Neutral Citation Number: [2018] EWCA Crim 1743

Case No: 201605518C2/201605520/C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES
His Honour Judge Dodgson
T20167044

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE GROSS
LORD JUSTICE DAVIS
MR JUSTICE HADDON-CAVE
and
SIR PETER OPENSHAW
(sitting as an Additional Judge of the Court of Appeal)

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Between :

	SIMON TAJ	**Appellant**
	- and -	
	THE CROWN	**Respondent**

- -
- -

Abbas Lakha Q.C. and **Trevor Siddle** for the Applicant
John McGuinness Q.C. and **Louise Oakley** for the Respondent

Hearing date : 26 April 2018

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Judgment Approved

Sir Brian Leveson P :

1. On 26 October 2016, in the Crown Court at Kingston upon Thames, before His Honour Judge Dodgson and a jury, Simon Taj was convicted unanimously of the attempted murder of Mohammed Awain. Following an adjournment for further psychiatric evidence, he was sentenced (pursuant to s. 226A of the Criminal Justice Act 2003) to an extended sentence of 19 years' imprisonment, comprising a custodial term of 14 years with 5 years on licence. The full court (Sir Brian Leveson P, Baker and Martin Spencer JJ) granted leave to appeal against conviction; his application for leave to appeal his sentence was then adjourned to be determined, if appropriate, after the appeal.

The Facts

2. The facts reveal a remarkable and very troubling story. At roughly 2.00 pm on Sunday 31 January 2016, Taj was driving a rented van along the Albert Embankment when he came across Mr. Mohammed Awain, an electrician, whose car had broken down. Smoke

was emanating from the body and exhaust of Mr Awain's vehicle and he was standing outside it.

3. Taj parked his van alongside Mr Awain, and asked if he could do anything to help. Mr Awain was busy on the telephone to his wife requesting that she contact a recovery company, but he asked Taj if he had any jump leads. Being suspicious, Taj (who has no security credentials of any sort) then proceeded to ask Mr Awain a number of questions regarding his employment, and requested to see his driving licence. Somewhat unsettled, he then walked around Mr Awain's vehicle and paced towards the Lambeth Bridge and back again: when out of Mr Awain's hearing, he called 999 to alert the authorities to the situation, which he described as a "possible bomb scare threat".

4. Returning to the car, Taj (who was wearing a high visibility jacket) asked to look inside. Under the impression he was a local security officer, Mr Awain proceeded to open the boot and allowed access to the interior of the car which, not surprisingly in view of his occupation, contained electrical equipment and wires. This caused Taj to form the view that Mr Awain was involved in terrorist activity.

5. In the light of the emergency phone call, police officers were quick to respond. They conducted an inspection of the scene and equally quickly concluded that Mr Awain was not, in fact, a terrorist and had simply broken down. There was an attempt made to jump-start the car in the presence of both of the officers and Taj which resulted in sparks under the bonnet and a large quantity of smoke, sufficient to block the carriageway. At this point the officers directed that Mr Awain cease any attempts to fix or restart his car and organise recovery.

6. Concerned by what had just happened, irrespective of the involvement of the police, Taj ran back towards the bridge. He says he tried to stop other people from approaching the vehicle and was still convinced that he was in the midst of a terrorist incident. It is unclear whether this was before or after PC Law said that Taj could leave as the police were in attendance and equally unclear whether he heard these words being said.

7. The police left the scene and Taj also returned to his van and drove away. As he did so, however, it was his case that he had "ruminating thoughts" about Mr Awain having a bomb, and he felt compelled to do something about it. As a result, at about 2.46 pm, he returned and placed a tyre lever (as a potential weapon) on the passenger seat of his van, so as to have it to hand. He alighted to find Mr Awain waiting by his vehicle, talking on the telephone. Alarmed, again, that Mr Awain was making enquiries as to how to detonate a bomb, Taj was spurred into action. He returned to his van, took the tyre lever from the passenger side, approached Mr Awain and began to hit him around the head with it. He says his motive was to incapacitate Mr Awain from getting back to his car, which he still believed to contain a bomb.

8. CCTV footage captured the start of the attack, but it quickly moved out of sight of the camera. Passers by, however, were shocked by its severity and made some attempts to intervene. They saw Taj hit Mr Awain around the head a number of times and attempt to spray him in the eyes with an aerosol can. He continued to strike him while Mr Awain sought to protect his head and escape blows by putting his head into a bicycle stand. Meanwhile, Taj was heard to claim that he was a policeman and that Mr Awain was a

terrorist who needed to be finished off.

9. A number of people called 999 and officers arrived on the scene. WPC Harley approached Taj, while another officer attended to Mr Awain who was bleeding heavily from his head. Taj was visibly agitated, and had blood on him. She told him to drop his weapons and attempted to restrain him: he expressed surprise and asked her "why are you arresting me he's the terrorist". Taj struggled with the officer, escaping her attempts to detain him, and ran into a nearby hotel. PC Carmargo pursued and then arrested him in the hotel lobby.

10. The case for the prosecution was that Taj launched an unprovoked, unjustified, vicious assault on Mr Awain and that he did this with a clear intention to kill. The defence case was that he had acted in self-defence and in defence of others, genuinely believing that Mr Awain was a terrorist who needed stopping.

11. As to the events, in evidence in chief, Taj explained that he attacked Mr Awain with a tyre lever: "thinking that he had a roadside bomb in his vehicle, I was trying to incapacitate him or disable him from going and detonating that bomb". He confirmed that he thought that Mr Awain would have to get to his vehicle to detonate the bomb and that he was by the vehicle at the time. He admitted that he had said that he was the police and that "he needs to be finished off", meaning, he explained, that he wanted to disable him from being able to get to his vehicle.

12. When cross examined, Taj agreed that he could see Mr Awain on the telephone, not having moved from where he had left him; the smoke emanating from the van had disappeared. He hit him "maybe five to six times" and he remembered Mr Awain putting his hands over his head and up to his face to protect himself. He agreed that Mr Awain never fought back and may have been on the ground when he continued to hit him over the head: he "wanted to incapacitate him and disable him from being able to manoeuvre towards his vehicle". The result was that Mr Awain suffered serious injuries.

13. At the heart of the defence case was that the proposition that Taj did not have the requisite specific intent required either for attempted murder or for the alternative of causing grievous bodily harm with intent contrary to s. 18 of the Offences Against the Person Act 1861 in that he neither intended to kill or cause really serious harm. This proposition turned on Taj's mental state.

14. Psychiatric evidence was obtained by both prosecution and defence, for the former from Dr Browne and for the latter from Dr Reid. On 13 October 2016, Dr Browne and Dr Reid submitted a document entitled "Heads of Agreement", in which the following points were set out as undisputed:

    i) Taj is fit to plead and stand trial;

    ii) Taj was diagnosed as suffering from drug induced psychosis and was suffering from a drug or alcohol induced psychotic disorder at the time of the offence;

    iii) Taj had the ability to form an intent at the time of the alleged offence; the driving

force behind his actions was a drug induced/drug and alcohol induced paranoid state of mind.

15. Adding further background, by his own admission, Taj had abused drugs and alcohol from a very young age. It appears that he started drinking alcohol and abusing cannabis from as early as the age of 12. At 16, he started taking ecstasy and, by 18, he had moved on to cocaine. He also admits to taking MDMA. He readily admitted in his evidence to the jury that he had been out drinking "heavily" on Friday 29 January 2016 and well into the early hours of Saturday 30 January 2016. Specifically, he admitted to having drunk light ales, lager, Jägerbombs, Quattro, Red Bull, vodka, champagne. He said it was possible that he had also taken some shots of Sambuca. On the Saturday night he drank a further four pints of beer.

16. In relation to his mental health, Taj was frank with the jury. He admitted that, in November 2009, he had been subject to detention pursuant to s. 2 of the Mental Health Act 1983 and that (as he knew) drugs and alcohol had a detrimental effect on his mental wellbeing. When cross-examined, he further admitted that, by the age of 21, he knew the effect that alcohol and cocaine had on him, and that they could cause him to experience feelings of paranoia. These feelings could come in the form of voices, and feelings of aggression and vulnerability, as if he were under threat. He accepted that he was paranoid on the day of the incident, and realises what he did was not right. With regards to the weeks leading up to the incident he admitted that he had been habitually drinking to excess and had used cocaine.

17. There was no evidence to suggest that Taj had taken any drugs or alcohol on the 31 January 2016 itself and nobody spoke of him showing signs of having recently consumed alcohol or drugs other than his irregular behaviour. No samples were taken on arrest (on the Sunday afternoon) and therefore no forensic evidence on the subject was adduced at trial.

18. Both Dr Reid and Dr Browne gave evidence. Dr Browne stated that, by the time of his review, Taj presented as remarkably normal. Dr Browne explained to the jury that the use of drugs and alcohol could induce a condition very similar to psychosis and that the effects could last for weeks. Dr Reid echoed Dr Browne's evidence, stating that Taj displayed no evidence of an ongoing psychosis. The experts reiterated their shared belief that he had been suffering from a drug induced psychosis on the day of the incident. During the course of trial, although it was not suggested that there was a sensible ground for the belief, the prosecution never challenged the defence assertion that Taj did genuinely believe that Mr Awain was a terrorist who posed an immediate threat.

The Ruling

19. The defence sought to rely on self-defence as codified in s. 76 Criminal Justice and Immigration Act 2008 ("the 2008 Act") noting, in particular, s. 76(4)(b) which makes it clear that the defence is available even if the defendant is mistaken as to the circumstances as he genuinely believed them to be whether or not the mistake was a reasonable one for him to have made. Although s. 76(5) provides that a defendant is not entitled to rely upon any mistaken belief attributable to intoxication that was voluntarily induced, it was argued that as there was no suggestion that Taj had alcohol or drugs present in his system at the time, he was not 'intoxicated' and so was not deprived of the

defence.

20. It was also submitted that *R v McGee, R v Harris, R v Coley* [2013] EWCA Crim 223 supported the proposition that to be in a state of "voluntarily intoxication" there had to be alcohol or drugs active in the system at the time of the offence. In particular, *Harris* was concerned with a man in the habit of drinking heavily as a result of clinical depression who would cease to drink when returning from holiday and who, in the past, suffered alcohol psychosis when he stopped drinking. On this occasion, he had started a fire in his own house, thereby endangering his neighbours. Based on self-induced intoxication and *DPP v Majewski* [1977] AC 443, the judge refused to leave insanity to the jury on the basis that the condition was caused by past voluntary intoxication. This court concluded that the judge had misinterpreted the law on the basis that the defendant was not, in any sense, intoxicated at the time of the offence.

21. The present case does not concern insanity (which it was then agreed was not established) or the establishment of specific intent but, rather, the availability of self defence. Judge Dodgson ruled that the phrase 'attributable to intoxication' in s. 76(5) of the 2008 Act was not confined to cases in which alcohol or drugs were then present in the appellant's system. He relied on the Oxford English Dictionary which defined intoxication as:

> "The action of rendering stupid, insensible, or disordered in intellect, with a drug or alcoholic liquor; the making drunk or inebriated; the condition of being so stupefied or disordered."

He said that while usually referring to the state of mind induced by alcohol, there was nothing to limit its application to that time if there is cogent evidence that the effect of the alcohol, or drugs, continued to render the person *inter alia* 'disordered in intellect".

22. The judge distinguished *Harris* concluding that the crucial words were contained within the conclusion of Hughes LJ (at [59]) that Harris "was not suffering from a direct or acute reaction to the voluntary taking of intoxicants". In that case, the defendant was suffering from the effects of not being intoxicated, whereas in this case, he was indeed suffering from a direct or acute reaction to the voluntary taking of intoxicants. Thus, self defence was not open to Taj although it would be a matter for the jury to determine whether the relevant specific intention for either attempted murder or causing grievous bodily harm with intent had been established.

The Appeal

23. Abbas Lakha Q.C., for Taj, submits that the judge was wrong to withdraw self defence from the jury: Taj's mistaken belief was not attributable to voluntary intoxication not least because there was no evidence that he was intoxicated by drink or drugs. The purpose of s. 76 of the 2008 Act was to re-state the concept of reasonable force involved in self defence and s. 76(4) was not intended to be denied to a person suffering from a paranoid state of mind, however caused. Rather, the objective element of self defence was encompassed by s. 76(6) and (8) of the 2008 Act on the basis that the jury was the ultimate arbiter of whether the degree of force used was disproportionate or not.

24. As for the interpretation of s. 76(5) prohibiting D from relying on "any mistaken belief

attributable to intoxication that was voluntarily induced", Mr Lakha argued that English law had repeatedly interpreted intoxication in such a way as connotes the immediate and ongoing effects of current intoxication. He relied on the analysis of the law in relation to insanity and the observations of Lord Birkenhead in *R v Beard* (1920) 14 Cr App R 159 at 164 in these terms:

> "But drunkenness is one thing and the diseases to which drunkenness leads are different things, and if a man by drunkenness brings on a state of disease which causes such a degree of madness even for a time, as would have relieved him from responsibility if it had been caused in any other way then he would not be criminally responsible."

25. He argues that this decision follows *R v Davis* (1881) 14 Cox CC 563 (delirium tremens was not intoxication) and has been followed, for example, by *Coley* (*supra*) and, in particular, in relation to the appeal of *Harris* that although that defendant's condition was caused by past voluntary intoxication, he was not suffering from "a direct or acute reaction to the voluntary taking of intoxicants" and should not be deprived of the defence of insanity on the basis that since his mental illness was brought on by past voluntary drinking, he should be treated as if still drunk. He relies on the observations of Hughes LJ (at [59]) in these terms:

> "We agree that there is scope for the argument that an illness caused by his own fault ought as a matter of policy to be treated in the same way as is drunkenness at the time of the offence. This would, however, represent a significant extension of *DPP v Majewski* [1977] AC 443 and of the similar principle expounded in *Quick* which likewise concerned a case where what was asserted was an acute condition (there of automatism) induced arguably by the defendant's fault. A great many mental illnesses have their roots in culpable past misconduct of the sufferer: those attributable to many years of past drug abuse or alcohol abuse are perhaps the most obvious… Whether the *Majewski* approach ought to be extended to such cases may be a topic which might be addressed in the forthcoming work of the Law Commission on loss of capacity and it should, no doubt, be the subject of proper public debate. But in the present state of the law, *Majewski* applies to offences committed by persons who are then voluntarily intoxicated but not to those who are suffering mental illness."

26. Thus, Mr Lakha argues that there must be evidence that the intoxicant was present and active in the system at the time of the alleged offence. Like Harris, Taj was suffering from a condition of mental illness when he attacked Mr Awain; that it may not have been long lasting did not mean that it was not a true illness.

27. Furthermore, Mr Lakha pointed to s. 76(9) of the 2008 Act to the effect that the provisions were "intended to clarify the operation of the existing defences". Had Parliament intended to exclude mistakes of fact resulting from a recognised mental condition, it would have done so specifically. As it was, the subsection clarified the common law position expressed in cases such as *R v O'Grady* (1987) 85 Cr App R 315 and *R v Hatton* (2006) 1 Cr App R 16. Both these cases were, however, concerned with men then under the immediate influence of alcohol with the result that the point did not

specifically arise.

28. John McGuiness Q.C. for the Crown also said that the meaning of s. 76(5) was clear but fundamentally disagrees as to that clear meaning. He argues that, as a matter of construction of language, the phrase "attributable to intoxication that was voluntarily induced" is not limited to a case where a defendant is in a state of intoxication at the time. He lays particular emphasis on the word "attributable" as being wider than a defendant being then in a state of (chemical) intoxication. *Coley* was concerned with insanity, *McGhee* automatism and *Harris* specific intent. The earlier decision in *Quick* [1973] QB 910 (which was not a case of intoxication) also concerned automatism. None considered s. 76(5) of the 2008 Act.

29. Furthermore, contrary to the observations of Hughes LJ in *Coley*, Mr McGuinness does not accept that his submission represents "a significant extension" to *Majewski* which does not, in terms, confine the exclusion of reliance on mistaken belief attributable to voluntarily induced intoxication to cases where the defendant is chemically intoxicated at the time. The House was then concerned with a case where the defendant was in a state of (chemical) intoxication; his defence was that his consumption of drugs and alcohol meant that he did not know what he was doing and remembered nothing. The speeches focus on that case and, in particular, whether self-induced intoxication was a defence to crimes of basic intent as well as those requiring specific intent to be established.

30. Mr McGuinness went further, identifying that *Majewski* was decided before *R v Williams (Gladstone)* (1983) 78 Cr App R 276. That case confirmed the common law development that, in respect of self-defence, a defendant's belief as to the existence of circumstances need not be reasonable as long as it was genuinely held. There is thus a strong policy justification for the interpretation of s. 76(5) for which the Crown contends.

31. Such a view was supported by *R v Oye* [2013] EWCA Crim 1725, [2014] 1 Cr App R 11 in which on a trial for affray and subsequently inflicting grievous bodily harm (at which times it was undisputed that he was insane within the terms of *M'Naghten's case* (1843) 10 Cl & F 200), it was argued that the defendant was entitled to be acquitted. It was conceded that he genuinely believed that he was forced to defend himself because of the insane delusion that evil spirits were intent on harming him. The defence of self defence, however, was rejected on the basis of "strong policy objections": s. 76(6) of the 2008 Act and *R v Martin (Anthony)* [2003] QB 1 were to the effect that the second limb did include an objective element by reference to reasonableness. Such policy objections similarly operated on the basis that at the time of the offence, Taj was suffering from a direct or acute reaction to the voluntarily taken intoxicants, whether or not they were present in his system. Thus the conviction is not, in any event, unsafe.

32. Mr Lakha responds to the last submission by arguing that once the judge had concluded (as the prosecution had conceded) that Taj genuinely believed that Mr Awain was a terrorist, it was for the jury (and only the jury) to consider the reasonableness of his actions. He noted that the defence of self defence had been left to the jury in *Oye* and, as a result, submits that it was not open to the judge to withdraw it.

Further Evidence

33. After the conclusion of the argument, Mr Lakha submitted a further medical report from Dr Reid (dated 7 May 2018), generated in the light of events which had occurred while Taj was in custody when he became manic such that a diagnosis of bipolar affective disorder was appropriate. Dr Reid observed that, while it was difficult to state with certainty that his alcohol use or drug use prior to this may or may not have contributed to the onset or severity of his illness, it was "certainly very possible" that he was experiencing symptoms of mental illness in the absence of substance or alcohol misuse at the time of the index offence. When subsequently asked whether he was supporting a defence based on insanity, on 15th May 2018, Dr Reid concluded that, while Taj did suffer defects of reason due to disease of the mind, he did not support such a defence observing:

> "I am not convinced that his actions were motivated by a clear delusional belief that the victim was a terrorist and a bomb was about to go off and he had no option but to act as he did."

34. We invited written submissions in relation to this material. Mr Lakha argues that as the cause of Taj's belief is a central issue in the appeal, the evidence of Dr Reid fulfils the requirements of s. 23 of the Criminal Appeal Act 1968 and should be admitted. Mr McGuinness submits that Dr Reid's more conservative opinion is somewhat obliquely expressed, raising only possibilities (the symptoms not, in any event, being typical of bipolar disorder) such that he is not able to opine one way or the other. The result is that this evidence (even if new and not available at the time of the trial) would not afford a ground for allowing the appeal.

Analysis

35. We start with s. 76 of the 2008 Act (as amended) the relevant part of which which (omitting the specific provisions dealing with the householder defence) provides for reasonable force for the purposes of self defence in these terms:

> "(1) This section applies where in proceedings for an offence—
>
> (a) an issue arises as to whether a person charged with the offence ("D") is entitled to rely on a defence within subsection (2), and
>
> (b) the question arises whether the degree of force used by D against a person ("V") was reasonable in the circumstances.
>
> (2) The defences are—
>
> (a) the common law defence of self-defence; and
>
> (aa) the common law defence of defence of property; and
>
> (b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).
>
> (3) The question whether the degree of force used by D was

reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not —

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(5A) In a householder case, ….

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) Subsections (6A) and (7) are not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(8A) For the purposes of this section “a householder case” is a case where ….

(9) This section except so far as making different provision for householder cases, is intended to clarify the operation of the

existing defences mentioned in subsection (2).

(10) In this section—

(a) “legitimate purpose” means—

(i) the purpose of self-defence under the common law, or

(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);

(b) references to self-defence include acting in defence of another person; and

(c) references to the degree of force used are to the type and amount of force used.”

36. The common law, replicated in the 2008 Act, establishes that the defence of self-defence has two limbs. The first is whether the defendant genuinely believed that it was necessary to use force to defend himself. The second is whether the nature and degree of force used was reasonable in the circumstances. Once self-defence has been raised as an issue, it was for the prosecution to disprove it to the criminal standard. This is to be contrasted with a defence of insanity, where the burden is on the defendant.

37. Leaving aside cases of self-induced intoxication, it had long been established that the first limb of the defence involved an assessment of the subjective state of mind and belief of the defendant: objective considerations of what was or was not reasonable are only relevant to the extent that they may cast light on what the state of mind of the defendant in truth really was. It thus follows that even if the belief is based upon a mistake or a delusion, provided it was genuinely held, it can operate to satisfy the first limb of the defence.

38. The evidence to be taken into account when considering whether or not a belief is genuinely held was considered by the Court of Appeal in the case of *R v. Williams (Gladstone)* [1987] 3 All E.R. 411 in which the appellant witnessed a man attack a youth and rushed to intervene. In defence of the youth, he assaulted the attacker and was charged with assault occasioning actual bodily harm. In fact, the youth had just committed a robbery and the supposed attacker had wrestled him to the ground to prevent him escaping. Notwithstanding the mistake, the appellant was convicted. He then appealed his conviction on the basis that the trial judge gave a misdirection to the jury in requiring the mistake to be a reasonably held mistake.

39. Giving the judgement of the Court, the then Lord Chief Justice, Lord Lane put the matter as follows:

> “The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there.”

40. This principle was upheld in *Beckford v The Queen* [1988] A.C. 130, in which Lord Griffiths explicitly stated that at [387]:

> "Where there are no reasonable grounds to hold a belief, it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held."

41. Whether or not a belief is genuinely held must be derived from the circumstances. Thus, in *Dewar v DPP* [2010] EWHC 1050 (Admin) the court emphasised that consideration should be given to whether or not the defendant had acted instinctively given the situation in which he had found himself and in *Unsworth v DPP* [2010] EWHC 3037 (Admin), the court emphasised the length of time that the threat had been in place and the extremeness of the measures taken to remove it. 'Extremeness' in this context is distinct from and should not be equated with 'reasonableness', albeit that one may have bearing on the other.

42. By underlining the requirement of reasonableness, the second limb of the defence incorporates (but is not confined to) objective considerations: see, for example, *Palmer v The Queen* [1971] AC 814. Other relevant factors, reflected in s. 76 of the 2008 Act, include the possibility of retreat, the fact that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action and that evidence of a person having only done what he or she honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose. Thus, it is now conventional to direct juries, as regards the issue of the reasonableness of the force used, not only as to the circumstances in which the defendant found himself in responding by the use of force (for example a "heat of the moment" situation) but also, in an appropriate case, as to the circumstances in which the defendant genuinely, albeit mistakenly, believed them to be.

43. Thus, in *Oatridge* (1994) 92 Cr App R 367 the defendant stabbed the victim genuinely, but mistakenly, believing the victim had been attempting to kill her. It was held that the jury should have been directed to consider whether the degree of force used in response was commensurate with the degree of risk which the defendant genuinely believed to be created by the attack under which she genuinely believed herself to be. Accordingly, the fact that the defendant may have mistaken the victim's intentions towards her was no bar to the requirement for such a direction: on the contrary, it was a reason for it. The question of whether the response is, or may be, in fact commensurate with the (mistakenly) perceived risk remains for assessment by the jury: see, for example, the decision in *Yaman* [2012] EWCA Crim 1075.

44. Turning to the effect of intoxication, the law, replicated and confirmed in s. 76(5) of the 2008 Act in relation to self defence, has long been that a mistake of fact due to self-induced intoxication does not provide a defence to a criminal charge: see *R v. Lipman* [1970] 1 Q.B. 152, 53 Cr.App.R. 600, CA; *DPP v Majewski* [1977] A.C. 443, HL; *R. v O'Grady* [1987] Q.B. 995, 85 Cr.App.R. 315, CA; and *R. v Hatton* [2006] 1 Cr.App.R. 16, CA.

45. In that regard, there is an obvious causal link in the case (such as *O'Grady* and *Hatton*) where offences were committed in the acute stages of voluntary intoxication. In this case, however, it was common ground that there was no evidence that Taj was intoxicated at the time of the offence, as opposed to suffering psychotic disorder,

following his deliberate ingestion of drugs and/or alcohol in the days and weeks prior to the incident in circumstances in which he knew that such a disorder was likely to follow such behaviour.

46. In that regard, Mr Lakha relies on *R v. Coley, R v. McGee, R v. Harris* arguing that the law has long recognised the distinction between intoxication (upon which a defendant was not entitled to rely) and a disease of the mind induced by intoxicants (in respect of which he was not deprived of a defence). This distinction, it is argued, was very clearly elucidated in the judgment of Lord Birkenhead LC in *Beard* (1920) 14 Cr App R 159 at 164 (cited above).

47. The facts of *Harris* require elucidation. He had been charged with aggravated arson, contrary to section 1(2) of the Criminal Damage Act 1971 on the basis of an allegation that he had started a fire in his own house being reckless as to whether the lives of his neighbours in the next door semi-detached house would be endangered. It was common ground between prosecution and defence that, at the time, the defendant was suffering from an episode of alcohol psychosis or alcohol-induced hallucinosis caused by the sudden cessation of heavy drinking. In the days leading up to the offence the family of the defendant had raised concerns about his mental health and had sought medical assistance. In particular, he had been complaining of hearing voices, had been seen to be attempting to cut the grass using an electric lawnmower which was not plugged in, and removing important documents to his shed.

48. On the other hand, it was also accepted that the defendant set the fire, that he knew the nature and the quality of his act and that he knew that it was wrong. The defence was based on his challenge to the allegation that he was reckless on the basis that, because of his medical condition, the thought had never occurred to him. The crux of the issue raised before the Court was whether or not this was a case of voluntary intoxication. As in this case it was agreed that the offending behaviour was caused by a condition which was caused by voluntary intoxication, but that the defendant was not intoxicated at the time. The trial judge ruled that mental illness caused by voluntary intoxication was relevant insofar as it provided him a defence to a charge of recklessness. If he was incapable of being reckless due to such an illness the jury need not consider his intent beyond that.

49. It was in that context that Hughes LJ observed (see [25] above) that there was scope for the argument that an illness caused by his own fault ought as a matter of policy to be treated in the same way as is drunkenness at the time of the offence but that this would represent a significant extension of *DPP v Majewski* [1977] AC 443 and was at risk of covering mental illness attributable to many years of past drug or alcohol abuse. Thus, we must deal first with the submission made by Mr McGuinness that this observation is a mischaracterisation of *Majewski*, which itself requires an analysis of the development of the law and its articulation in that case.

50. Lord Birkenhead LC in *Beard* set out a useful historical analysis of the principle (as he described it) "that a man who by his own voluntary act debauches and destroys his will power shall be no better situated in regard to criminal acts than a sober man", by tracing early statements back to 16th Century (*Reniger v. Fogossa,* 1 Plowden, 19, 1551 (Cam. Scacc.), and citing Hale's Pleas of the Crown, vol. i., p. 32, Coke upon Littleton, 247a, and Hawkins' Pleas of the Crown, Book I., c. 1, s. 6 ("He who is guilty of any crime

whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober.") Thus, in In *Reniger v. Fogossa,* 1 Plowden, 19, 1551 (Cam. Scacc.) the court stated:

> "If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby."

51. As the court in *Reniger* pointed out, the principle can be traced back to antiquity:

> "And *Aristotle* says, that such a Man deserves double Punishment, because he has doubly offended, *viz.* in being drunk to the evil Example of others, and in committing the Crime of Homicide. And this Act is said to be done *ignoranter,* for that he is the Cause of his own Ignorance."

52. Whilst the early common law authorities speak simply in terms of 'drunkenness' (*i.e.* the present state of being drunk) being no defence, it is clear that the mischief at which they are aimed is more general, namely voluntary intoxication does not allow a person to escape criminal responsibility for his subsequent actions. As Blackstone said in his Commentaries, Book IV., c. 2, s. III., p. 25:

> "As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour."

53. Turning to *Majewski*, the appellant was involved in brawl at a public house and subsequently assaulted various police officers. He faced various charges of assault. His defence was that the offences had been committed while he was suffering from the effect of alcohol and drugs. Judge Petre directed the jury that, as no specific intent was required to be proved, self-induced intoxication by drink and drugs could not be a defence and was to be ignored in reaching verdicts. The appellant was convicted. An appeal based on misdirection of the jury was rejected both by this court and the House of Lords which reaffirmed the rule at common law that self-induced intoxication was not a defence to a criminal charge. It was accepted that while the rule had been mitigated for offences where a special intent had to be proved, it remained effective and had not been altered by s. 8 of the Criminal Justice Act 1967 and, accordingly, self-induced intoxication by drink or drugs or both was not a defence to the assaults alleged against the appellant.

54. The following five themes emerge from a close reading of their Lordships' judgments in *Majewski*:

i) The principle that self-induced intoxication does not amount to a defence to criminal responsibility is a long-standing common law principle.

ii) The underlying rationale of the principle is recklessness, namely that persons should be criminally responsible for their reckless conduct in taking drink or drugs and their actions flowing therefrom.

iii) The principle is founded in pragmatism and policy, namely the needs of society to maintain order and to keep public and private violence under control.

iv) It would bring the law into contempt if the principle were otherwise and self-induced intoxication was a defence to criminal responsibility.

v) Criminal behaviour as a result of drink and drugs is one of the serious menaces facing society today.

55. These themes are illustrated by the following passages of the speeches in *Majewski*:

> "[T]o maintain order and to keep public and private violence under control… is the prime purpose of the criminal law." (*per* Lord Elwyn-Jones LC, p. 469G).
>
> "If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases: see *Reg. v Venna* [1976] QB 421, *per* James L.J. at p. 429. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness." (*per* Lord Elwyn-Jones LC, p. 469G - with whom Lord Diplock agreed at p.476E).
>
> "One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences." (*per* Lord Simon of Glaisdale, p. 476G).
>
> "There is no juristic reason why mental incapacity (short of *M'Naghten* insanity), brought about by self-induced intoxication, to realise what one is doing or its probable consequences should not be such a state of mind stigmatised as wrongful by the criminal law; and there is every practical reason why it should be." (*per* Lord Simon of Glaisdale, p. 476G).

"If there were to be no penal sanction for any injury unlawfully inflicted under the complete mastery of drink or drugs, voluntarily taken, the social consequence could be appalling. That is why I do not consider that there is any justification for the criticisms which have been made of the Court of Appeal's decision in *R v. Lipman* [1970] 1 QB 152. Lipman was convicted of manslaughter because he had killed his companion by stuffing bedclothes down her throat under the illusion, induced by the hallucinatory drugs he had taken, that he was fighting for his life against snakes." (*per* Lord Edmund-Davies, p. 484B).

"If, as I think, this long-standing rule was salutary years ago when it related almost exclusively to drunkenness and hallucinatory drugs were comparatively unknown, how much more salutary is it today when such drugs are increasingly becoming a public menace? My Lords, I am satisfied that this rule accords with justice, ethics and common sense, and I would leave it alone even if it does not comply with strict logic. It would, in my view, be disastrous if the law were changed to allow men who did what Lipman did to go free. It would shock the public, it would rightly bring the law into contempt and it would certainly increase one of the really serious menaces facing society today. This is too great a price to pay for bringing solace to those who believe that, come what may, strict logic should always prevail. I agree with my noble and learned friend on the Woolsack that, for the reasons he gives, section 8 of the Criminal Justice Act 1967 does not touch the point raised in this appeal, and I also agree that directions along the lines laid down by my noble and learned friend on the Woolsack should be given by trial judges to juries in the kind of cases to which my noble and learned friend refers. (*per* Lord Edmund-Davies, p. 484F).

"As to the complaint that it is unethical to punish a man for a crime when his physical behaviour was not controlled by a conscious mind, I have long regarded as a convincing theory in support of penal liability for harms committed by voluntary inebriates, the view of Austin, who argued (Lectures on Jurisprudence, 1879, pp. 512-513) that a person who voluntarily became intoxicated is to be regarded as acting recklessly, for he made himself dangerous in disregard of public safety." (*per* Lord Edmund-Davies, p. 496C).

"There is, at least superficially, logic in that approach: but logic in criminal law must not be allowed to run away with common sense, particularly when the preservation of the Queen's Peace is in question. The ordinary citizen who is badly beaten up would rightly think little of the criminal law as an effective protection if, because his attacker had deprived himself of ability to know what he was doing by getting himself drunk or going on a trip with drugs, the attacker is to be held innocent of any crime in the assault. *Mens rea* has many aspects. If asked to define it in such a case as the present I would say that the element of guilt or moral turpitude is supplied by the act of self-intoxication reckless of possible consequences." (*per* Lord Russell, p. 498F).

56. *DPP v. Majewski* focused on crime committed while specifically under the influence of drugs or alcohol. Having said that, however, it is difficult to see why the language (and the policy identified) is not equally apposite to the immediate and proximate consequences of such misuse. That is not to say that long standing mental illness which might at some stage have been triggered by misuse of drugs or alcohol would be covered. The point is that a defendant who is suffering the immediate effects of alcohol or drugs in the system is, in truth, not in a different position to a defendant who has triggered or precipitated an immediate psychotic illness as a consequence of proximate ingestion of or drugs in the system whether or not they remain present at the time of the offence.

57. The fact is that medical science has advanced such that, in the modern age, the longer term *sequelae* of abusing alcohol or drugs are better known and understood; and, as in the present case, it was agreed that Taj's episode of paranoia which led him to mistake the innocent Mr Awain as a terrorist was a direct result of his earlier drink and drug-taking in the previous days and weeks. In the circumstances, we are not persuaded that the view expressed by Hughes LJ applies to Taj, given that his paranoia was the direct and proximate result of his immediately prior drink and drug-taking. Alternatively and if need be contrary to the view expressed by Hughes LJ, as a matter of common law, we have no doubt that, had the House in *Majewski* (or even the court in *Reniger v. Fogossa*) been presented with the same medical evidence and facts as in the present case, the House would have had no difficulty in applying the general common law principle with equal force to this case and holding that Taj had no defence because his state of mind had been brought about by his earlier voluntary intoxication. We see that as an application of *Majewski*, rather than an extension of that decision or, at the highest, a most incremental extension.

58. From that analysis we turn to the provisions of s. 76 of the 2008 Act. Mr Lakha contended for a narrow construction of the phrase "attributable to intoxication" in s. 76(5) and submitted (with particular focus on the word "intoxication") that the phrase could only refer to the present state, *i.e.* where someone was actually intoxicated. Mr McGuinness contended for a broader construction of the phrase "attributable to intoxication" in s. 76(5) and submitted (with particular focus on the word "attributable") that the phrase included a mistaken state of mind brought about by earlier episodes of intoxication.

59. The Oxford English Dictionary definition of "attribute" includes:

> "1. Regard as belonging or appropriate to *(a poem attributable to Shakespeare)* 2. Ascribe to; regard as the effect of a stated cause *(the delays were attributable to the heavy traffic)*…"

60. In our view, the words "attributable to intoxication" in s. 76(5) are broad enough to encompass both (a) a mistaken state of mind as a result of being drunk or intoxicated at the time and (b) a mistaken state of mind immediately and proximately consequent upon earlier drink or drug-taking, so that even though the person concerned is not drunk or intoxicated at the time, the short-term effects can be shown to have triggered subsequent episodes of *e.g.* paranoia. This is consistent with common law principles. We repeat that this conclusion does not extend to long term mental illness precipitated (perhaps over a considerable period) by alcohol or drug misuse. In the circumstances, we agree with Judge Dodgson, that the phrase "attributable to intoxication" is not confined to cases in which alcohol or drugs are still present in a defendant's system. It is

unnecessary for us to consider whether this analysis affects the decision in *Harris*: it is sufficient to underline that the potential significance of voluntary intoxication in the two cases differs.

61. We must deal shortly with the further evidence which Mr Lakha submitted after the conclusion of the hearing. In our judgment, the movement of Dr Reid from a clear conclusion (which, we underline, was in agreement with that expressed by the psychiatrist instructed by the Crown) to a more nuanced conclusion based on behaviour in prison does not afford a ground for allowing the appeal: that a psychotic episode may have been precipitated without alcohol or drugs says nothing about whether it was (as Taj agreed he knew to be the case) in fact precipitated on this occasion by alcohol and drugs.

62. In the alternative, if we are wrong about either of the foregoing conclusions, there is another basis upon which the judge was entitled to withdraw the case from the jury and which, in the circumstances of this case, he could (and should) have done so: this concerns the second limb of the defence.

63. In the normal course, once it is common ground that a defendant has a genuine belief in circumstances that might generate a defence of self defence, the decision whether or not the nature and degree of force used was reasonable in the circumstances is for the jury. This case, however, was not normal. In *Oye* [2013] EWCA Crim 1725, [2014] 1 Cr App R 11 the court considered this limb of the defence in the context of a case where the defendant suffered an insane delusion that he was being attacked. Giving the judgment of the court, Davis LJ made it clear (at [47]):

> "The position remains, as we think plain from the provisions of s.76 of the 2008 Act, that the second limb of self-defence does include an objective element by reference to reasonableness, even if there may also be a subjective element: see, in particular, s. 76(6) and see also the decision in *R v Keane and McGrath* [2010] EWCA Crim 2514. An insane person cannot set the standards of reasonableness as to the degree of force used by reference to his own insanity. In truth, it makes as little sense to talk of the reasonable lunatic as it did, in the context of cases on provocation, to talk of the reasonable glue-sniffer."

64. That observation is equally apposite in this case. Any objective consideration of the facts revealed no reasonable basis for the response of Taj. At no stage was Mr Awain armed at the time of the attack and neither did he do anything to suggest that he might have been. Taj had alerted the police who had investigated Mr Awain and the contents of his van and were (entirely properly) fully satisfied that he was no more than that which he claimed: an electrician whose van had broken down. The police had reassured Taj who moved away, returning as Mr Awain remained in the vicinity of his van trying to summon help. Further, Mr Awain did nothing to resist Taj or fight back when he was attacked: rather, he tried to flee and was pursued. Finally, Taj was not deterred by the intervention of any of the witnesses, who describe the attack as "vicious", "the worst that they had ever witnessed", and "quite horrific". There is no basis upon which the jury could have concluded that the extent of force used was reasonable.

65. In all the circumstances, this appeal against conviction is dismissed.

Sentence

66. Taj was born on 24 July 1984 and had previous convictions for theft, possessing a bladed article, possessing controlled drugs, criminal damage, threatening behaviour and assault. A character reference from his cousin spoke of the gentle, humble side of his character and observed that his family had been taken aback by his arrest. On the other hand, the injury sustained by Mr Awain was extremely serious and Taj had allowed himself (knowing the potential effect of consuming alcohol and drugs) to reduce himself into such a state that he put the life of a member of the public at risk underlines how dangerous he was.

67. At the trial, Trevor Siddle for Taj argued that the psychotic disorder ought to serve to reduce the sentence on the grounds that it reduced his culpability and that, in any event, a conclusion that Taj was dangerous was not justified on the basis that there was no evidence from his prior conduct or from this isolated incident of serious violence that he posed a significant risk of serious harm in the future. While not considering it necessary to impose an indeterminate sentence, the judge did not agree with either submission.

68. As for culpability, the judge concluded that he was dangerous and considered that the appropriate starting point for the offence was thirteen years' custody. He went on to determine that the aggravating features, including previous convictions, the sustained nature of the attack and his failure to respond to the intervention of others justified an increase in the custodial term to 14 years. As for mitigation, he explained that had Taj not been fully aware that his state of mind would be affected by consumption of cocaine and alcohol, he might have had more sympathy. His conduct had "created a ticking time bomb" not diffused by the assurance provided by the police officers who attended. The judge observed that people were trying to drag him away and stop him all without success and concluded:

> "I do not regard the fact that you were suffering from the mental disorder as lowering your degree of culpability in this case.
>
> This is not a case where someone acted as they did, because of an inability to control their actions. Rather, this is a case where you knew your actions would induce a state of mind where you could be a danger both to yourself and others. And, therefore, it does not afford you mitigation".

69. Bearing in mind the potential risk to the public and his conclusion that Taj was dangerous, he imposed an extension period of five years. This led to an overall sentence of 19 years comprising a custodial term of 14 years with an extended licence pursuant to s. 226A of the Criminal Justice Act 2003 of 5 years.

70. In this court, Mr Siddle repeats the submissions that he made before the judge. In relation to the finding that Taj was dangerous, the submission is misconceived. Taj knew the effect of consuming alcohol and taking drugs and although he may not have foreseen that he would attack an innocent member of the public with murderous intent, it is beyond argument that his behaviour demonstrated that he created a real risk to the public

and was very likely to continue to do so without treatment and a decision to abstain from risks likely to generate a paranoid state. The need for an extended licence was obvious and the judge was entirely correct to impose the maximum term that he could.

71. As for the impact of Taj's psychotic disorder on his culpability, Mr Siddle is faced with the clear finding of the judge that Taj knew that the cocaine and alcohol he took would induce a state of mind that could make him a danger. Indeed, Taj conceded as much in evidence. It is equally clear that there is ample authority for the proposition that intoxication is no mitigation (but can aggravate offending). Of particular relevance is *R v Cantling* [2006] EWCA Crim 2319 which made it clear (at [32]) that the judge was entitled to refuse to reduce sentence where the appellant "had knowingly exceeded the prescribed dose of drugs and knew that alcohol was contraindicated". This situation (even if there was no alcohol proved to be in Taj's body at the time) is, in reality, identical to that.

72. In the circumstances, the application for leave to appeal against sentence is refused.