

Developments in Substantive Criminal Defences

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Cases on reasonableness standards

R v Ray [2017] EWCA Crim 1391



CJIA 2008: 76 Reasonable force for purposes of self-defence etc.

...

(3) 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, and subsections (4) to (8) also apply in connection with deciding that question.

...

(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

(6) In a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

Cases on reasonableness standards

R v Ray [2017] EWCA Crim 1391



M Dsouza, 'Understanding the "Householder Defence": Proportionality and Reasonableness in Defensive Force' (2016) 75 Cambridge LJ 192

V → thwarts threat from D in (Case 1) a public park; OR (Case 2) D's home. Degree of force is disproportionate, but not grossly disproportionate.

Case 1

Not householder case → s76(6) → force is automatically unreasonable, because disproportionate.

Case 2

Householder case → s76(5A) → force is not automatically unreasonable (because not grossly disproportionate, even though disproportionate).

What if D knew she had another equally effective, but less forceful option?
A jury *might* find that D was unreasonable to use the more forceful option.

Is **parsimonious** (i.e. **sparing**) use of force relevant to reasonableness?

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



CJIA 2008: 76 Reasonable force for purposes of self-defence etc.

...

(3) 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, and subsections (4) to (8) also apply in connection with deciding that question.

(4) If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



Three alternative bases for dismissing appeal (1):

“Mistaken belief attributable to intoxication” in s76(5) not confined to cases in which intoxicants were **then** present in the appellant’s system. 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” [60].

CA: The *Harris* ruling is relevant, but distinguishable. Psychosis in *Harris* resulted from abstinence from alcohol after a period of abuse, whereas psychosis in *Taj* resulted from alcohol consumption.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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Three alternative bases for dismissing appeal (1):

Questions/Concerns:

1. Was *Harris/Majewski* really relevant?
2. It seems that now, illnesses resulting from the recent voluntary **in**take of alcohol fall under s76(5) (and possibly the *Majewski* rule), but illnesses resulting from **ceasing** intoxicant intake after a period of voluntary abuse do not. What reasons of policy support this?

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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Three alternative bases for dismissing appeal (2):

Alternatively (i.e. *obiter dicta*), willing to overrule *Harris* and hold that the rule on voluntary intoxication applies equally to extant intoxication, and to psychiatric conditions caused by recent intoxication.

“[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 alcohol or drugs... whether or not they remain present at the time of the offence”. [56]

The same policy considerations apply to both, and since “medical science has advanced such that, in the modern age, the longer term sequelae of abusing alcohol or drugs are better known and understood”, [57) there is no reason to restrict the *Majewski* rule to persons intoxicated while offending.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



Three alternative bases for dismissing appeal (2):

Questions/Concerns:

1. Better informed experts \neq better forewarned members of the public
2. Proposed rule is a significantly greater intrusion into liberty by threat of criminal sanction that *Majewski* ever was.
3. Problem of scope – how recent is recent enough?

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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Three alternative bases for dismissing appeal (3):

In the further alternative (i.e. also *obiter dicta*), there is no basis on which the jury could have concluded that the extent of force used by D in self-defence was reasonable. An objective standard applies to this evaluation, so ordinarily, D's paranoia or psychosis must be discounted entirely. Since an "objective consideration of the facts revealed no reasonable basis for the response of Taj", his conviction was safe (at [62-64]).

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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Three alternative bases for dismissing appeal (3): (a brief detour into self defence)

The two limbed rule on self-defence:

1. (Purely subjective limb) Did D genuinely believe it was necessary to use defensive force? If so,
2. (Objectivised evaluation) Was “the type and amount of force used” reasonable in the circumstances as D believed them to be?

Beckford [1988] AC 130; *Williams (Gladstone)* (1984) 78 Cr App R 276; s76 of the Criminal Justice and Immigration Act 2008

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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Three alternative bases for dismissing appeal (3):

(a brief detour into self defence)

CA: While the first limb of the test is subjective, the second limb is objective, and requires that the effects of the defendant's psychosis ordinarily be discounted.

Draws support from *Oye* [2013] EWCA Crim 1725, which, in turn, relied on two pre-CJIA cases, *Canns* [2005] EWCA Crim 2264, and *Martin (Anthony)* [2001] EWCA Crim 2245.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



Three alternative bases for dismissing appeal (3):

Accordingly, Taj gets the benefit of genuine, albeit psychiatric illness induced, belief about whether defensive force was needed (first limb), BUT his subjective assessment of the scale of the threat is irrelevant when deciding whether the force deployed was reasonable (second limb).

Instead, CA refers to facts apparent to a reasonable person (i.e. not Taj) :

- Awain was not armed (and did nothing to suggest he was),
- The police had ‘entirely [properly]’ been satisfied that Awain was merely an electrician whose car had broken down.

On those facts, Taj’s response excessive. Self-defence unavailable.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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Three alternative bases for dismissing appeal (3):

Concern: This reading of the second limb is, with respect, incorrect.

1. Unlikely that the CA in *Oye*, *Canns* or *Martin (Anthony)* support it.
2. ss76(3), 76(4) and 76(5) rule this reading out.
3. The reasonableness standard in s76(3) governs only the comparison of the force that D chose to deploy, and the threat D genuinely (perhaps due to psychosis, but not voluntary intoxication) perceived.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



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A possible solution?

Self-defence is unavailable where, because D suffers an abnormality of mental functioning arising from a recognised medical condition, she mistakenly believes she is under threat, and responds using force.

Features of the test

- The defendants in *Martin (Anthony)*, *Canns*, *Oye*, and *Taj* suffered conditions that would meet this test
- Where insanity is available (eg. *Oye*), that should apply
- Else D should be convicted, and her condition should be considered in mitigation
- The ‘abnormality of mental functioning arising from a recognised medical condition’ standard comes from the test for diminished responsibility: s2(1)(a) Homicide Act 1957. So when the charge is murder, D can plead diminished responsibility and make sentencing discretion available.

Cases on reasonableness standards

Taj v The Crown [2018] EWCA Crim 1743



A possible solution?

- Common law can evolve it – s76 CJA 2008 poses no barrier.

CJA 2008: 76 Reasonable force for purposes of self-defence etc.

(1) This section applies where in proceedings for an offence—

(a) an issue arises as to whether a person charged with the offence (“D”) is entitled to rely on a defence within subsection (2), **and**

(b) the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances.

- In *Martin (Anthony)*, *Canns*, *Oye*, and *Taj*, the CA has arguably already taken steps towards evolving this common law rule.
- Improves self-defence rule; no need for expansive reading of s76(5) CJA

M Dsouza, ‘*Intoxication, psychoses, and self-defence: Evaluating Taj [2018] EWCA Crim 1743*’ (2018) 9 Arch Rev (Forthcoming 27 Nov 2018)

Cases on reasonableness standards

R v Wawrzyniak [2017] EWCA Crim 2008



“...the particular characteristics of the appellant [must] be taken on board when considering why the appellant had shaken [the baby, and] also in considering whether those actions should or may therefore have been reasonable and proportionate in the appellant's mind to avoid the threat of serious injury or death.” [24]

M Dsouza, ‘Criminal Culpability After the Act’ (2015) 26(3) *King’s Law Journal* 440

Re F (Mental Patient: Sterilisation) [1990] 2 AC 1:

- D can intervene when necessary to save V from an impending threat, but not practicable to communicate with V.
- A reasonable person would do the same, in V’s best interests.
- No officious interventions – no defence if there was some other more appropriate person (doctor, police officer) was on hand to do the needful.

Miscellaneous Updates



***R v BM* [2018] EWCA Crim 560**

- On the interplay of private consent and state regulation
- Tattoos/Body Decoration → Body Modification → Cosmetic surgery

***R v Rejmanski* [2017] EWCA Crim 2061**

- Loss of control
- Interpretation of s54(3), Coroners and Justice Act, 2009

54(3) In subsection (1)(c) the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

***Loake v CPS* [2017] EWHC 2855 (Admin)**

- Is insanity a defence to strict liability offences?

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