The Queen v Madrill [2013] NTSC 23

PARTIES:	**THE QUEEN**
	v
	MADRILL, Phillip
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	(21237889)
DELIVERED:	19 April 2013
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JUDGMENT OF:	BARR J

CATCHWORDS:

INTERPRETATION – "court" – "trial" – section 43H *Criminal Code* (NT)

CRIMINAL LAW – Defence of mental impairment – agreement between parties – meaning of "court" for the purpose of s 43H – whether plea of not guilty because of mental impairment may be entered before judge alone – judge alone constitutes "court" – judge alone can accept a plea of not guilty because of mental impairment and make a finding of mental impairment

Criminal Code (NT) s 33, s 43F, s 43H, s 55(2), s 348
Interpretation Act (NT) s 55(2)

R v MacDonald (2000) 110 A Crim R 238 at 43

REPRESENTATION:

Counsel:

Plaintiff:	S Robson
Defendant:	G Betts

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Madrill [2013] NTSC 23
No. (21237889)

BETWEEN:

THE QUEEN
Plaintiff

AND:

PHILLIP MADRILL
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 19 April 2013)

Ruling in relation to s 43H *Criminal Code*

[1] The accused is charged with an offence against s 181 of the *Criminal Code*, unlawfully causing serious harm ("the offence").

[2] The Crown agrees that the defence of mental impairment is established by reference to the report of psychiatrist, Dr Lester Walton, dated 6 December 2012, supplemented by a further opinion provided by Dr Walton to Mr Robson, Senior Crown Prosecutor, by email dated 17 April 2013. Dr Walton has summarised the position as follows:

> "My opinion is that it is highly likely that because of Mr Madrill's psychotic illness at the material time he could not control his actions

and it is also probable that he could not appreciate the wrongfulness of his conduct."[1]

[3] The opinion of Dr Walton establishes the grounds of defence of mental impairment set out in sub-paragraphs (c) and (b) respectively of s 43C(1) *Criminal Code*.

[4] There is no issue that the accused is unfit to stand trial within the meaning of s 43J(1) *Criminal Code*.

[5] The parties to the prosecution of the offence agree that the accused is not guilty of the offence because of mental impairment.

[6] The issue I have to determine relates to the interpretation of s 43H of the *Criminal Code*, contained within Part IIA of the Code, headed "Mental impairment and unfitness to be tried", and more specifically contained within Division 2 of Part IIA, headed "Mental impairment".

[7] The section heading to s 43H reads:

"Plea of not guilty by reason of mental impairment may be accepted"

[8] The section heading is not part of the Act. Section 43H was inserted into the *Criminal Code* by Act 11/2002, s 4, and as far as I can ascertain, the heading to s 43H was not amended or inserted after 1 July 2006. Therefore, under s 55(2) *Interpretation Act*, the heading is not part of the Act.

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[1] In his report dated 6 December 2012, Dr Walton wrote at p.3, point 2: "Loss of control would seem to be the most relevant feature. I doubt that Mr Madrill was deprived of the capacity to understand the nature and quality of his acts but there would have to be a doubt about whether or not he had a proper appreciation of the wrongfulness of his acts."

[9] I turn then to the substance of s 43H. The section reads as follows:

> "If the parties to a prosecution of an offence agree, the court may, at any time during the trial of the offence, accept a plea and record a finding of not guilty of the offence because of mental impairment."

[10] The expression "at any time during the trial" requires the beginning and the end of the trial to be identified. For present purposes, it is not necessary to determine exactly when a trial ends. However, it is necessary to determine exactly when a trial begins. The trial is deemed by s 336(2) to begin when the accused is called upon to plead to the indictment and to say whether he is guilty or not guilty of the charge.[2]

[11] The learned Crown prosecutor submits that a trial begins only once an accused is arraigned and enters a plea of "not guilty". That submission relies on *R v MacDonald* (2000) 110 A Crim R 238 at 243, where Bell J. held that, in New South Wales, the trial did not commence as soon as an accused was called upon to plead but only after the entry of a plea of not guilty. However, there her Honour was dealing with the position at common law, and, as she noted, "the time of commencement of a trial will vary according to the language of any relevant statute governing trial

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[2] This is, more precisely, the combined effect of sub-sections (1) and (2) of s 336. Under s 336(1), "an accused person is to be informed in open court of the offence with which he is charged as set forth in the indictment and may be called upon to plead to the indictment and to say whether he is guilty or not guilty of the charge." Section 336(2) then provides: "The trial is deemed to begin and the accused person is deemed to be brought to trial when he is so called upon."

proceedings."[3] In the Northern Territory, s 336(2) *Criminal Code* has modified the common law.

[12] Because the trial begins when the accused is called upon to plead, it is not necessary, for the trial to begin, that the accused actually plead to the charge in the indictment. Moreover, because the trial begins (or is deemed by law to begin) at a time before the accused actually pleads to the indictment, the trial necessarily begins before any jury is empanelled, indeed at a time before there is any legal requirement for the involvement of the jury. My reason for this conclusion drives from s 348 of the *Criminal Code*, which reads as follows:

> "Subject to section 348A [*not presently relevant*] if the accused person pleads that he is not guilty he is by such plea, without any further form, deemed to have demanded that the issues raised by such plea shall be tried by a jury and is entitled to have them tried accordingly."

[13] By a plea of not guilty, the accused joins issue with the Crown. It is the plea of "not guilty" which triggers the involvement of the jury.

[14] I return to consider s 43H. The *Criminal Code* does not expressly permit an accused person to plead "not guilty because of mental impairment" at the time of arraignment. However, s 43F(1)(a) provides that the defence of mental impairment may be raised by the defence at any time during the trial. In that context, I interpret s 43H, by implication, as either permitting an accused to plead, or acknowledging that an accused may plead "not guilty

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[3] *R v MacDonald* (2000) 110 A Crim R 238 at 243 at [23].

because of mental impairment" and then, subject to the agreement of both the prosecution and defence, expressly permitting the court to accept that plea and record a finding that the accused is not guilty because of mental impairment.

[15] In the present case, because the special plea is not a simple plea of "not guilty", s 348 has no role to play where, in addition, the parties to the prosecution of the offence agree that the accused is not guilty of the offence because of mental impairment. The requirement for a jury thus does not arise.

[16] I turn next to consider the meaning of the expression "the court" in s 43H. In my view, on their proper interpretation, in relation to the period of time after the trial has begun and the accused has pleaded "not guilty because of mental impairment", the words "the court" refer to the presiding judge. There is no jury to whom the words "the court" could refer.

[17] It follows from my interpretation that it is the judge who has to exercise the discretion vested in the court to accept the plea and the judge who has the consequent role of recording a finding of "not guilty because of mental impairment".

[18] Mr Robson submits that "the court" means the court constituted by a jury as the tribunal of fact. He relies on s 43C, which states that the defence of mental impairment is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the

offence, suffering from a mental impairment and he or she did not know the nature and quality of the conduct; or he or she did not know that the conduct was wrong;[4] or he or she was not able to control his or her actions.

Mr Robson also relies on s 43E, which reads as follows:

> "The question of whether a person was suffering from a mental impairment having the effect specified in section 43C(1)(a), (b) or (c) is a question of fact to be determined *by a jury* on the balance of probabilities." [italic emphasis added]

[19] I do not consider that the issue is determined by reference to s 43C and s 43E. In my view, s 43E states the standard of proof applicable (the civil standard), but it is not intended to and does not have the significance attributed to it by Mr Robson's submission. Section 43E, and also s 43G, apply when relevant facts relating to mental impairment and its effects are in contest, in which case the issues are required to be decided by a jury – see s 43G(2). However, when s 43H applies, it overrides s 43E and s 43G and the earlier provisions in Division 2.

[20] In this context I mention another matter which I consider to be an indication that the words "the court" in s 43H refer to the presiding judge and not the jury. The discretion to accept a plea and record a finding of not guilty of the offence because of mental impairment, (whether characterized as a dual discretion or a discretion which, if exercised, is coupled with an obligation to make a mandated finding) is in no sense a jury function. In particular,

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[4] which the Code explains in terms that "he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong" – see s 43C(1)(b).

juries do not record findings, unlike courts of record constituted by judicial officers. It has not hitherto been the function of a jury to "accept a plea" or to "record a finding" (whether of guilty or not guilty).

[21] In further support of the submission summarised in [18], Mr Robson contends that the *Criminal Code* contains no provision for a judge alone trial in mental impairment matters, unlike the position in Western Australia, Victoria, and South Australia.[5] That contention suggests that s 43H establishes a system of judge alone trials. It does not. Rather, it establishes a procedure to avoid trials. Consistent with the Northern Territory legislature's enactment of a regime under which a jury decides the defence of mental impairment where the relevant facts relating to mental impairment and its effects are contested, s 43H applies when (and only when) there is no contest. The process under s 43H is not properly to be characterised as a "judge alone trial". In my view, s 43H is a provision intended to avoid the need for a trial (by jury) in circumstances where prosecution and defence

[5] In Western Australia, s 651A of the *Criminal Code* was enacted in 1995 to enable judge alone disposition (with consent of the prosecution), and was then replaced by similar provisions in s 93 of the *Criminal Procedure Act*. In Victoria, s 21(4) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 was enacted. In South Australia the *Criminal Law Consolidation (Mental Impairment) Act* 1995 amended the *Criminal Law Consolidation Act 1935* to insert a new Part 8A, of which s 269B enables judge alone determinations with the defendant's consent.

agree that an accused person is not guilty of the offence charged because of his or her mental impairment.[6]

[22] The role of the court under s 43H is supervisory, in the interests of both the community and the accused, to ensure the appropriateness of the agreement reached between the parties.

[23] Mr Robson also relies on the Minister's second reading speech to the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Bill 2002 to submit that "the avoidance of judge alone disposition of questions of mental impairment seems to have been deliberate". Mr Robson further submits:

> "In outlining the general scope of the Bill the [Minister for Justice and Attorney General] explained that its reforms did not alter substantive law but were 'primarily procedural and dispositional in nature' before confirming that 'both the defence of mental impairment and the issue of fitness to be tried *will be matters for a jury*.' …" [emphasis added in counsel's written submission]

[24] In my view the second reading speech was incorrect or incomplete in its summary of the Bill's provisions, to the extent that there was no mention of two 'dispositional' provisions: (1) an agreement by the parties to a

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[6] Consistent with recommendations (1) and (2) of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General contained in its report on the General Principles of Criminal Responsibility (December 1992): "Where the accused wishes to plead not guilty by reason of mental impairment, the trial judge may accept the plea with the concurrence of the prosecution. This avoids farcical trials where insanity is not in issue (see the Murray Report at 390-392 referring to the similar recommendations of the English Butler Committee in 1975)." and "Where the trial judge accepts a plea in accordance with (a), the prosecution may state the circumstances of the offence to the court prior to any disposition being made. This recommendation is to overcome any suggestion that these cases would be dealt with other than in open court and allows a public airing of the facts on which the acceptance of the plea is based." Part IIA of the *Criminal Code* (NT) is substantially based on the Model Bill developed and drafted by the Criminal Law Officers Committee.

prosecution in relation to the accused being unfit to stand trial (s 43T)[7] and (2) an agreement by the parties to a prosecution leading to the accused being entitled to a finding of not guilty of the offence charged because of his or her mental impairment (s 43H).

[25] In conclusion, I rule that the accused in the present case may enter a plea of "not guilty because of mental impairment" when asked to plead to the charge in the indictment, and that, if the parties to the prosecution agree, a judge, without jury involvement, may lawfully accept that plea and record a finding of not guilty of the offence because of mental impairment.

[26] This ruling may well apply to the interpretation of the words "the court" in s 43H irrespective of the stage of the trial at which the parties to the prosecution agree that the accused is not guilty of the offence charged because of mental impairment. However, it is arguable, as Mr Robson maintains, that once a jury has been sworn, the reference to "the court" in s 43H is to the court constituted by a jury, and that a jury (not a judge) has the discretion to accept the plea etc. The application of s 43H in circumstances after a jury has been sworn falls to be determined at another time, if and when the issue arises.

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[7] s 43T(1) reads: "If, at any time before or during the trial of an offence, the parties to the prosecution of the offence agree that the accused person is unfit to stand trial, the court may dispense with an investigation into the fitness of the accused person to stand trial and record a finding that the accused person is unfit to stand trial."