R v Taj – self-defence, drinking and mental illness

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A. Background

In *R v Taj* [2018] EWCA Crim 1743, the Court of Appeal (CA) attempts to clarify the rule applicable to mistaken self-defence, where D's mistake was attributable to psychosis (not amounting to insanity), which in turn was caused by voluntary intoxication. Unfortunately, it falls short. To see how, recall the criminal law's rules on voluntary intoxication and self-defence:

Voluntary intoxication: When D does not form the mens rea for an offence, she is ordinarily entitled to an acquittal. But if D did not form the mens rea because she was voluntarily intoxicated, the public policy based rule in *DPP v Majewski* [1977] AC 443 effectively attributes mens rea for an offence of basic intent to her, thereby making her liable to a conviction.

Self-defence: The test for self-defence comes from cases like *R v Beckford* [1988] AC 130 and *R v Williams (Gladstone)* (1984) 78 Cr App R 276, and is statutorily reinforced by s76 of the Criminal Justice and Immigration Act 2008 ('CJIA'). It has two limbs. When D pleads self-defence we must ask:

I. Did D genuinely believe it was necessary to use force to defend herself? A purely subjective standard applies here – it doesn't matter whether D was mistaken, or whether a reasonable person would have thought as D did – we are only interested in what D believed. If the answer is yes, then
II. Was 'the type and amount of force used' objectively reasonable in the circumstances as D believed them to be?

If the answer is yes, then D is entitled to an unqualified acquittal.

Although D is entitled to the benefit of her own beliefs in the first limb, even if they were mistaken and unreasonable, the common law (for instance, *R v Hatton* [2005] EWCA Crim 2951) and s76(5) CJIA recognise one exception. Where D's mistaken belief was 'attributable to' voluntary intoxication, she cannot rely on it when pleading self-defence. There are clear parallels here with the *Majewski* rule mentioned above.

B. The issue in *Taj*

Now consider the facts of *Taj*. Simon Taj began abusing drugs and alcohol as a child. Eventually, this took a toll on his mental health – heavy intoxicant abuse would bring on a psychosis that made him hear voices, and become aggressive and paranoid. This psychosis would linger for a while even after the intoxication wore off. On the night of 29 January 2016 and into the early hours of the 30th, Taj drank heavily. Then, on the 31st afternoon, while in the grip of post-intoxication psychosis, Taj became convinced that that Mr Awain, a Muslim man he saw standing next to a broken-down car, was a terrorist trying to detonate a bomb. He attacked and nearly killed Awain with a tyre lever, but pleaded self-defence to the charge of attempted murder. He argued that despite being wrong about whether Awain had posed a threat, he was entitled to the benefit of his honest, albeit unreasonable, beliefs about the circumstances that existed at the time of the attack.

The prosecution argued that although there was no evidence that Taj still had intoxicants in his system on the 31st afternoon, his mistaken belief that Awain was a terrorist was attributable to voluntary intoxication-induced psychosis. Therefore, s76(5) CJIA disentitled him from relying on his mistake. The defence disagreed with this reading of s76(5). It relied on the CA's decision in *R v Harris* [2013] EWCA Crim 223 (which was not a self-defence case) in support. In *Harris*, D failed to form the mens rea for an offence because he was suffering from psychosis caused by his sudden cessation, 5-6 days previously, of alcohol consumption after a period of abuse. The trial judge ruled that the *Majewski* rule applied but the CA disagreed, holding that it applied only to persons who were still voluntarily intoxicated when acting. Along similar lines, Taj's defence argued that s76(5) only prevented persons from relying on their mistaken beliefs as to circumstances if they formed those beliefs while (and because) voluntarily intoxicated.

The trial judge in *Taj* ruled that that the phrase 'attributable to intoxication' in s76(5) was broad enough to also encompass cases where although the intoxicants no longer remain in the system, D's voluntary intoxication continues to render her 'disordered in intellect'. *Harris* was distinguished on the basis that the psychosis in that case resulted from the *absence* of alcohol, whereas in *Taj*, it resulted from alcohol consumption. Accordingly, self-defence was withdrawn from the jury. Taj was convicted, and appealed.

C. The CA's judgement

A strong bench of the CA dismissed Taj's appeal. Three substantive points stand out:

1. The CA held that the phrase 'a mistaken belief attributable to intoxication' in s76(5) also encompasses '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' (para 60). It also hinted (most notably, in the seeming importance accorded in para 57 to Taj's paranoia being the result of his 'drink and drug-taking') that it agreed with the trial judge's basis for distinguishing *Harris*.

2. Alternatively, it was willing to rule that *Harris* was wrong, and that the *Majewski* rule (or something similar) also applied when the defendant's 'state of mind had been brought about by his earlier voluntary intoxication' (para 57). It held that the policy considerations underlying the *Majewski* rule are equally apposite when criminal liability is denied due to conditions that are the immediate and proximate after-effects of voluntary intoxication (para 56). It was assumed that this holds whether the said conditions are relied upon to support a denial of mens rea (as in *Majewski*), or to explain a mistaken belief about the need to use force in self-defence.

3. In the further alternative, the CA held that the withdrawal of self-defence was safe anyway, because no properly instructed jury could have concluded that the extent of force that Taj used in self-defence was reasonable. It ruled that in making this evaluation, the defendant's paranoia or psychosis has to be discounted entirely, since the law prescribes an objective standard of reasonableness. Since an 'objective consideration of the facts revealed no reasonable basis for the response of Taj', his conviction was safe (para 62-64).

D. Some points of note

There are several points of interest in the CA's ruling:

a. Despite the obvious difference in context between cases applying the *Majewski* rule (i.e. denials of mens rea), and those applying s76(5) CJIA (i.e. mistaken self-defence), surprisingly it was not suggested that different rules about the effect of voluntary intoxication might apply. There are several plausible grounds to think this might be the case:

   i. The *Majewski* rule is an entirely common law rule, whereas a statutory provision – s76(5) CJIA – encapsulates the intoxicated self-defence rule.

   ii. The harshness of the *Majewski* rule is capped – when it applies, at worst defendants are convicted of basic-intent offences. However, when s76(5) applies, it often makes self-defence impossible to argue, thereby exposing defendants to convictions for even specific intent offences.

   iii. The *Majewski* rule is a rule of *in*culpation, effectively supplying mens rea to defendants who do not, in reality, have the mens rea for an offence, and have therefore not even prima facie offended. s76(5) on the other hand, is a rule relating to *ex*culpation. The defendant admits to committing a prima facie offence, but makes the exculpatory claim that she acted in self-defence (albeit that she was mistaken about whether a threat had existed). Here, the defendant's voluntary intoxication limits the mistaken beliefs that she can rely upon in exculpation.

   One may plausibly think that different policy considerations apply to two rules that are so different in such important respects. Regrettably, this possibility was never explored in *Taj*.

b. The primary basis for the court's ruling (C.1 above) is arguable, up to a point. The phrase 'attributable to intoxication' is certainly capable of being read broadly, and *Harris* was a case of psychosis resulting from the voluntary abstinence from alcohol rather than the voluntary intake thereof. But in *Harris*, the court was unequivocal: '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' (para 59). Nevertheless, the trial judge's distinction between illnesses caused by alcohol intake and those caused by the abstinence therefrom, forms a key part of the court's primary basis for dismissing Taj's appeal. Presumably therefore, the law is now that illnesses resulting from the recent voluntary intake of alcohol fall under s76(5) (and maybe the *Majewski* rule), but illnesses resulting from the voluntary cessation thereof do not. As a normative legal proposition, this is defensible, but no actual defence of it is offered in *Taj*.

c. The court's first alternative basis for upholding the trial judge's ruling (C.2 above) is obiter dicta and so technically, not binding. It relies on the proposition that the same policy considerations apply to the still intoxicated, and the recently intoxicated who are still suffering the proximate and immediate after effects thereof. This proposition is not supported with much argument. The CA says is that 'it is difficult to see why the language (and the policy identified) [in *Majewski*] is not equally apposite to the immediate and proximate consequences of such misuse', and adds 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' (para 56). Now 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' (para 57) we needn't restrict the *Majewski* rule to persons intoxicated while offending.

But it is certainly arguable that those who are voluntarily intoxicated, and those suffering the post-intoxication effects of voluntary intoxication, are in different positions. The former are susceptible to a policy-based rule making then criminally liable for as long as they are intoxicated; *Taj* would put the latter in this precarious position for a significantly longer time. The threat of criminal sanction under *Taj* would therefore represent a much greater intrusion into liberty than the equivalent threat under the *Majewski* rule. What's more, even if advances in medical science have made medical experts more aware of psychoses resulting from intoxicant abuse, that does not imply that the layperson is also better informed about the slightly longer-term effects of intoxicant consumption. One therefore worries that the rule proposed in *Taj* is much more likely to result in a defendant being surprised by criminal liability, than the *Majewski* rule.

Perhaps there are policy considerations capable of supporting the extended rule in *Taj*, but none are discussed in adequate detail in the judgment itself.

d. Assuming that the extended rule in *Taj* was applied, a further worry about its scope would arise. How far removed from the allegedly criminal conduct would it be acceptable for the defendant's voluntary intoxication to be? Some guidance was offered in *Taj* – the CA said that the mistaken state of mind must be 'immediately and proximately consequent upon earlier [voluntary intoxication]', but insisted that this 'does not extend to long term mental illnesses precipitated [by intoxicant misuse]' (para 60) But for how long after being voluntarily intoxicated can a defendant be said to still be suffering the 'immediate and proximate' effects thereof? The facts of *Taj* themselves suggest that this period may last for a day or two. There are also indications that the court in *Taj* would have decided *Harris* differently. In *Harris*, the gap between D setting his house on fire, and the last time he drank before then, was nearly a week. So might there be some facts in which a voluntarily intoxicated defendant's legally precarious situation could last for a week? Or longer? We simply don't know, and given the potentially devastating criminal consequences that turn on such questions, this is a serious concern.

e. But perhaps the most significant worry relates to the court's second alternative (and therefore also obiter dicta) basis for its ruling (C.3 above). After reaffirming the standard two-limbed rule on self-defence, the court adopted a controversial interpretation of the second limb espoused in *R v Oye* [2013] EWCA Crim 1725 and two pre-CJIA cases, *R v Canns* [2005] EWCA Crim 2264 and *R v Martin (Anthony)* [2001] EWCA Crim 2245.

These cases hold that when applying the second limb of the self-defence rule, D's psychiatric condition should ordinarily be ignored. Accordingly, although these cases allowed D the benefit of his genuine – albeit psychosis-induced – beliefs about whether he was under

threat (the first limb), his subjective perceptions of the threat were deemed irrelevant when deciding whether the force with which he responded was reasonable. Instead, the court referred to the threat that a reasonable person would have perceived. Since the reasonable person would see little or no threat, the defence was effectively made unavailable.

This interpretation of the second limb of the test for self-defence runs contrary to settled law, and is illogical. If the second limb of the test refers to the threat that a reasonable person would perceive, the test for self-defence is effectively becomes an objective one – by itself, satisfying the first limb of the test counts for nothing. But the CA in *Martin (Anthony)* did not see itself as changing the law so radically.

Even if this interpretation was somehow tenable before the passing of the CJIA, now it is indefensible. s76(3) says: '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*'. The only exception is in s76(5), which says that D is not entitled to rely on any mistaken belief attributable to voluntary intoxication. Neither that provision, nor the common law rule underlying it, applied in *Martin (Anthony)*, *Canns*, or *Oye*; and in *Taj*, the court's discussion on this point was premised on s76(5) being inapplicable.

In *Oye*, the court relied on s76(9): "This section… is intended to clarify the operation of… [self-defence]" – to argue that since *Martin (Anthony)* and *Canns* were decided pre-CJIA, s76 was intended to preserve, rather than change, the principles laid down therein. Now the precise effect of s76(9) is difficult to pin down, but no sensible interpretation of it permits the court to override the express statutory words of s76(3).

s76(3) does refer to an objective standard of reasonableness, which of course cannot be adapted to account for D's psychosis – the 'reasonable psychotic person' does not exist. But crucially, the standard in s76(3) governs only the comparison of the force that D chose to deploy, and the threat that D genuinely (possibly due to psychosis, but not due to voluntary intoxication) perceived. s76(4) expressly states that D's perception of the threat facing her need not itself be reasonable. On this point therefore, *Oye* was simply wrong, and in following it, so is *Taj*.

E. A solution?

None of this suggests that people who, due to psychoses (whether caused by voluntary intoxication or not), see and respond to imaginary threats, should be allowed to plead self-defence, be acquitted, and potentially do it again. From a policy perspective, we would want self-defence to be unavailable when, because D is suffering an abnormality of mental functioning arising from a recognised medical condition, she mistakenly perceives a threat. She should instead plead insanity if (as in *Oye*) it is available, or be convicted and have her condition taken into account at sentencing. Where the charge is murder, the grounds for denying D the plea of self-defence should ideally allow her to avoid the mandatory life sentence by pleading diminished responsibility instead. Such a development would clarify and improve the law of self-defence. In principle, a case like *Taj* should be decided on this basis alone.

This rule could be introduced by legislation, but the common law too can recognise it. s76 CJIA poses no barrier – on its own terms it does not relate to *when* a plea of self-defence is available. s76(1) states cumulative conditions for the application of s76. These are when (a) D pleads self-defence, *and* (b) the question arises whether the degree of force used by D is reasonable in the circumstances. A rule withdrawing the plea of self-defence from defendants who use force to respond to non-existent threats they perceive because of psychoses, would be logically prior to, and therefore outside, the question whether the degree of force D used was reasonable, and is therefore outwith s76.

Arguably, the foundations for such a rule have already been laid in *Martin (Anthony)*, *Canns*, *Oye*, and *Taj*. In both *Martin (Anthony)* and *Oye* the court referred to policy reasons for not letting persons who used force to defend themselves against threats that they imagined due to psychoses plead self-defence. Furthermore, both *Martin (Anthony)* and *Canns* were homicide cases, and although the defendants could not plead self-defence, the partial defence of diminished responsibility defence applied to them. What remains is for a court hearing an appropriate case to pull these strands together and expressly recognise this rule as a part of the common law. One hopes that this will happen in the near future.

A rule like this would also obviate the need for an expansive interpretation of s76(5). And while the *Majewski* rule is far from perfect, the proposed rule would let the task of better delineating the boundaries of the *Majewski* rule be taken up in a more suitable case.