

AUSTRALIA / JUDGMENT

McDiarmid v R [2023] NSWCCA 322

COURT

Court of Criminal Appeal

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Source record**Court of Criminal Appeal****Supreme Court****New South Wales****Medium Neutral Citation: McDiarmid v R [2023] NSWCCA 322****Hearing dates: 06 December 2023****Date of orders: 13 December 2023****Decision date: 13 December 2023****Before: Harrison CJ at CL at [1];****Wilson J at [50];****Ierace J at [51]****Decision: (1) Grant leave to appeal on ground 3.****(2) Allow the appeal on ground 3.****(3) Set aside the special verdict entered in the District Court on 4 November 2021.****(4) Remit the matter to the District Court at the Downing Centre on 19 January 2024 at 9:30am for the allocation of a fresh trial date.****(5) Pending any release application, bail should be refused.****Catchwords: CRIME – appeals – appeal against a special verdict of act proven but not criminally responsible – where trial judge considered accused presented unusually on complainant's account of acts charged, on body worn police camera and in court – where accused expressly and repeatedly disavowed potential mental health defence – where both accused and Crown opposed to special verdict at trial – where accused gave evidence of historical brain injury – where no expert evidence about effect of any potential impairment on accused's brain and cognitive functioning – where special verdict entered****Legislation Cited: Crimes Act 1900 (NSW) ss 61, 61KC, 112****Criminal Appeal Act 1912 (NSW) s 6****Criminal Procedure Act 1986 (NSW) s 133****Evidence Act 1995 (NSW) s 144****Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) ss 5, 28, 30, 33, 34, 83****Cases Cited: EE v R [2023] NSWCCA 188****Filippou v The Queen (2015) 256 CLR 47; [2015] HCA 29****Smoje v Forrester [2017] NSWCA 308****Strinic v Singh (2009) 74 NSWLR 419; [2009] NSWCA 15**

Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460; [2002] HCA 9

Yebdoo v Holmewood [2021] NSWCA 119

Category: Principal judgment

Parties: Jamie Thomas McDiarmid (Applicant)

Rex (Respondent)

Representation: Counsel:

T Quilter (Applicant)

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Solicitors:

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Solicitor for Public Prosecutions (Respondent)

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Jurisdiction: Criminal

Date of Decision: 04 November 2021

Before: McClintock SC DCJ

File Number(s): 2020/316926

HEADNOTE

[This headnote is not to be read as part of the judgment]

Mr McDiarmid was tried by Judge McClintock SC sitting alone on an indictment relating to an alleged break and enter in Liverpool. The focus in the trial was the competing accounts of the complainant and Mr McDiarmid as to what happened in the apartment building on the night in question.

Closing submissions in the trial finished on 2 November 2021 and judgment was reserved for 4 November 2021. Some time on 2 November 2021 after close of argument the trial judge emailed the parties, to notify them that he would like to hear from them as to the defence of cognitive impairment. The matter was then relisted for 3 November 2021.

His Honour there informed the parties that he was considering entering the special verdict of act proven but not criminally responsible and raised several concerns as to Mr McDiarmid's presentation on the complainant's account, in footage on the body worn cameras of the police and in Court. Mr McDiarmid, through counsel, expressly disavowed any contemplation of a special verdict and maintained his innocence. The Crown also opposed the entry of the special verdict.

His Honour gave judgment the next day and entered the special verdict with particular reference to his interpretation of the way Mr McDiarmid presented, as well as some general evidence he gave about historical trauma to the brain. The entry of the special verdict was challenged on several grounds, including relevantly that the "trial judge erred by making findings of fact about the operation of the brain in the absence of any evidence"

The Court (Harrison CJ at CL, Wilson J and Ierace J agreeing) held (allowing the appeal, setting aside the special verdict and directing a new trial):

1. It was not an error for the trial judge to take on judicial notice that frontal lobe damage can impede executive functioning in a general sense: [41]-[42]
2. However, it was an error in this case to enter the special verdict absent specific evidence of how Mr McDiarmid's cognitive functioning was relevantly impaired by his history of brain trauma, if at all. In so doing, His Honour had elevated the opinions he formed as to Mr McDiarmid's executive functioning without a medical basis. General knowledge on the one hand of the relationship between brain damage

and behaviour is distinct from the extent to which, if at all, Mr McDiarmid suffered from frontal lobe damage, or the consequences for him, if any, in terms of his behaviour or cognition: [41]-[45].

Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460; [2002] HCA 9, applied

JUDGMENT

1. HARRISON CJ at CL: Jamie McDiarmid seeks leave to appeal against a special verdict of act proven but not criminally responsible pursuant to s 28 of the Mental Health Cognitive Impairment Forensic Provisions Act 2020 (NSW) entered by his Honour Judge McClintock SC on 4 November 2021. Mr McDiarmid was tried before his Honour sitting without a jury charged with the following offences:

Charge/Crimes Act Section Particulars

1 Break and enter the dwelling house and therein did commit a serious indictable offence, namely sexual touching without consent: s 112(1)(a) The sexual touching involved a course of conduct as per Counts 2 to 5

2 Assault: s 61 Attempted hug

3 Sexual touching without consent, knowing the complainant was not consenting: s 61KC Pressing erect penis against the complainant's body

4 Sexual touching without consent, knowing the complainant was not consenting: s 61KC Attempted kiss

5 Sexual touching without consent, knowing the complainant was not consenting: s 61KC Pulling complainant's pants down and touching her buttock

1. His Honour returned the special verdict on Count 1. No verdict was given on the remaining charges which were brought in the alternative to count 1. Following the verdict, Mr McDiarmid was remanded in custody and referred to the Mental Health Review Tribunal: ss 33(1)(a) and 34 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020. Mr McDiarmid remains without a release date.

2. Four grounds of appeal are relied on:

Ground 1: The trial judge made factual errors that were productive of a miscarriage of justice by:

1. ignoring the complainant's evidence about how she left the unit;
2. ignoring evidence about the complainant swearing at the applicant;
3. failing to make any finding about the foot rubbing incident.

Ground 2: The trial judge failed to comply with s 133(2) Criminal Procedure Act 1986 by failing to set out in his judgment the principles of law that were applied and his findings of fact relied upon in relation to his conclusion about "adaptive functioning".

Ground 3: The trial judge erred by making findings of fact about the operation of the brain in the absence of any evidence.

Ground 4: The special verdict is unreasonable.

1. In my opinion, for the reasons that follow, leave to appeal should be granted, Ground 3 should be upheld and the appeal allowed. It becomes unnecessary in the circumstances to consider the other grounds of appeal.

Background

1. The events that give rise to the charges occurred at an apartment in Liverpool on 5 November 2020. The complainant, aged 29, had lived there since May the same year. She did not know Mr McDiarmid. It was not in issue that he was then aged 38 when he attended the unit and interacted with the complainant. The terms of that interaction are disputed.
2. The complainant gave evidence that at 6:30pm she was "lightly dozing" in bed when she heard the closed but unlocked door to her unit open. She left her bedroom and saw Mr McDiarmid standing in her living room. She said "who are you? What are you doing here?" She said that in response he mumbled and spoke "gibberish". He appeared to be "very intoxicated or high".
3. The complainant said she was shocked but pretended to treat him like a friend she had not seen for a long time. This was a method of trying to persuade him to leave voluntarily. She gave him a cigarette and a drink. They sat next to each other on the lounge. Mr McDiarmid said something like "I had a friend that lived here" or "I used to live here". He also introduced himself. The complainant could not remember what name he used, but she said it started with the letter "J". The complainant wrote a fake name and number on a piece of paper and gave it to Mr McDiarmid, saying something like "call me later, see you again soon". She walked to the door of the unit and said, "it's time for you to leave, it was so good seeing you".
4. After the complainant went to the door, she alleged Mr McDiarmid pushed the door shut and pulled her pants down on one side by touching the waist band and feeling her cheek. This occurred while she was facing the door and he was behind her. She said that he then licked the right side of her face, including the neck and jaw area and put his arms around her such that she could feel his erection against her backside.
5. According to the complainant, when Mr McDiarmid first touched her, she recalled saying something along the lines of "What the fuck?...Get the fuck out. No way, get the fuck out". She also said that at some point Mr McDiarmid stood very close to her face and said, very aggressively, "you're a fucking gold digger, you're a fucking gold digger".

6. The complainant left the unit via a door that led to the balcony. She then left the balcony, which is on the ground floor, by climbing over the balustrade. She walked around the side of her unit block and hid behind a vehicle. She called triple-0 and reported what had just happened. The complainant told the operator that she thought Mr McDiarmid was "on ice or something, he is like mumbling and he smells like alcohol". She said that Mr McDiarmid was initially aggressive towards her, before she offered him a drink and cigarette. She said, "he was like you're a very pretty girl and I was like oh here take my number um then he was like trying to kiss me in the house and I was pushing him away...". The complainant said, "I tried to walk towards my like, walk towards my door, he pulled me back by the back of my trackpants, he tried to pull my trackpants down, which I pulled up...He was trying to feel up the back of my shirt and um I don't know but...he was doing those sorts of things like".
7. In cross-examination, the complainant disagreed that Mr McDiarmid rubbed her feet. She also disagreed there was any conversation about sore feet.
8. The police attended the unit block and spoke to both the complainant and Mr McDiarmid in separate conversations. Those conversations were captured, in part, by body worn cameras. The recorded conversations with Mr McDiarmid, are difficult to follow. However, some things said by Mr McDiarmid include the following:
 1. "I never fuckin' raped her";
 2. "I didn't do the wrong thing...";
 3. "...my mate used to live there about six, seven years ago right. I been walking around here... I've been walking from one end of the city to the other from western to eastern to try and link up with my old associates alright ... so I can fucking ... um some money transactions for myself so I can be prosperous and look after my mum and fucking dad now they're dying right...";
 4. "I pressed the number three first and I pressed every other button ...someone's got to answer...one of the boys gotta be and ah ah I walked in and then she opened the door ah I didn't know who the fuck it was...and the door opened and I'm free I go how you going ...her name is hi and how you going my name is Jamie ...and then we sorta come in ...opens the door...so I come in and sit on the lounge and he goes ... do you want me massage my feet... only if you bought me a bag...Ah...fuckin ... fuckin 10 minutes later when certain things start like...I don't know man";
 5. "...when the door opened I said hi ... how you going ... and it was very ... would you like to come in fucking ... I'm a 37 year old bloke and she's 30 year old mate ... fucking why not you know what I mean you asking me to fucking massage your feet you fuckwit but you don't want me to put one in ya that's a bit weird...";
 6. "... I've got three ABIs on my head alright..."

7. Sorry guys for any inconvenience yeah, I can't believe that's this ... I'd actually be proud if it was a supermodel or something ... How's ... mate she's alright ... I was thinking me mate lives there and then he invites me in and then she go can you go? ... Ah alright sweet give me five minutes ... I was there for fucking two minutes and the coppers are here what the fuck I've done nothing wrong."
8. "... gonna charge me with rape you're going to put me back in gaol..."
1. Mr McDiarmid was arrested and taken to Liverpool Police Station. The Custody Management Records showed Mr McDiarmid said he had taken ice, cannabis and alcohol. His intoxication level was described as "seriously affected". He was described as "highly irate, agitated and not making sense...abusive, threatening and violent". Some four hours later, at 10:30pm, Mr McDiarmid was described as no longer displaying the effects of being under the influence of alcohol or drugs. He was described as abusive, aggressive and violent when speaking to the police but calm when left alone.
2. The officer-in-charge of the investigation gave evidence about his interactions with Mr McDiarmid on the evening of the incident. He said he attempted to "get a forensic procedure from him" but that did not occur until the following morning because of Mr McDiarmid's "aggressive nature at that time". He also formed the view Mr McDiarmid was intoxicated or affected by some sort of intoxicating substance at the time he spoke to him.
3. Mr McDiarmid gave evidence. He said he attended the complainant's address that day because he was looking for his friend, Ray, and he had previously attended a party there. He said he was hoping to get some drugs from that place so that he could make some money.
4. Mr McDiarmid said he pressed a couple of the buzzers at the entrance, and was then "buzzed into the building". Once inside the building, he saw a door to one of the units was wide open. He saw a woman inside who was asleep on the lounge. She woke up and looked at him. Whilst standing outside her unit, he asked her, "is Ray here"? She responded, "Who's Ray?" He then asked her if she had a cigarette and if she knew the time. She went to her handbag and produced a cigarette. She then gestured for him to enter and take the cigarette. She offered him a drink. He accepted the offer but asked if he could first use the toilet. He used the toilet and then sat with her on the lounge. He complained of sore feet. She said she also had sore feet and put them on his lap. He then rubbed her feet for 30 to 40 seconds. She then stood up and walked to the front door. She was on her phone and said she would be back in a minute. She walked out the door and did not return. Mr McDiarmid denied there was any sexual touching.
5. Mr McDiarmid remained in the unit and finished his drink. He then started to feel uncomfortable. After five or ten minutes he went out to the driveway and then saw the complainant talking to the police. She then pointed at him and said, "that's him". Mr McDiarmid then spoke to the police. He said in evidence that if he had done something wrong, he would have fled.

6. Mr McDiarmid said that earlier that day he smoked about a gram of cannabis and had a few alcoholic drinks. He smoked a few grams of ice a couple of days earlier. He was unsure whether he was still affected by the ice. He said he was a "bit stoned" when he first arrived. He also said he was "stoned" and "fried" when he was sitting on the lounge with the complainant.
7. Mr McDiarmid also said that he had sustained three brain injuries:
 1. On 13 September 1998, shortly before his 16th birthday, his frontal lobe was damaged following multiple cerebral aneurysms. He was diagnosed by Dr Vera Banks, neurosurgeon. He was in the Liverpool Brain Injury Unit for about six months.
 2. Around 2012, he was hit across the head with a couple of bricks. This required his head to be surgically glued back together.
 3. In 2013 or 2014, he was admitted to the brain injury unit at the Prince Alfred Hospital in Melbourne.
1. It was a feature throughout the trial that Mr McDiarmid made a number of interruptions to the proceedings. The trial judge frequently intervened to control him. Despite this behaviour, his counsel was satisfied that he was fit to stand trial and no issue of fitness was raised.

The trial

1. The parties made closing argument on 2 November 2021 that generally focussed on the competing versions of the facts, including Mr McDiarmid's state of mind. The trial judge adjourned, reserving judgment until 4 November 2021. The trial judge thereafter emailed the parties seeking submissions on the defence of cognitive impairment, which led to the matter being relisted for further argument on 3 November 2021. On that date, the trial judge raised the question of whether the option of a special verdict should be considered, and if so, whether such a verdict should be returned. During submissions, defence counsel declined an invitation to present further evidence and indicated that previous attempts to have Mr McDiarmid assessed were unsuccessful. She also resisted the special verdict, indicating that her instructions did not favour such an outcome. The Crown also advocated against the special verdict.

The judgment

1. The trial judge, in summary, reasoned as follows.
2. He accepted that the incident occurred in the way described by the complainant. His Honour regarded her as "an entirely credible witness" having regard to the following. Her 000 complaint was immediate, and consistent with her evidence. She did not embellish the allegations when given the opportunity to do so by the operator. The recording revealed she was in a distressed condition, which was consistent with her account.

3. There were no significant inconsistencies in her evidence, including in the complaint evidence. The one exception was the claim in the message to her sister that she was "beaten". However, the trial judge noted she was not cross-examined about that and his Honour did not regard it as a matter that undermined her otherwise "consistent and believable narrative".
4. Mr McDiarmid's comment to the police that the complainant did not want or allow him "to put one in" [her] was consistent with her account that the event involved unwanted sexual advances.
5. By contrast, the trial judge found Mr McDiarmid's account of the event "confusing". His Honour said it lacked "logical and narrative consistency". The trial judge noted that his version "varied considerably" on each occasion he described the event, including who he was there to see and why. His Honour accepted the Crown's various criticisms of Mr McDiarmid's evidence, which included inconsistencies about the position of the door and whether the complainant asked him to leave.
6. Further, the trial judge was satisfied beyond reasonable doubt that the door was closed before Mr McDiarmid opened it. The photographic and video evidence showed an operational gas strut that caused the door to close automatically. This supported the complainant's account that the door was closed before Mr McDiarmid entered and undermined his account that the door was either ajar or wide open.
7. For these reasons, the trial judge accepted that Mr McDiarmid committed the physical acts of break and enter as well as the various acts of sexual touching.
8. His Honour concluded beyond reasonable doubt (even though the standard of proof was lower than that) that Mr McDiarmid had a cognitive impairment: s 5 of the Act. His Honour had regard to:
 1. Mr McDiarmid's evidence that he suffered from brain injuries.
 2. His behaviour on the evening of the offence (as described by the complainant).
 3. His behaviour on the evening as captured by police body worn cameras.
 4. His behaviour at the trial (including the comments that were transcribed when his microphone was muted).
1. His Honour considered s 28 of the Act and concluded, on the balance of probabilities, that Mr McDiarmid did not know that his actions were wrong in the sense that he could not reason with a moderate degree of sense and composure about whether his actions, as perceived by reasonable people, were wrong. His Honour had regard to Mr McDiarmid's behaviour during the event, including the fact that:
 1. The complainant described him as "talking gibberish".

2. The complainant engaged in a "sophisticated pretence as a means of controlling the situation" which Mr McDiarmid likely misinterpreted because of his "limited understanding of social cues".
3. Mr McDiarmid became angry at the complainant and called her a "gold digger".
4. Mr McDiarmid abused the complainant outside the unit for what the trial judge described as "some sort of betrayal".
5. Mr McDiarmid failed to leave the premises after the complainant left, which showed that he failed to understand the situation.
1. The trial judge concluded that Mr McDiarmid suffered a delusion "that a stranger would want to seduce him and he was unable to heed all the obvious indicators to the contrary".
2. Sections 28 and 30 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 provide as follows:

28 Defence of mental health impairment or cognitive impairment

- (1) A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person--
 - (a) did not know the nature and quality of the act, or
 - (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).
- (2) The question of whether a defendant had a mental health impairment or a cognitive impairment, or both, that had that effect is a question of fact and is to be determined by the jury on the balance of probabilities.
- (3) Until the contrary is proved, it is presumed that a defendant did not have a mental health impairment or cognitive impairment, or both, that had that effect.
- (4) In this Part,
"act" includes--
 - (a) an omission, and
 - (b) a series of acts or omissions.

30 Effect of finding of act proven but not criminally responsible because of mental health impairment or cognitive impairment

A jury must return a special verdict of act proven but not criminally responsible if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established.

1. Having set out these provisions, his Honour proceeded as follows:

"Generally speaking the onus of establishing a defence of mental illness falls on the accused. There is a presumption of sanity as outlined in the Act. Notwithstanding the fact that the accused did not directly raise or initially address on cognitive impairment I notified the parties by email that I was giving consideration to such an issue. Both parties ultimately agreed that the defence was fairly raised on the material before me and both agreed that I did not need expert evidence to make such a determination. Although it is obvious that it is desirable on most occasions to have such evidence, I do not think it is appropriate as the trial judge and the jury to attempt to obtain such further evidence and I left the decision to the parties. Neither party called any expert evidence.

The issue is whether the material gives rise under the new provision under s 28 to a defence of cognitive impairment as defined above. Cognitive impairment under s 5 is defined as the following:

5 Cognitive impairment

- (1) For the purposes of this Act, a person has a cognitive impairment if –
 - (a) the person has an ongoing impairment in adaptive functioning, and
 - (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
 - (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons.
- (2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons –
 - (a) intellectual disability,
 - (b) borderline intellectual functioning,
 - (c) dementia,
 - (d) an acquired brain injury,
 - (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
 - (f) autism spectrum disorder.

It is clear from the material raised in the defence case that the accused has at least one of the outlined cognitive impairments, that is an acquired brain injury. I do not simply rely for the finding on the statement of the accused, although that was uncontradicted. I also rely on the behaviours and statements of the accused in this trial and in the material relating to the body worn cameras and the description of his conduct by the complainant.

The transcript on Tuesday 2 December 2021 recorded what was meant to be muted, however they demonstrate essentially the soliloquies of the accused.

The accused's conduct in my view provides clear evidence of a frontal lobe injury.

It is well known that the frontal lobe of the brain controls executive functions. Included in this are the regulation of emotions, reasoning, attention, impulse control, reading the emotions of others, empathy and controlling social behaviours.

Neither party argued the defence of mental illness had not been raised. The Crown suggested that I had a discretion to put the defence, however in my view the defence is so transparently available and, as I indicated in argument, the strict application of the law without the defence being raised might lead to a miscarriage of justice.

Ultimately I exercised my discretion in favour of putting the defence. This is in the clear awareness that there is no expert evidence.

I intend to direct myself on that issue.

The agreed process by which cognitive impairment is to be dealt with is to first determine whether the Crown had proved beyond reasonable doubt the acts relied upon to constitute the offences and next determine when the defence is validly raised, whether it is more likely than not that the defence is established. If it is not then one would go on to consider the elements. If it is, there is no need to do so.

I will give myself the direction as outlined in the bench book. The issue is whether the accused is responsible according to law, that is raised from my determination. It is an exception to the general law that the prosecution bears the onus of proof. The onus is on the accused. By way of a further exception the standard of proof is on the balance of probabilities. It is sufficient if the accused establishes on the balance of probabilities the matters outlined in relation to the test under the new Act and the issue to be determined is that outlined in the new Act in s 28, the two subsections relevant to what effectively was the old M'Naghten test of disease of the mind or defect of reason.

As is the direction, it may arise, notwithstanding that there is no organic disorder, although in this case there clearly is. A defect of reason or memory or understanding involves a disorder of the capacity to reason such as would have prevented the accused from knowing that what he was doing in that he did not know the physical nature or quality of the act. I have noted the actual test is outlined as indicated. The test is for the jury to ask whether the accused could know in a sense of appreciating or understanding that the act was wrong."

1. Thereafter, under the heading COGNITIVE IMPAIRMENT, his Honour concluded as follows:

"The evidence of cognitive impairment derives from the accused's own evidence of brain injury, his conduct on the evening in question, his interview on the body worn cameras, his conduct in the trial (of which the transcript of Tuesday is an unintended record) and his conduct as observed by me.

In summary, the accused appears to lack significant executive control of various aspects of social interaction. He gives the appearance of being aware of the need to control aspects of his conduct, but in reality he appears almost entirely unrestrained and disinhibited. His conduct on the night was more extreme than that in Court, but only by a degree, that is when he is interviewed on the body worn cameras.

As a general proposition all of the evidence shows that he is highly voluble. There is an element of word salad on occasion. It is not clear how much he understands and there appears to be a varying degree of comprehension depending on topic. He is highly reactive. He is physically intimidating and volatile. He moves and gestures and gesticulates in an extreme manner. With his appearance by AVL, I have observed his physical conduct over the screen and it is clear that a trial in person would have been impossible. He is clearly deficient in comprehending social cues and acting on them. He exhibits some aspects of a theory of mind but it is not clear how sophisticated this is given the reaction and conduct that he engages in.

I am satisfied beyond reasonable doubt that the accused suffers from a cognitive impairment. The issue then becomes is the s 28 test satisfied on the balance of probabilities. I have already outlined some of the relevant evidence to the issue of whether the accused did not know that the act was wrong, that is the person could not reason with a moderate degree of sense and composure about whether the act perceived by reasonable people was wrong.

I have already outlined the reaction of the complainant to a stranger being in her house. She described him as variously talking gibberish and being incomprehensible and intoxicated. Given the accused's apparently sober presentation whilst in custody it would be difficult to determine without foreknowledge of his condition what was causing his erratic behaviour and sometimes incomprehensible monologues. It might be that he was intoxicated but it might be his normal conduct.

Her reaction was to humour him by pretending to know him and being effusively friendly. This is a relatively sophisticated pretence as a means of controlling the situation and keeping herself safe, however for a person with limited understanding of social cues it is likely that he misinterpreted and mistook her pretence as an attempt to engage him in sexual conduct. Aspects of his conduct clearly demonstrate this misalignment. He is angry with her for being a "gold digger". He abuses her outside the unit in the company of police for some sort of betrayal. He fails to take the cue when she says it is time to leave. He misinterprets the giving of the phone number as an invitation to stay. He misunderstands that her pretence of receiving a phone call is a ruse to escape him. He expects her to return, not picking up that any reasonable person would have been terrified by his conduct. He fails to leave, not recognising the danger of staying, after

he entered the house and groped a stranger. There is no demonstration of consciousness of guilt because he is deluded about the reality of the situation that he has created.

On one level, the accused has demonstrated generally that he is incapable of a moderate degree of composure. Of course, that is not the test. The Crown suggested that various statements he made demonstrated that he was able to discern right from wrong. For instance, he would not enter a house without permission or he was gentleman and knew how to treat ladies, et cetera. The repetition of these aphorisms does not mean that his thinking at the time was not distorted or delusional. The recognition of simple recognised morals when on trial for a breach of those very constraints is no insight into his thinking at the time. The accused does not necessarily demonstrate a lack of intelligence or a canny instinct for survival. What he demonstrates is cognitive impairment in some, though not all aspects of his executive functions.

Ultimately, I am satisfied that as a result of his cognitive impairment that he is not a person who could reason with a moderate degree of sense and composure about whether the act as perceived by reasonable people was wrong. His delusion was, in the circumstances, that a stranger would want to seduce him and he was unable to heed all of the obvious indicators to the contrary.

I have come to the conclusion that the accused is, to use the old terminology, 'not guilty' although under the new terminology the appropriate verdict for a jury to return is a special verdict of act proven but not criminally responsible if the jury is satisfied that the defence of mental health or cognitive impairment has been established. I am so satisfied on the balance of probabilities.

Accordingly, I enter the special verdict and I do so in relation to count 1 and all of the particulars which the Crown relied upon. If it is necessary I also reach this special verdict in relation to the other counts, but clearly I do not need to actually enter those verdicts. So on count 1 there is a special verdict."

Mr McDiarmid's submissions

1. As noted above, his Honour concluded that Mr McDiarmid's conduct provided clear evidence of frontal lobe injury. He submitted that his Honour was not permitted to form the conclusion or express the unsupported opinion that "it is well known that the frontal lobe of the brain controls executive functions". That was said to be so because:
 1. There was no evidence to support it;
 2. It is not a matter of common knowledge such that proof of the matter is not required: Evidence Act 1995 s 144;
 3. It was not open to his Honour to rely on his own purported knowledge of those matters from his previous judicial or legal experience: see *Strinic v Singh* (2009) 74 NSWLR 419; [2009] NSWCA 15 at [52], [58]-[65]; *Smoje v Forrester* [2017] NSWCA 308 at [44]-[55]; *Yebdoo v Holmewood* [2021] NSWCA 119 at [38]-[40].

1. Moreover, Mr McDiarmid contended that even if s 144 was the mechanism upon which his Honour relied to have regard to this "information", he did not comply with s 144(4) which provides:

The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

1. His Honour raised the prospect of returning a special verdict and invited submissions on that issue, but Mr McDiarmid submitted that he did not "refer to relevant information" relating to the frontal lobe or its relationship with executive functions. This was particularly so in circumstances where his Honour had been informed that Mr McDiarmid did not support a special verdict: "My client is clearly not supportive of running a mental illness defence".
2. Mr McDiarmid submitted that by acting on matters that were not the subject of evidence, the trial judge made factual and legal errors. The legal error was of a kind within the second limb of s 6(1) of the Criminal Appeal Act 1912; the former was productive of a miscarriage of justice within the third limb or s 6(1), thus warranting an order for a new trial: see *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29 at [4] and [48]; *EE v R* [2023] NSWCCA 188 at [28]-[42].

Crown submissions

1. The Crown embraced his Honour's conclusion that Mr McDiarmid's conduct provided clear evidence of a frontal lobe injury and the role of the frontal lobe on executive functioning. The Crown accepted that Mr McDiarmid gave evidence that he had sustained damage to the right front lobe of his brain in 1998 but that there was no medical evidence led in the trial to that effect. The Crown emphasised that proof is not required about knowledge that "is not reasonably open to question and is ... capable of verification by reference to a document the authority of which cannot reasonably be questioned": s 144(1) of the Evidence Act.

Consideration

1. With great respect, it seems to me that the Crown's submissions miss the point. It may be accepted for the purposes of the argument that there is a well-known and accepted relationship between frontal lobe damage and compromised executive functioning. Although Mr McDiarmid actually appears in terms to challenge the existence of that relationship or his Honour's legitimate ability to refer to it, and also apparently challenges that it is a matter of which proof is not required because it is not reasonably open to question or capable of verification by reference to a document the authority of which cannot reasonably be questioned, it seems to me that his real objection is different and much simpler.

2. Doing the best I can, Mr McDiarmid's real concern would instead appear to be that there was no evidence in this case upon which his Honour could apply that notorious and uncontroversial medical relationship to the determination of whether Mr McDiarmid himself either has frontal lobe damage at all or the extent to which it may have affected his executive functioning if he does. On the contrary, his Honour has adopted the existence of a medical framework to support his non-medical and non-expert opinion about Mr McDiarmid's behaviour and what in his Honour's opinion has caused it. It is not the absence of expert evidence about the relationship between frontal lobe damage and behaviour generally which is of concern. It is the complete absence of expert or other technical evidence about Mr McDiarmid and his condition that could have permitted his Honour to conclude that Mr McDiarmid suffered from a consequential cognitive impairment, or that any such impairment meant that he did not know the nature and quality of his act, or that it was wrong.
3. Nor does the Crown's contention that his Honour complied with s 144(4) withstand scrutiny. For example, the Crown points to the following comments made by his Honour during the course of the trial:

"It's obvious and it would be obvious to a jury that his conduct is extraordinary and that that extraordinary conduct occurred at the time of the offence, of the alleged offences, and has continued. He's highly animated as he was at the time, he has a delivery that is state of consciousness, he appears to have, I'm not going to diagnose it, but an uninhibited mechanism of delivery and his reactions are not calm, not considered and uninhibited and uncontrolled".

"I think a jury would inevitably in this case have asked questions about an issue relating to essentially a mental evidence [sic] defence. That arises partly because as the accused very presciently observed, I've observed his demeanour, his conduct, his actions at the scene on the body worn video and I've heard the evidence in respect of his conduct which even on his own version gives rise to a number of issues about his mental state."

"Everything I have seen of the accused suggests he is incapable of a moderate degree of composure; that is physically and to a degree I as the tribunal of fact I'd have to consider whether that translates to issues about his cognition."

A delusional state "that in the present circumstances that's nothing wrong with bursting into a premises because Ray's my mate and therefore nothing wrong with touching a person coming onto me", is not irrational in the circumstances but is "an aspect of the cognitive deficiency".

1. These are his Honour's opinions. His Honour was undoubtedly entitled to express them. They are not, however, the opinions of a relevantly qualified expert. It could not in my view be said that his Honour's opinions are not reasonably open to question or that they are capable of verification by reference to a document the authority of which cannot reasonably be questioned.

2. Even if the parties were aware, as the Crown contends, that his Honour intended to take into account "the effect of [Mr McDiarmid's] brain injury on his behaviour", that did not simultaneously authorise his Honour to proceed to determine matters based upon his own opinions without evidence to support them. The generally understood and accepted relationship between frontal lobe damage and behavioural changes is analogous to the type of matters described by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; [2002] HCA 9 at [66]:

"(b) Notorious facts judicially noticed without inquiry

Facts that have been judicially noticed without inquiry include: that cancer is a major health problem in the community and, despite research, little progress has been made in controlling it; that HIV is a life-endangering disease; that a child victim of sexual assault may be reluctant to resist, protest or complain about the sexual assault, due to fear of punishment or rejection; and that many lawyers now charge hundreds of dollars an hour for their services, that legal aid is often unavailable to litigants in tort cases and that the cost of those services is substantially increased when lawyers cannot give advice to their clients because the law is unpredictable."

1. However, the extent to which, if at all, Mr McDiarmid suffered from frontal lobe damage, or the consequences for him, if any, in terms of his behaviour or cognition, are not similarly notorious. Ground 3 is formulated in terms that the trial judge erred by making findings of fact about the operation of the brain in the absence of any evidence. The ground of appeal ought more felicitously have been framed in terms that the trial judge erred by making findings of fact about the operation of Mr McDiarmid's brain in the absence of any evidence.
2. Before recording the orders I propose should be made, some attention should be given to the potentially adverse practical consequences for Mr McDiarmid of any order of this Court allowing his appeal. As a forensic patient, Mr McDiarmid is presently subject to the supervision of the Mental Health Review Tribunal. That body has the power to order the release of a forensic patient: s 83 Mental Health and Cognitive Impairment Forensic Provisions Act. Although this Court has no information concerning any proposed release, it must be assumed that there will be a release order at some stage.
3. If Mr McDiarmid's appeal is allowed, and the s 28 verdict is set aside, he will cease to be a forensic patient, and will in the ordinary course be returned to the custody of NSW Corrective Services. Only if granted bail pending any re-trial could he be released to the community. It is at least theoretically possible that Mr McDiarmid's release could occur more expeditiously through review by the Mental Health Review Tribunal than by any grant of bail being made to him. To that extent, allowing his appeal could, in a practical way, visit an adverse outcome upon him.
4. Understanding that, Mr McDiarmid was firm in the position he advanced to the Court to the effect that, regardless of the consequences, he wished to continue with his application for leave to appeal against the entry of the special verdict.

Conclusion

1. For these reasons, I propose the following orders:
 1. Grant leave to appeal on ground 3.
 2. Allow the appeal on ground 3.
 3. Set aside the special verdict entered in the District Court on 4 November 2021.
 4. Remit the matter to the District Court at the Downing Centre on 19 January 2024 at 9:30am for the allocation of a fresh trial date.
 5. Pending any release application, bail should be refused.
1. WILSON J: I have had the advantage of reading the reasons of the Chief Judge at Common Law and agree with the orders proposed by his Honour, for the reasons he has given. Even if it was open on the evidence for the trial judge to conclude that Mr McDiarmid had a cognitive impairment as defined by s 5 of the Mental Health and Cognitive Impairment Forensic Provisions Act, there was no evidence capable of establishing that the effect of any cognitive impairment was that he did not know the nature and quality of his act, or that it was wrong. There was insufficient evidence to support the special verdict.
2. IERACE J: I agree with the orders proposed and reasons of Harrison CJ at CL, and with the additional reasons of Wilson J.

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