COMMENT

"Fitness to Plead"

Colin Wells writes

The ability of a defendant to effectively participate in criminal proceedings is a fundamental element of the right to a fair trial protected by the common law and art.6 ECHR. The question of participation can arise where a defendant suffers from a low IQ and/or mental disorder, which raises issues of fitness to plead.

The Court of Appeal (Criminal Division) in *R. v. Walls* [2011] EWCA Crim 443, recently examined the issue of fitness to plead, considering the *Pritchard* test and the s.4A of the Criminal Procedure (Insanity) Act 1964.

The appellant, who had a low IQ and hearing difficulties, appealed against his convictions for sexual assault on a child under 13. Following the verdict, the trial judge pointed out a number of failings in the defence including the failure to obtain a psychological profile of the defendant. Defence counsel informed the judge that there had never been any issue as to fitness to plead and as such a psychological profile was unnecessary. Following sentence, the appellant was seen by a forensic psychiatrist who reported that had he seen the appellant prior to trial he would have considered him unfit to plead. The issue for determination in the Court of Appeal was the effect of the appellant's low IQ and learning disability on his ability to participate in a criminal trial in light of the criteria contained in *R. v. Pritchard* 173 E.R. 135.

The appeal against conviction was dismissed. Where a defendant was unfit to plead the court had to determine whether he did the act in accordance with the procedures set out in section 4A of the Criminal Procedure (Insanity) Act 1964. Consideration should be given to ways in which the characteristics of a defendant evident from a psychological or psychiatric report could be accommodated in the trial process so that the defendant's limitations could be understood by a jury before a court embarked on the significant step of embarking on a trial of fitness to plead. Where a defendant was found unfit to plead and the court determined he had done the act in question the court's powers of disposal were limited and its ability to either protect the public or to assist the defendant was severely limited too.

The Court of Appeal recognized that there had been a significant increase in the number of cases where the issue of unfitness was raised.

Save in clear cases, a court had to rigorously examine the adduced evidence of psychiatrists and then subject that evidence to careful analysis against the *Pritchard* criteria as interpreted in *R. v. Podola* [1960] 1 QB 325.

Save in cases where the unfitness was clear, the fact that psychiatrists agreed was not enough. A court would be failing in its duty both to the public and defendant if it did not rigorously examine the evidence and reach its own conclusion.

A rigorous examination of the expert evidence in the appeal led the court to reject the evidence of psychiatrist as he had failed to address the *Pritchard* criteria and the evidence could not have formed a basis for concluding that the appellant had been unfit to plead.

On the trial of a preliminary issue as to the accused's fitness to plead, the following principles apply, as *per R. v. Podola* :

1. In all cases in which a preliminary issue as to the accused person's sanity is raised, whether that issue is contested or not, the jury should be directed to consider the whole of the evidence and to answer the question: "Are you satisfied upon that evidence that the accused person is insane so that he cannot be tried upon the indictment?".
2. If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is a burden upon the defence of satisfying the jury of the accused's insanity. In such a case, as in other criminal cases in which the onus of proof rests upon the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out.
3. Conversely, if the prosecution alleges and the defence disputes insanity, there is a burden upon the prosecution of establishing it.

Abuse of Process footnote

When considering a defendant's ability to participate in criminal proceedings the abuse of process jurisprudence should also be considered. Where a defendant lacks the ability – through one or a combination of factors such as age, lack of maturity, social functioning, intellect emotional and mental capacity – proceedings may be stayed as an abuse of process (see, *T and V v. United Kingdom* (2000) 31 EHRR 861, *SC v. United Kingdom* (2005) 40 EHRR 10, *Subramaniam v. the Queen* [2004] HCA 51 and *R (TP) v. West London Youth Court* [2005] EWHC 2583(Admin)). In considering the issue of fitness to plead the decision in *R. v. Walls* reiterates the importance of a rigorous examination of medical expert evidence from psychiatrists, who need to address the *Pritchard* criteria.

About the author

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