Criminal Law - The Presumption of Sanity - Burden of Proving Sanity or Insanity

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Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol9/iss2/15

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were to be attacked in his own home)—even to the point of killing
the aggressor, is to put the imprimatur of civility upon an uncivilized
act. If the law will justify the taking of life in the recited circumstances,
what legal or moral restraint can logically distinguish aggression in any
other situation where the choice lies between escape or homicide?

Has the Pennsylvania court re-established the law of the frontier and
the days of the old west?

It is not a facile matter to distinguish the “retreat” and “no retreat”
areas, and a herculean task to define them. Logic would appear to
justify the conclusion that for all practical purposes, the future use
of self-defense will not require the accused to flee aggression in Penn-
sylvania homicide cases. To borrow an old phrase: “The exception has
now become the rule.”

J. Kerry Lewis

CRIMINAL LAW—THE PRESUMPTION OF SANITY—BURDEN OF PROVING
SANITY OR INSANITY—The Pennsylvania Supreme Court has held that
insanity is a defense to murder, but was unable to come to any agree-
ment as to the effect of the presumption of sanity, and the burden of
proving sanity or insanity.


The defendant, Dennis Vogel, shot and killed two persons while carry-
ing out an armed robbery. At his trial, he pleaded not guilty by reason
of insanity. The defense presented four eminent psychiatrists to estab-
lish Vogel’s legal insanity in accordance with the M’Naghten rule. The
commonwealth offered no testimony to rebut or impeach the testi-

23. The MODEL PENAL CODE § 3.04 (1962) set forth the following standard:

(b) The use of deadly force is not justifiable under this section unless the actor
believes that such force is necessary to protect himself against death, serious bodily
harm, kidnapping or sexual intercourse compelled by force or threat;

(l) The actor is not obliged to retreat from his dwelling or place of work, unless
he was the initial aggressor or is assailed in his place of work by another person
whose place of work the actor knows it to be. . . .

The Proposed Crimes Code for Pennsylvania which was submitted by the Joint State
Government to the Pennsylvania General Assembly in 1967, uses precisely the same lan-
guage in Section 304(b)(2)(i)(a) Use of Force in Self-Protection.

It will be noted that the subject case has extended the proposed area of retreat by
substituting “place of business” for “place of work”, and by elimination of the specific
qualifying conditions dealing with retreat.

Query: Is the court more sensitive to the public’s need than the peoples’ elected rep-
resentatives?
mony given by the witnesses for the defense. Instead, the commonwealth relied solely upon the presumption of sanity, and upon the testimony of witnesses as to the circumstances surrounding the robbery and killings. Vogel was subsequently found guilty of armed robbery, as well as two counts of murder in the second degree. In a five-two decision, the Pennsylvania Supreme Court reversed his conviction, and a new trial was granted. Four separate opinions were filed by the members of the court. Three opinions in support of the order for a new trial, and one dissenting opinion.

BACKGROUND

It has been a well settled principle of law in this commonwealth that insanity is an affirmative defense, with the burden of proof resting with the defendant.\(^1\) It has been an equally well settled principle that all men are presumed to be sane, until the presumption has been rebutted by a fair preponderance of the evidence; and the presumption is to be treated as the full equivalent of express proof.\(^2\) The presumption is the equivalent of proof in that the prosecution is not required to present any evidence to reinforce the presumption. To this extent the prosecution can rely solely on the presumption. The jury is then permitted to weigh the evidence of insanity presented by the defendant, against the naked presumption in order to establish whether the defendant has sustained his burden of proof.

The instant case is of major importance in that it establishes a departure from the principle which treats the presumption as the equivalent of full and express proof. The present case also elicits a significant new trend, by a minority of the court, away from the treatment of insanity as an affirmative defense.

THE PRESUMPTION OF SANITY AND ITS EFFECT

The issue surrounding the presumption of sanity is best stated as follows—can the defendant be convicted of murder, where he has introduced evidence to challenge the presumption of sanity; and where the commonwealth has relied solely on the presumption, and has pre-

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sented no evidence to impeach or otherwise off-set the evidence of insanity? Or, more simply, can the presumption be relied upon as the full equivalent of proof?

Case law in Pennsylvania as early as Commonwealth v. Gerade,3 has taken the position that the presumption of sanity is the equivalent of full and express proof. The presumption is considered to be valid until it is successfully rebutted by a fair preponderance of the evidence. This principle has been reaffirmed in Commonwealth v. Iacobino, the court holding that: "where mental capacity at the time of the act is at issue, the Commonwealth is aided by the presumption of sanity, it is not required to prove affirmatively mental capacity to commit the act."4 Accordingly, when the defendant introduces evidence challenging the presumption, it has traditionally been sufficient to give rise to a question of fact for the jury.

In the instant case, Mr. Justice Jones, with whom Mr. Justice O'Brien concurs, addressed himself to the effect of the presumption of sanity. Relying on the approach taken by the court in the civil case of Allison v. Snelling & Snelling, Inc,5 he takes the position that "a verdict may not be based solely upon a presumption where there is evidence which credibly contradicts the presumption."6 Therefore, the prosecution can not, as it did in the instant case, simply rest it's case upon the presumption.

The result of this approach is to change the role accorded the presumption of sanity, from an evidentiary device to a procedural device. As a procedural device, the presumption of sanity operates as a presumption of fact. To this extent, it serves only to remove the question of sanity from the criminal proceeding until it is deliberately put in issue by the defense. Once challenged, the presumption is no longer valid, and is totally discarded in considering the sanity issue. This is an obvious departure from the manner in which the presumption was used in Gerade, and Iacobino.

This approach is not an unfounded one, since it has been established firmly in the civil law of the commonwealth. In Watkins v. Prudential Insurance Co. the court said:

A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the

Recent Decisions

scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption, being a legal rule or conclusion is not evidence.\(^7\)

In *Heath v. Klosterman*, the court also said: “A presumption such as this is not evidence, and it can not weigh as evidence, since it gives way the moment proof of the contrary is presented.”\(^8\)

It is recognized by Justice Jones, that there is no valid reason why a presumption of fact, which is given no evidentiary weight in a civil case, should be treated any differently in the realm of criminal law.

As was stated above, the effect of this approach is to remove the concept of the presumption from the realm of evidence into the realm of procedure. In so doing, the role of the presumption of sanity can best be described as a procedural convenience which eliminates the issue of sanity from the trial until it is put in issue by the defendant.

In separate opinions filed by Mr. Justice Roberts, and Mr. Justice Pomeroy, the effect of the presumption of sanity was handled incidentally to the problem of the burden of proof. They too agree in principle, that the presumption of sanity is to be given no evidentiary weight, but rather is to be used as a procedural convenience.\(^9\) Here too, a departure from the rule established in *Gerade* and *Iacobino* can be seen.

The approach taken in the opinions by Justices Jones, Pomeroy, and Roberts shows little disagreement concerning the effect of the presumption of sanity. But, they do disagree, as will be shown, over the issue of proving sanity or insanity.

**The Effect of the Burden of Proof**

The positions taken by Justices Pomeroy and Roberts are in disagreement with those of Justices Jones and O’Brien as to two very important issues. First, who carries the burden of proving sanity or insanity? Second, what quantum of evidence is required to establish sanity or insanity?

A long line of cases, the most recent of which being *Commonwealth v. Updegrove*,\(^10\) have firmly established the principle that insanity is an affirmative defense; and therefore the burden of proving insanity rests with the defendant. This same line of cases has also established that a

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fair preponderance of the evidence is the quantum necessary to sustain this defense.\textsuperscript{11}

Addressing himself to the problem, Mr. Justice Roberts takes the position that the burden of proving insanity is not a matter of defense.\textsuperscript{12} His opinion is that once the presumption of sanity has been challenged, the burden of proving sanity must necessarily rest with the prosecution.\textsuperscript{13} A specific mens rea has always been considered as much an element of the crime of murder as the act of killing.\textsuperscript{14} Starting with this premise, it is argued by Justice Roberts that intent to commit murder is so interrelated with the capacity to formulate the intent, \textit{i.e.} sanity, as to become an essential element of the crime.\textsuperscript{15} Very simply, you can not have the intent to commit murder if you do not have the capacity to formulate the requisite intent. Therefore, sanity is an element of the crime which must be proven by the prosecution. It is not a novel approach to require the prosecution to prove the existence of sanity as an element of the crime. This rule is in effect in the federal courts as well as twenty-two of the states.\textsuperscript{16}

Mr. Justice Pomeroy, takes essentially the same stand on the question of the burden of proof. Although he does not espouse the same arguments of interrelation between intent and sanity which had been made by Justice Roberts, it can only be assumed that he must agree in principle with these arguments. He states in his opinion that:

\begin{quote}
I realize that our case law has placed upon the defendant the burden of establishing his insanity by a preponderance of the evidence . . . upon reflection, however, I see no reason why the Commonwealth should not have the same burden with regard to sanity, once that matter has been put in issue, as we have placed upon it as to all other facts necessary to support a guilty verdict.\textsuperscript{17}
\end{quote}

This leads directly into the problem of what quantum of evidence should be required of the prosecution in order to prove the element of sanity. In \textit{Commonwealth v. Bonomo},\textsuperscript{18} the court reiterated the long standing rule of law that in a criminal case, the commonwealth has the

\begin{footnotesize}
\begin{enumerate}
\item See note 1.
\item \textit{Id.}
\item \textit{Commonwealth v. Drum}, 58 Pa. 9 (1868).
\item 17 A.L.R. 3rd 146, 158, 159 (1968).
\end{enumerate}
\end{footnotesize}
burden of proving, beyond a reasonable doubt, every essential element necessary for a conviction. Recently, in the case of *In Re Winship*, the United States Supreme Court decided for the first time that the "reasonable doubt standard" was part of due process and applicable to the states. Accordingly, the position taken by Justices Roberts and Pomeroy, would not only shift the burden of proving sanity, but would also require the prosecution, as a matter of due process, to prove sanity beyond a reasonable doubt.

Mr. Justice Jones, in his separate opinion, did not agree that sanity should be treated as an element of the crime. He defended the traditional concept of insanity as being an affirmative defense. His argument is based on the definition of legal insanity as formulated under the M'Naghten test. Under this rule, the test for legal insanity does not focus on the question of the capacity to formulate the requisite intent, but rather on the question of whether or not the defendant was capable of distinguishing the quality of his act as between right and wrong. In other words, the test would be—did he know that the act he intended to carry out was wrong? Mr. Justice Jones says: "Legal insanity in this Commonwealth may or may not bear on the question of intent . . . . An individual may intentionally kill someone with malice aforethought, but be incapable of distinguishing right from wrong." Therefore, by virtue of the very nature of the M'Naghten test, intent must be divorced from the concept of sanity. To hold, that intent and sanity are so interrelated as to constitute a homogeneous element of the crime, would be paramount to abandoning the basic operating premise of the M'Naghten rule, hence abandoning the rule itself. Accordingly, Justice Jones takes the view that insanity can not be, and should not be considered, an element of the crime; but rather, must continue to be considered a matter of defense.

20. The *Queen v. M'Naghten*, 10 Cl.& F. 200, 8 Eng. Rep. 718 (1843). This case established the following rule: "it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." The M'Naghten test was adopted in this Commonwealth a few years later in *Commonwealth v. Mosler*, 4 Pa. 264, (1846). It has remained the test of insanity through a long succession of cases. A more recent application of the rule may be found in *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98, (1960).
22. See note 6
SOME INCIDENTAL SPECULATION ON THE ROBERTS OPINION

As noted above, the heart of the argument by Justice Jones centers around the distinction between sanity and intent inherent in the M'Naghten rule. To this extent, the arguments espoused by Justice Roberts, run contrary to the traditional concept of legal insanity as defined under the M'Naghten rule.

It is submitted that Justice Roberts is in fact tacitly dissenting from the M'Naghten rule and its rigid approach to the sanity issue. It is further submitted that he would almost certainly favor a more comprehensive and reliable test of insanity.

Justice Roberts has been a staunch advocate of the concept of "diminished responsibility" as a means of softening the stringent interpretation accorded questions of mental capacity under the M'Naghten rule. The concept of diminished responsibility involves a recognition that the defendant may not be legally insane under the M'Naghten test, but nevertheless be suffering from a mental disorder of sufficient magnitude as to affect his capacity to form the premeditated intent requisite of first degree murder. Diminished responsibility is analogous to the lack of malice aforethought which distinguishes manslaughter from murder of the first degree. Likewise, proof of diminished responsibility would prevent conviction of murder in the first degree, and thereby avoid a possible death sentence. California applies this approach under what is known as the "Wells-Gorshen rule."23 However, this concept has been consistently rejected by the Supreme Court of Pennsylvania,24 which continues to rely on the all-or-nothing approach of the M'Naghten rule. In those cases which have rejected the concept of diminished responsibility, Justice Roberts has steadfastly dissented. Examining his dissenting opinions in Commonwealth v. Ahearn,25 Commonwealth v. Phelan,26 and Commonwealth v. Rightnour,27 one readily detects his genuine dissatisfaction with the M'Naghten test. In all three cases, Justice Roberts argues for the admission of expert psychiatric testimony to support and sustain the existence of diminished responsibility. In Rightnour, he attacked the majority opinion of the court saying: "In

25. Id.
my view, the position advanced [by the majority] must be based, at least in part, on the belief that a person is wholly sane or wholly insane, a position which is now abandoned as based on a psychological un-truth."  

It is submitted that the approach taken by Justice Roberts in the instant case, marks a progression beyond the argument for diminished responsibility which he first espoused in the Ahearn decision. It appears as though Justice Roberts has come to the conclusion that even if the diminished responsibility concept were to be adopted in this common-wealth, it would be insufficient to bring the M’Naghten test into focus with twentieth century realities concerning mental disease and defect.  

In future cases dealing with the insanity issue, it would not be surprising to find Justice Roberts leading the assault against the antiquated M’Naghten rule. It is further anticipated that he will indeed support a more comprehensive test of insanity such as that proposed by the Model Penal Code;  

or possibly a modified form of the Durham rule, as it has been applied in the United States Court of Appeals for the Third Circuit.  

CONCLUSION  

The instant case gives rise to a new and formidable principle of criminal law in this commonwealth. The opinions of the majority in this case have established that the presumption of sanity shall not be the equivalent of full and express proof of sanity, but shall merely have
the effect of a procedural rule of law which eliminates the issue of sanity from the criminal proceeding until raised by the defendant. To this extent, Gerade and Iacobino have been overruled.

The present case also produces evidence of a significant trend which has not yet attained the majority status of the court. Two of the Justices of the court have expressed the opinion that insanity should no longer be treated as a defense. Instead, sanity should be regarded as an element of the crime, with the burden of proving sanity beyond a reasonable doubt, resting with the commonwealth.

And, finally, mention must be made of what can only be described as a speculative trend regarding future opinions of Justice Roberts concerning the appropriate test for insanity. It would appear, from his opinion in the Vogel case, as well as his opinions in such related decisions as Ahearn, that his future opinions will be in the vanguard of those which attack the M'Naghten test as an antiquated relic of the dark ages.

Ronald G. Mokowski

LABOR LAW—FEDERAL COURTS—LABOR MANAGEMENT RELATIONS ACT, 1947—SUITS UNDER § 301(a) TO ENJOIN STRIKES IN BREACH OF A NO-STRIKE AGREEMENT—The Supreme Court of the United States has held that a federal court may enjoin a strike which violates the no-strike provision of a collective bargaining agreement if that agreement contains a mandatory grievance-arbitration procedure.


In the Boys Market case, the Supreme Court of the United States once again considered the effect of § 4 of the Norris-LaGuardia Act on an

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1. Section 4 provides:
   No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute or prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
   (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
   (c) Giving publicity to the existence of, or the facts involved in, any labor dispute,