4) provides that the court must dismiss a charge if it is satisfied that at the time of carrying out the conduct constituting the alleged offence:
 - a. the defendant was suffering from a mental illness or mental disturbance; and
 - b. as a consequence of the mental illness or disturbance the defendant:
 - (i) did not know the nature and quality of the conduct; or
 - (ii) did not know the conduct was wrong; or
 - (iii) was not able to control his or her actions.
7. The onus is on the defendant to satisfy these requirements.¹ The standard of proof is on the balance of probabilities.²

THE EVIDENCE

8. Whether or not the requirements for a dismissal of the charges have been satisfied depends on the evidence and its probative value.
9. A primary item of evidence tendered at the hearing of the s77 application was a report prepared by Mr Tim Jacobs dated 26 March 2018.³
10. Mr Jacobs addressed the defendant's past psychiatric history.
11. He began by referring to a CCIS note completed by Dr Gregory Lysenko on 8 March 2018 in relation to the defendant having been treated in Queensland for a psychosis when he was apparently 18 years of age. The note read:

¹ *O'Neill v Lockyer*[2012] NTSC 10, p 11.

² *O'Neil v Lockyer* [2012] NTSC 10, p 12.

³ Exhibit 1.

Writer (Dr Lysenko) has liaised with Bowen Mental Health Service and obtained medical records of contact: KW was treated with olanzapine for psychotic symptoms, and had limited contact with the service owing to relocating to Kununurra. Notes indicate a reluctance to adhere to treatment.

12. Mr Jacobs then referred to a note entered in PCIS on the 6 January 2018 in relation to concerns raised by police at the Darwin watch house about the defendant's mental health. Ms Danielle Jordan, a registered nurse, noted the following:

Police Sergeant Andy approached the custody nurse at approx 1100. He expressed concerns in relation to KW's mental health over the past 48 hours two presentations to the watch house with the second presentation involved in a MVA [motor vehicle accident]. Andy advised in interview KW expressed possible mental health issues.

13. Although no assessment was conducted by mental health staff at the time, Mr Jacobs reviewed an electronic record of interview conducted on 6 January 2018 and noted that "the themes expressed by KW [were] of a religious nature presented in a way that was likely to be beyond faith and more in accordance with mental illness".
14. Mr Jacobs said that he first interviewed the defendant on 11 January 2018, and concluded that he was experiencing mental illness. He said that his explanations "appeared to be congruent with a delusional belief concerning others believing, or becoming aware that he was previously alleged to have been a paedophile". Mr Jacobs said that at one point in the interview the defendant aggressively grabbed a piece of paper from him which he was using for note taking, and accused him of writing something defamatory about his family. Mr Jacobs then formed the opinion that it was clinically appropriate for the defendant to be reviewed at an approved treatment facility.

15. Mr Jacobs stated in his report that the defendant attended the Tamarind Centre on 30 January 2018, and was assessed by Mr Jinson Charls, a mental health nurse who was attached to the TEMHS Acute Care Team. Mr Charls recorded that the defendant's thought content included "...concerns that he was known to be a paedophile, and that there was some form of internet web page that indicated such; and that many random people in the wider community had knowledge that he was a paedophile". Mr Charls recorded in CCIS his impression of the defendant in these terms: "delusional thoughts that others thinking he is a paedophile". Mr Charls also recorded that the defendant reported that he experiences random people beeping at him from their car indicating to him that they knew he was an alleged paedophile. Mr Jacobs said that this assessment was discussed at an Acute Care Team meeting, and the defendant was scheduled to see the psychiatric registrar, Dr Gregory Lysenko.

16. In his report Mr Jacobs stated that the defendant was seen by Dr Lysenko on 8 March 2018, at which time the following was recorded in CCIS:

KW reported that he went out drinking on the night of 05/01/2018 and got the sense that others believed he was a paedophile on that night. He went out the next night, and developed this sense again; he reports on that night that he recalls an incident whereby he interpreted that others thought he was a paedophile, and he believes that he saw a woman access a file online which detailed him being a paedophile. KW reports that this made him angry, and he drove his car at speed up and down Mitchell Street to convey his anger "I wanted to kill someone; I wanted to make it clear to everyone that I could". KW states that he damaged his car on the curb, and he was pursued by police for a time, he acknowledged driving at a police vehicle prior to stopping and being arrested.

17. Mr Jacobs note that Dr Lysenko also recorded that the defendant believed that "stealth drones" were currently monitoring him and that he was experiencing "possible perceptual disturbance". Dr Lysenko also recorded that the defendant had

“a history of likely perceptual disturbances (auditory hallucinations)”. Dr Lysenko also recorded in CCIS that the defendant “didn’t care about the potential outcome” of his court matter as regards the potential for imprisonment. Mr Jacobs noted that this statement was “similar to what KW had also previously indicated...in the index offence interview on 17 January 2018”. Mr Jacobs said that this also provided “some indication of the unlikelihood of any attempt to falsify his history of symptoms or similarly provide tactical responses to questions with a view to potential benefit of having his associated charges theoretically dismissed”.

18. Mr Jacobs then went on to refer to Dr Lysenko’s overall impression of the defendant:

Likely longstanding psychotic illness; probable schizophrenia with symptoms likely influencing offending behaviour...early cannabis use raises vulnerability to developing a psychiatric illness. KW’s religious faith appears to be influencing his perception of psychotic symptoms. Nil acute risks identified, however offending behaviours appears to have been precipitated by psychotic thinking in combination with acute intoxication; intoxication and untreated psychotic symptoms raises risk of harm to others.

19. In his report Mr Jacobs interviewed the defendant at length in relation to the alleged offences on 6 January 2018 and his conduct on the previous day.
20. The defendant reported that on 5 January 2018 he had been thinking about his girlfriend who left him in July 2017. He soon became upset and he tried to ring her on a number of occasions, but was unsuccessful. He felt that she had become aware that he was a suspected paedophile. His rationalisation for this was that she had once made a remark about “paedophile priests”.
21. The defendant also reported on 5 January 2018 that he had prayed that his former girlfriend would have “a place in her heart” for him, and that his prayers were “in

accordance with his religious teachings in which a person should knock and you will receive". After having failed to establish contact with his ex- girlfriend, the defendant thought that "God had failed to assist him" and thought at the time: "God you've fucked with my head too many times". As a result of his anger at God, he consumed alcohol "in the belief that God had not assisted him and therefore he would consume alcohol which he had been avoiding due to his commitment to his faith".

22. Later on 5 January 2018 the defendant was arrested and taken into protective custody.
23. The defendant reported on 6 January 2018 that while drinking with former work colleagues at a bar he believed that one of his colleagues showed the others a photograph of him from an internet site that had been taken by police when he was 15 years of age. The defendant also saw the photo which reportedly included a caption indicating that he was "a sexual deviant and a suspected paedophile". The defendant said that he attempted to explain to the group that he was not a paedophile. He reported that other people at the bar became hostile towards him because of his perception that they had become aware that he was a suspected paedophile, and were "having a go at [him]".
24. The defendant said that he tried to reason with various patrons and staff about the allegation that he was a paedophile, but was unsuccessful. He then left the premises and drove his vehicle in an aggressive manner by way of demonstrating to "the world" his anger.

25. The defendant reported that he felt it necessary to express his anger by way of dangerous driving to random people, but not actually harm anyone.⁴ He stated that he would have taken evasive action if someone had been on the road at the time. He indicated that he drove his vehicle in the direction of the police vehicles due to his state of anger, but did not change direction into the vehicles when they swerved. The defendant felt that “the police placed themselves at risk by pursuing him in their vehicles, rather than him deliberately trying to confront police”. He did not consider “this was assault as alleged, as he did not actually hit any of the police vehicles”.
26. The defendant felt that his actions were “a build –up of stressors” – “god not assisting him in contacting his ex-girlfriend, finally enjoying some time with others and then the phone being shown around indicating that he was a paedophile and being targeted by staff/security bar staff due to his perceived belief that they were aware of the paedophilia allegations, as well as alcohol intoxication”. Mr Jacobs mentioned additional recent stressors such as the defendant’s appearance in a court case in which he figured as the victim of a sexual abuse, “anxiety and associated avoidance of various activities such as attending church and going to a gymnasium due to the belief that he thought others were aware that he was a suspected paedophile, and also limited sleep from the previous night”.
27. Mr Jacobs stated that the defendant “explained that historically he believed since he was fifteen years old that random unknown people had found out this reported allegation that he was a paedophile, and that he had suspected that this was due to a ‘a confidential file’ from when he spent a period ‘in care’ had been accessed by others, and the details not kept confidential; and somehow this reportedly false information became publicly available”. The defendant reported that “random cars

⁴ It should be noted that this report differed to the account that he gave to Dr Lysenko. The defendant reported

would drive by and beep their horn at him indicating to him that they were aware that he was an alleged paedophile”. He also indicated that when he was living in Queensland members of the public “had somehow also become aware of these allegations”.

28. Mr Jacobs said that he when challenged about his beliefs that random people had become aware of the allegations of paedophilia, the defendant became quite angry and dismissive. However, he was uncertain as to how people had become aware of the allegations; but believed that the information could have “been available on the internet after having been leaked from the confidential file about him as a juvenile”. The defendant said that he had searched the internet, but was unable to find anything alleging that he was a paedophile. He attempted to explain the absence of such material by saying that the information was probably stored on “some type of private internet forum that he could not access and /or on the ‘dark web’”. At this point the defendant’s anger was quite palpable and Mr Jacobs had to make reasonable efforts to placate him.
29. In his report, Mr Jacobs expressed a number of opinions and made certain recommendations.
30. Mr Jacobs noted that the defendant has a history of mental illness and was previously treated in Queensland for psychosis with anti-psychotic medication. There is also evidence of previous mental health symptoms. He also noted that concerns were raised by police shortly after the commission of the alleged offences that the defendant may be mentally ill.

31. Mr Jacobs believed that at the time he assessed the defendant on 11 and 17 January 2018 he was experiencing a mental illness involving delusions. Mr Jacobs believed that the defendant's "explanation of the circumstances at the time of the alleged offence was more likely than not indicative of delusions of reference, persecutory delusions and tentatively potentially also perceptual disturbances". During one interview the defendant displayed aggression by grabbing a piece of paper on which notes were being made and became angry when his claim about random drivers of cars beeping their horn at him was challenged. Mr Jacobs stated that "whilst anger alone is not indicative of mental illness, its presence in this context provides an indication of a potential mental disturbance; and is relevant to the nature of the alleged offences".
32. Mr Jacobs went on to note that on 30 January 2018 the defendant was assessed by the mental health nurse, Jinson Charls, who formed the opinion that the defendant may have been delusional and required further assessment by the psychiatric registrar.
33. Mr Jacobs then noted during his assessment of the defendant on 8 March 2018 that Dr Lysenko had concluded that the defendant had a "likely longstanding psychotic illness; probably schizophrenia...", antipsychotic medication (Quetiapine 100mg) having been prescribed.
34. Based on the foregoing, Mr Jacobs believed on the balance of probabilities that the defendant had a mental illness at the time of the alleged offending. He also was of the view that "in accordance with Dr Lysenko's...assessment, KW's symptoms of mental illness were probably secondary to untreated schizophrenia at the time". In addition, Mr Jacobs noted that the defendant's "self -reported explanations of various people finding out that he has been alleged to be a paedophile dates back to

the self-reported age of fifteen; thereby, tentatively offering an indication of a long held delusional belief”.

35. Mr Jacobs went on to say:

In relation to 77(2)(b), it was evident in my opinion and also inferred by Dr Gregory Lysenko in his CCIS assessment note dated 8 March 2018 that on the balance of probability, KW’s psychotic symptomology, including delusional beliefs (persecutory and reference) were factors that operated actively to bring about the alleged conduct at the material time: “offending behaviour appears to have been precipitated by psychotic thinking in combination with acute intoxication...(Dr Lysenko CCIS notes dated 8 March 2018)” Further, KW’s acute anger was secondary to his likely long held delusional beliefs that others not only believed he was a paedophile, but also that others were prejudicial towards him due to this likely delusional allegation; as well as the experience of likely delusions of reference associated with the phone image of him, and associated caption, indicating that he was a suspected paedophile. He considered that his conflictual interactions with bar staff were because they believed that he was a paedophile. Accordingly, in my opinion his reportedly medium –range intoxication of alcohol should not preclude the opinion that the symptoms of such psychosis materially contributed to the alleged offence.

36. Mr Jacobs noted that the defendant’s “alcohol consumption was secondary to a reportedly religious conflict with god, in which he felt anger with god for not assisting him to contact his ex-girlfriend”. Mr Jacobs went on to note that Dr Lysenko remarked that the defendant’s “religious faith appears to be influencing his perception of psychotic symptoms”. Mr Jacobs expressed the opinion that the defendant’s “preoccupation with his religious beliefs goes well beyond what would be recognised as faith, and is likely to be of a delusional intensity and tentatively includes possible associated perceptual disturbances”.

37. Mr Jacobs stated that the defendant’s explanations of his symptoms also “included impaired judgment, impulsivity, anger, frustration and impaired insight; and that

these factors also operated actively to bring about the alleged conduct at the material time”.

38. Mr Jacobs formed the opinion that the defendant was suffering from a mental illness at the time of the alleged offending and that mental illness materially contributed to the conduct constituting the alleged offences.

39. In relation to s 77(4)(b) of the Act, Mr Jacobs proffered the following opinion:

Due to KW’s likely longstanding pre-existing psychosis (as per the impression made by Dr Lysenko), exacerbated by a combination of alcohol intoxication, associated stress and limited sleep, KW’s psychotic symptoms of delusions (persecutory and delusions of reference) as well as impaired judgment, impaired insight and anger associated with his delusional beliefs; resulted in KW lacking capacity to reason with a moderate degree of sense and composure about whether his conduct as perceived by a reasonable person was wrong at the material time.

40. The oral evidence given by Jacobs at the hearing did not add a great to the matters dealt with in his report.

41. Mr Jacobs said that in arriving at his opinion that the defendant was unable to reason with a moderate degree of sense and composure about whether his conduct as perceived by a reasonable person was wrong at the material time he had regard to the defendant’s likely mental state at the time and the subsequent assessments conducted in relation to his mental state.

42. Although he considered intoxication due to the consumption of alcohol to have been a contributing factor, Mr Jacobs formed the opinion that the mental illness from which the defendant was suffering at the material time materially contributed to the alleged offending.

43. Mr Jacobs said that although Dr Lysenko did not address s 77 (4)(b) of the Act, the doctor was of the view that the symptoms of mental illness materially contributed to the alleged offending.
44. Mr Jacobs gave evidence to the effect that if the defendant was suffering from a psychosis at the relevant time such a psychotic state could lead to a “loss of reality”, thereby affecting the defendant’s ability to reason with a moderate degree of sense and composure as to the relevant matter.
45. Mr Jacobs was asked a number of questions regarding his qualifications, in particular in relation to the subjects he studied as part of his Masters Degree in Forensic Mental Health. It appeared that no part of his degree was devoted to the clinical and diagnostic aspects of mental health, nor to the relationship between the symptoms of a mental illness and the McNaghten Rules (which are broadly included in s 77(4) (b) of the Act).
46. However, Mr Jacobs said that outside the scope of his degree he had read a body of literature concerning the McNaghten Rules, noting that the various Australian jurisdictions have taken different views as to the meaning of the limb- “did not know the conduct was wrong”. Mr Jacobs held the view that in the Northern Territory “wrong” in the context of s 77(4)(b) (ii) meant “legally wrong”.
47. When it was brought to Mr Jacobs’ attention that “wrong” in the context of the Northern Territory provision meant “morally wrong”, he said that the defendant absolutely satisfied the s 77(4)(b) (ii) criteria.
48. Dr Lysenko also gave evidence at the hearing.
49. Dr Lysenko told the court that he is a psychiatric registrar for the Mental Health Access Team, holding a Bachelor of Medical Sciences and a Bachelor of Medicine

and Surgery. He said that he had seen the defendant in a clinical setting on two occasions.

50. Dr Lysenko made it clear that when he examined the defendant he did not do so for the forensic purposes envisaged by s 77 of the Act. He said that any evidence he could give to the court would be based on his impression of the defendant's mental state at the time he presented at the clinic and the defendant's account of the relevant events.
51. The doctor said that he had formed the impression that at the time of the alleged offences the defendant was "experiencing longstanding symptoms of a delusion process, which...involved him believing that members of the public thought him to be a paedophile". Dr Lysenko considered that this had been going on for some time and he had been experiencing "delusions of reference surrounding that". He said that "included things such as him believing that members of the public would honk their horn and he inferred from that that these people in the public knew that he was a paedophile". Dr Lysenko said the defendant formed this belief on the fact that he had seen some documentation along the lines that he was a paedophile. He said that the defendant had also reported that on the night that the offences were allegedly committed he was with a person in a pub who had accessed a website declaring him to be a paedophile. Dr Lysenko said that this enraged the defendant and "made him incredibly angry and in response to that he wanted to show the world how angry he was for the fact that people thought he was a paedophile, when he knew in his heart parts of that weren't true". Dr Lysenko said that this led to the alleged offending behaviour.
52. Dr Lysenko told the court that as part of his clinical assessment of the defendant he did not explore the forensic aspects specified in s 177(4)(b) of the Act. In any event,

he felt that he did not have enough experience with s 77 of the Act to provide a strong opinion to the court about the criteria specified in s 77(4)(b).

53. Those matters aside, Dr Lysenko stated that the defendant's mental state would have certainly impaired his cognitive abilities. The doctor gave the following evidence:

Certainly it would have diminished his capacity to reason. He certainly was experiencing symptoms of mental illness at the time, on the balance of probability. His active delusional content running through his mind, directly interfering with his response to benign stimuli in the environments which he was misinterpreting in manner which, you know, triggered intense anger in him. Which had been building for some time a prolonged, onto period of what appears to be untreated mental illness.

54. Dr Lysenko agreed with the proposition that the defendant was suffering from increased anger at the time of the alleged offending due to the prolonged nature of his undiagnosed and untreated mental illness and that this heightened state of anger would have significantly impacted on his ability to reason.
55. Finally, Dr Lysenko agreed with Mr Jacobs' opinion that the defendant lacked the capacity to reason with a moderate degree of sense and composure about whether his conduct, as perceived by a reasonable person, was wrong at the material time.

WAS THE DEFENDANT SUFFERING FROM A MENTAL ILLNESS AT THE MATERIAL TIME AND DID HE AS A CONSEQUENCE OF THAT ILLNESS NOT KNOW THAT HIS CONDUCT WAS WRONG

56. It is apt to begin with the following analysis by Fairall and Yeo of the role of the expert witness in cases like the present:⁵

Generally, clinical evidence is not required as a matter of law to substantiate a case of insanity. This is consistent with the rule that it is for the jury, and not the expert, to decide whether an accused person is not criminally responsible on

⁵ P Fairall and S Yeo "Criminal Defences in Australia" 4th ed at [13.59].

account of insanity.⁶ However, in practice, it would be expedient for clinical evidence to be tendered in support of the defence of insanity. Without such evidence, the trial judge may be inclined to withdraw the issue from consideration by the jury. The correct approach is for the jury to deliberate on the ultimate issue of the accused's responsibility with the assistance of expert testimony.

57. Whilst, there is no legal requirement that a plea of insanity must be supported by medical evidence from a medically qualified witness,⁷ the practical necessity for medical evidence is apparent from the observation made in *Hitchens v R* [1962] Tas SR 35 at 51 that the “symptomology of a recognised mental disease such as schizophrenia is peculiarly a matter of expert psychiatric evidence”. It follows, as noted by Gillies, “that if the defence wants to elucidate the nature of this disease and effects on a person, it would in the practical sense be obliged to lead expert evidence on this topic”.⁸

58. The Hon Justice Murray, Senior Judge of the Supreme Court of Western Australia, has made the following observation regarding the receipt of expert evidence:⁹

...although the ordinary rules of evidence governing the receipt of expert evidence preclude a witness from offering an opinion about the existence of a fact which is the ultimate responsibility of the court to decide, that is not the case in relation to the issue of unfitness for trial or insanity affecting criminal responsibility.¹⁰ In those cases, the expert witness is permitted to be asked for an opinion directly affecting the existence of the fact ultimately in issue. Indeed the witness is encouraged to give an opinion in those terms.

⁶ *Fowler* (1985) 39 SASR 440; *Darrington* [1980] VR 353; *Haidley* [1984] VR 229.

⁷ *Attorney General (SA) v Brown* [1960] AC 432 at 452.

⁸ P Gillies “Criminal Law” 4th ed p244. See also *Bailey* [1961] Crim LR 828; *Chalk* [1961] Crim LR 326; *Attorney General (SA) v Brown* [1960] AC 432 at 452; *Sodeman v R* (1936) 55 CLR 192 at 217.

⁹ The Hon Justice Murray “The Challenges of Reporting Psychiatric Opinions to the Court” John Pougher Memorial Lecture October 2010, Royal Australian and New Zealand College of Psychiatrists, p 8.

¹⁰ It should be noted that the ultimate issue rule at common law was abolished by s 80 of the *Evidence (National Uniform Legislation) Act*.

59. His Honour went on to point out:¹¹

...if it be the case in relation to criminal responsibility, that the opinion is that the accused was, at the time of his conduct alleged to constitute the commission of the offence with which he is charged, unable to understand that what he was doing was morally wrong then that opinion should be offered in those terms, the cause of the incapacity by way of expert diagnosis of impairment being referred to and all matters of fact which bear upon the opinion being set out. Again, the reasoning of the witness to arrive at that opinion must be adequately set out.

60. Consistent with *Attorney General (SA) v Brown*, “where medical evidence is adduced, it may be of considerable importance, but it is to be remembered that the jury is entitled to and indeed must look at other relevant evidence throwing light upon D’s mental state – for example ‘the previous and contemporaneous acts of the accused may often be preferred to medical theory’”.¹² It must also be remembered that “it is for the jury to decide whether D was suffering from [a mental illness] and as well, whether it caused a relevant disturbance on the mind’s workings”.¹³

61. The first matter that calls for consideration is whether Mr Jacobs can be considered to be an expert witness in accordance with s 79 of the *Evidence (National Uniform Legislation) Act*.

62. Mr Jacobs’ expertise was considered in the recent matter of *Police v BJM*, which was published on 30 July 2018. There the Court concluded that while Mr Jacobs possessed “specialised knowledge” for the purposes of s 79(1) in relation to expressing an opinion as to whether a person was suffering from a mental illness at the material time and whether that mental illness materially contributed to the conduct constituting the alleged offending,¹⁴ he did not possess “specialised

¹¹ The Hon Justice Murray n 9, p9.

¹² Gillies n 8 p 244. This is a reminder of the probative value of non –expert evidence.

¹³ Gillies n 8, p 244.

¹⁴ *Police v BJM* 30/7/18 pp 24-27.

knowledge” for the purposes of expressing an opinion as to the criteria specified in s 77(4)(b) of the *Mental Health and Related Services Act* .¹⁵ As regards the latter, the Court found:¹⁶

Mr Jacobs admits that he is not qualified to diagnose a particular psychiatric illness, and there is nothing in his work history and clinical experience to demonstrate that he has in the past performed a diagnostic role in the treatment care and management of mentally ill persons. It seems to me that in order to proffer an expert opinion about whether a person meets one of the s 77(4)(b) criteria it is necessary to demonstrate specialised knowledge in relation to the diagnosis of psychiatric illnesses and how the symptomology of a particular diagnosed mental illness may affect a person’s knowledge of the nature and quality of their conduct or the wrongness of their conduct or ability to control their actions.

63. I remain of the view that Mr Jacobs’ expertise is confined to expressing an opinion as to the matters specified in s 77 (2) and (4) (a) of the Act, and does not extend to the matters referred to in s 77(4)(b) of the Act. In my opinion, the evidence that Mr Jacobs gave at the hearing concerning the content of his Masters Degree and personal research did not endow him with the requisite “specialised knowledge” to enable him to express an opinion that at the material time the defendant did not know that his conduct was wrong. In order to be able to provide such an opinion, Mr Jacobs would have to demonstrate “specialised knowledge” qualifying him to provide a psychiatric diagnosis of the defendant’s mental state and to describe the effects of that diagnosed mental illness on the workings of the defendant’s mind.¹⁷ Mr Jacobs does not possess such “specialised knowledge”.

64. The next matter to be considered is the expertise of Dr Lysenko.

¹⁵ *Police v BJM 30/7/18* pp 27-28.

¹⁶ *Police v BJM 30/7/18* pp 27-28.

¹⁷ See the observations made by Justice Murray above, p 10. See also *Hitchens v R* [1962] Tas SR 35 at 51 and the commentary by Gillies above, pp 9-10, n8.

65. Despite his reservations about possessing the requisite “specialised knowledge”, I am of the view that Dr Lysenko possesses the requisite “specialised knowledge” enabling him to express an opinion not only as to the matters referred to in s 77(2) and 77(4) (a) of the Act, but also as to the criteria specified in s 77(4)(b).
66. The question is whether with the assistance of the evidence given by Mr Jacobs and Dr Lysenko the Court can be satisfied on the balance of probabilities that at the time of carrying out the conduct constituting the alleged offences the defendant was suffering from a mental illness and as a consequence of the mental illness he did not know the conduct was wrong.
67. In my opinion, the evidence given by Mr Jacobs and Dr Lysenko establishes that it is more likely than not that the defendant was suffering from a mental illness at the material time.
68. That conclusion is based on the concerns raised by police shortly after the alleged offending and the subsequent assessments of Dr Lysenko, Mr Charls and Mr Jacobs coupled with the defendant’s history of mental illness in Queensland, which consists of a long standing pre-existing psychosis. The conclusion is also based on the history given by the defendant to Dr Lysenko and Mr Jacobs, including his explanations of the circumstances at the time of the alleged offending and the symptoms he reported suffering from at the time, which included delusions of reference and persecutory delusions with possible perceptual disturbances.
69. It is also more likely than not that the mental illness that the defendant was suffering from at the time materially contributed to the alleged offending in the sense that the mental illness was “a factor that operated actively to bring about the conduct”.¹⁸

¹⁸ *O’Neill v Lockyer* [2012] NTSC 10, p8.

Although alcohol may have been a contributory factor, the evidence is sufficiently cogent to establish that the mental illness materially contributed to the alleged offending.

70. It now remains to consider whether as a consequence of his mental illness the defendant did not know that his conduct was wrong in accordance with s 77(4)(b)(ii).
71. In order for the Court to be satisfied that the defendant did not know that his conduct was wrong the Court needs to find that as a consequence of the mental illness he was unable to reason with a moderate degree of sense and composure about whether his conduct, as perceived by a reasonable person, was wrong.
72. The origin of this legal test is to be found in the judgment of Dixon J in *Porter* (1933) 55 CLR 182 at 189 -90:

It supposed that he knew he was killing, knew how he was killing and knew why he was killing, but he was incapable of appreciating the wrongness of the act...The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could know that what he did was wrong. What is meant by "wrong"? What is meant by wrong is wrong having regard to the everyday standards of reasonable people. If you think that at the time when he administered the poison to the child he had such a mental disorder or disturbance or derangement that he incapable of reasoning about the right or wrongness, according to ordinary standards, of the thing he was doing, not that he reasoned wrongly, or that being a responsible person he had queer or unsound ideas, but that he was quite incapable of taking into account the considerations which go to make right or wrong, then you should find him not guilty upon the ground that he was insane at the time he committed the acts charged. In considering these matters from the point of view of

fact you must be guided by his outward actions to a very large extent. The only other matter which can help you really is the medical opinion. I think the evidence may be described as his outward conduct and the medical opinion. It is upon this you must act.¹⁹

73. His Honour's reference to "sense" or "composure" seems to acknowledge "the interaction between thought and feeling processes", which "sits well with contemporary clinical science".²⁰
74. The criteria specified in s 77(4)(b) (ii) of the Mental Health and Related Services Act, which equates to the test laid down in Porter, is concerned with the ability of a person to appreciate that his or her conduct would be "morally condemned", and "the accused's capacity to understand the normative judgments of the community".²¹ In *R v White* (2003) 7 VR 442 at 451 Chernov JA affirmed on appeal that the word "wrong" in the relevant statutory provision was directed to "the accused's awareness that reasonable persons would disapprove as wrong the actions he is performing".
75. As pointed out by Fairall and Yeo, "clearly, a person who is unable to reason with a degree of sense and composure cannot know how ordinary people might judge her or his conduct".²²
76. In my opinion, applying the applicable legal test, the Court can be satisfied on the balance of probabilities that at the time of the alleged offending the defendant did not know that his conduct was wrong in accordance with s 77(4)(b) (ii) of the Act.

¹⁹ This view was expressly approved in *Stapleton v The Queen* (195) 86 CLR 358. There the High Court made it clear that the expression "did not know the conduct was wrong" refers to the "canons of right and wrong, and not to the criminal law".

²⁰ Fairall and Yeo n 5 at [13.26]

²¹ E Colvin and J McKechnie "Criminal Law in Queensland and Western Australia" at [17.32].

²² Fairall and Yeo n 5 at [13.59].

77. The starting point is the outward conduct of the defendant and the symptoms he reported as experiencing at the time of the alleged offending which were taken into account by both Dr Lysenko and Mr Jacobs in reaching the conclusion that the defendant was suffering from a mental illness at the time of the alleged offending.
78. According to the history he gave and the explanation he provided for his conduct, the defendant was at the material time experiencing a variety of symptoms which included persecutory delusions and delusions of reference and possible associated perceptual disturbances. As a result of his delusional beliefs the defendant was extremely angry, and his anger appeared to be directed at “the world”. At the time of the alleged offending the defendant was engaged in “psychotic thinking”, to borrow the expression used by Dr Lysenko.
79. Although it is usual for a court to receive expert evidence in relation to the effect of the symptoms of a mental illness on the workings of a person’s mind (by reference to the McNaghten Rules), provided there is sufficient evidence of the symptomology of the mental illness from which the person was suffering from a mental illness at the time of the alleged offending, it is open to a jury or trier of fact to draw inferences as to the effects of those symptoms on the workings of the person’s mind by reference to the McNaghten Rules.²³
80. In my opinion, the fact that the defendant was suffering from a mental illness – the symptoms of which were of a psychotic nature and included persecutory delusions and delusions of reference as well as impaired judgment, impaired insight and anger associated with his delusional beliefs – gives rise to a reasonable and definite

²³ It is noted that back in the 19th century, psychiatric evidence in relation to the McNaghten Rules was subject to the ultimate issue rule, which allowed medical evidence as to “appearances of symptoms of a disease of the mind in the accused, but left it to the jury to draw inferences as to the effect of these symptoms”: B McSherry “ Psychological and

inference²⁴ that it is more probable than not that at the material time the defendant did not know that the conduct he was engaged in was wrong. The more probable inference is that the defendant was at the material time unable to reason with a moderate degree of sense and composure about whether his conduct, as perceived by a reasonable person, was wrong. The symptoms of the mental illness from which he was suffering at the time of the alleged offending would have clearly impacted upon the defendant's ability to reason with a moderate degree of sense and composure in the relevant sense. All of these symptoms would more likely than not have affected the defendant's thought and feeling processes to such an extent that he was unable at the time to reason (think rationally) with a moderate degree of sense and composure about the right or wrongness, according to ordinary standards, of his conduct. In my opinion, the defendant was unable due to his delusions, impaired judgment and insight and the anger associated with his delusional beliefs to take into account the considerations which go to make right or wrong.

81. In my opinion, the fact that the defendant had told Dr Lysenko that he had driven down Mitchell Street because he "wanted to kill someone and wanted to make it clear to everyone that [he] could" contradicted the explanation that he gave to Mr Jacobs does not detract from the conclusion that the defendant did not know that his conduct was wrong. The contradictory accounts are indicative of the defendant's disturbed and confused state of mind and irrational thinking at the material time. Furthermore, the overarching aspect is that the defendant drove the motor vehicle in the alleged manner to express the intense anger he was experiencing as a result of his delusional beliefs. That extreme anger in combination with his psychotic

Psychiatric Testimony and the Ultimate Issue Rule" (1999) *Journal of Law and Medicine* Vol 7, 9. See *R v Wright* (1821) Russ & Ry 456; *R v Higginson* (1843) 1 C & K 129; 174 ER 743.

²⁴ See *Holloway v McFeeters* (1956) 94 CLR 470 at 480-1.

symptoms of delusions and impaired judgment and insight deprived the defendant of the ability to reason with a moderate degree of sense and composure about whether his conduct, as perceived by a reasonable person, was wrong.

82. However, in the present case, the evidence is not limited to the drawing of probable inferences based on the mental illness that the defendant was suffering from at the time and the symptomology. In addition, the court is assisted by expert testimony in relation to the criteria specified in s 77(4)(b)(ii) of the Act.
83. Although Mr Jacobs does not, in the court's opinion, possess the requisite "specialised knowledge" within the meaning of s 79 of the *Evidence (National Legislation) Act* to proffer an opinion that the defendant did not know that the conduct he engaged in was wrong, Dr Lysenko does possess such "specialised knowledge"; and is therefore able to provide such an opinion.
84. As previously stated, Dr Lysenko held the view that the defendant's mental state at the time, which manifested itself in delusional beliefs that triggered intense anger, would have diminished his capacity to reason. Furthermore, Dr Lysenko agreed with Mr Jacobs' opinion (including the basis for that opinion)²⁵ that at the material time the defendant lacked the capacity to reason with a moderate degree of sense and composure about whether his conduct, as perceived by a reasonable person, was wrong.

CONCLUSION

85. I am satisfied on the balance of probabilities that at the time of the alleged offending the defendant was suffering from a mental illness and as a consequence of that

²⁵ Notwithstanding the opinion was inadmissible due to lack of "specialised knowledge".

illness he did not know the conduct constituting the alleged offending was wrong.
Accordingly, all charges are dismissed.

Dated 21 November 2018

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Dr John Lowndes
Chief Judge of the Local Court of the Northern Territory