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Aspects of the Criminal Law (Insanity) Act 2006

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Introduction

The situation, prior to the passing of the Criminal Law (Insanity) Act 2006, relating to the manner in which defendants who were unfit to plead, or who were found guilty but insane, was unsatisfactory.

Where a defendant being prosecuted was, in the District Court, found unfit to plead, the matter could, effectively, proceed no further: the District Court, even if the prosecution related to an indictable matter, could "make no order of any description with regard to the further attendance of the accused or with regard to his custody" (O'Connor versus the judges of the DMD, Supreme Court, extempore, 11/11/92).

Equally, the question of the release of somebody, detained at the pleasure of the government following a verdict of guilty but insane, whether into the community, or to a local psychiatric facility, presented certain difficulties and was an administrative matter, having regard to the interests of the patient and of the public, rather than a matter for further judicial adjudication (DPP versus Gallagher 1991 IR 31.

In those circumstances, it was obviously desirable to put in place an appropriate procedure to deal with the various matters that can arise from the mental infirmity at one time or another of the defendant.

Terms and conditions

This legislation is subject to terms and conditions.

Descriptions of mental infirmity used in previous legislation, particularly relating to the sexual offences, would be considered, now, inappropriate. For example, sexual intercourse with a woman who was an idiot, or an imbecile, or feebleminded was an offence under section 4 Criminal Law Amendment Act 1935. These terms would now be regarded as inappropriate.

However, even now, the accurate medical classification of mental deficiencies, and the differing terms and legal definitions of mental deficiencies used in various items of primary and secondary legislation, for various purposes, present their own difficulties.

Watch the wording in the 2006 Act:

‘Court’ and ‘court’ can mean two different things: any court exercising criminal jurisdiction, section 1 2006 Act; and the District Court, section 4 (3) 2006 Act.

‘Mental disorder’ can mean mental disorder within the meaning of the 2006 act or mental disorder within the meaning of the Mental Health Act 2001.

2006 Act, section 1
"’Mental disorder’ includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication;" section 1 2006 Act.

There is no distinction in the definition of intoxication in section 1 between voluntary and involuntary intoxication.

And this In addition, intoxication includes intoxication by solvents. One can imagine a situation in an industrial context where solvents might, by reason of the manufacturing process, be present in the atmosphere, or where they might be released by accident. In those circumstances, the defendant could not be found not guilty by reason of insanity. One could envisage this being an issue in prosecutions, for instance, of industrial reckless endangerment.

2001 Act section 3
"In this act "mental disorder" means mental illness, severe dementia or significant intellectual disability where-

(a) because of the illness, disability or dementia there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or

(b) (i) because of the severity of the illness, disability or dementia, the judgement of the person concerned is so in period that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition would prevent the administration of appropriate treatment that could be given only by such admission, and

(ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of the person to a material extent.

(2) in subsection (1)-

"mental illness" means a state of mind of the person which affects the person’s thinking, perceiving, emotion or judgement and which seriously impairs the mental function of the person to the extent that he or she requires care for medical treatment in his or her own interest or in the interest of other persons;

"severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting court, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression;

"Significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence or social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.

"Significant intellectual disability" does not, in the terms of this definition, include traumatic brain injury.

Committal under the 2006 Act may be for assessment or care or treatment.

Defendant's mental condition

Where the question of fitness to plead (or other questions relating to the mental condition of the defendant) arise in the course of the prosecutorial process, it may be appropriate to consider whether or not, when he was arrested and detained pursuant to section 4, he was then suffering from the mental condition.

The impact of section 4 (8) Criminal Justice Act 1984 may be relevant to the lawfulness of the detention of the defendant, if subsequently transpires that she was in need of medical attention in relation to a mental illness, which was not afforded to him.

Regulation 22 of the Custody Regulations SI 119/1987 apply those regulations which relate to suspects under 17 to suspects who are mentally handicapped. The failure to apply the relevant regulations might have implications for the admissibility of any statement made by the mentally handicapped defendant or of forensic evidence.

Psychiatric evidence: Notice

If the defence wish to introduce psychiatric evidence, they must give notice to the prosecution "*within 10 days of the accused being asked how he or she wishes to plead to the charge*.". (Section 19).

The wording of Section 19 may make that notice period meaningless under the current practice, insofar as the defendant, as I understand it, is asked how he intends to plead when the trial is about to begin.

There seems no reason why he cannot be asked either when he is first arraigned, or even when he is before the District Court. In order to trigger the notice period, it is not a prerequisite for the defendant to plead, and, accordingly, he can defer and that decision, should he choose to do so. For the question properly to be asked,

however, it would seem necessary that the court be in a position to accept record the plea.

Section 13, Criminal Procedure Act 1967, as substituted by Section 10 Criminal Justice Act 1999, relating to the defendant being sent forward on a plea is relevant.

Psychiatric evidence: Mandatory

In some instances, the court must hear psychiatric evidence before making a decision. They include findings of not guilty by reason of insanity (section 5(1)), and decisions to commit for treatment. (section 4(3)(b) 4(5)(c)).

Where a defendant being tried for murder claims to be suffering from a mental disorder, and that he is not guilty of murder, but guilty of diminished responsibility by reason thereof, the defendant is not obliged to call psychiatric evidence, but the prosecution are entitled to call opposing evidence. (Section 5(4)). However, it seems probable that the defence would call the appropriate evidence, as the onus is on the defence to establish that he suffered from diminished responsibility. (Section 6 (2))

Prosecution, where patently unfit or insane

Even where the suspect is patently unfit to be tried, or will inevitably be found not guilty by reason of insanity, it may be appropriate to prosecute nevertheless.

Where the person has been found unfit to be tried and the psychiatrist, in addition, considers him to suffer from a mental disorder/Mental Health Act 2001, and in need of care/treatment, the court may commit him for treatment, or direct that he receive outpatient treatment. (Section 4(5)(c)(i), (ii), Circuit Court, Section 4(3)(b)(i), (ii), District Court).

Where the defendant is found not guilty by reason of insanity, a further consideration is whether the defendant suffers from a mental disorder/Mental Health Act 2001, and needs inpatient care or treatment. If so, the court must commit him to the CMH. (Section 5(2).

Fitness to be tried

The defendant, prosecution or court may raise the issue. (Section 4(1)).

The court may request evidence from a consultant psychiatrist. (Section 4 (3) (aa), (5) (bb)).

Unlike the provisions relating to the making of an order for inpatient or outpatient treatment, there is no provision in the context of considering the defendant's fitness to be tried to direct the committal of the defendant to, or to direct his attendance at a psychiatric hospital for the purposes of examination.

The previously existing power to do so in Section 4(6)(a)(i) was repealed by the Criminal Law (Insanity) Act 2010. This came into force on 8 February 2011, courtesy of SI 50/2011.

The defendant is deemed unfit to be tried if:

He is suffering from a mental disorder, within the meaning of the 2006 Act,

and

He is unable to understand the proceedings so that he cannot do at least one of the following:

- Plead,
- instruct his legal team,
- elect for venue,
- make a defence,
- challenge a juror, or
- understand the evidence.

What court?

In summary offences and in indictable offences being dealt with summarily the District Court decides. (Section 4(3)(a)). But, if he is unfit, can he elect where it is necessary that he do so?

In hybrid offences, this question may be resolved by the prosecution electing for venue.

However, in relation to offences covered by section 2 Criminal Justice Act 1951, or similar provisions, although it would be open to the prosecution to refuse consent to summary disposal, this might be regarded as an abuse of process, if the offence was, of its nature, patently appropriate for prosecution in the District Court.

In indictable matters, where the matter arises in the District Court at Preliminary Examination stage, the defendant is sent forward for determining the question, when the Judge, rather than the jury determines the question. (Section 4(4).

Where the question arises after the return for trial, again the Circuit/Central Criminal Court Judge, rather than the jury determines the question. (Section 4(4)(a))

When?

The 2006 Act does not state at which point in the proceedings the issue may be raised for determination.

It may be that, as a trial proceeds, the issue may emerge as a result of the behaviour or the demeanour of the defendant.

The fact that the District Judge has determined that the defendant is fit does not preclude the issue arising subsequently in the same proceedings, in the District Court.

Apart from the fact that the District Judge retains seisin and can revisit the matter, having reconsidered, if different facts or circumstances concerning the defendant arise in the course of the proceedings, the issue may be raised afresh.

If the district judge has determined that the defendant was fit to stand trial in the course of what was initially a summary prosecution, but where the district judge subsequently, and by reason of facts and circumstances which have emerged in the course of the trial, has legitimately changed his mind and refuses jurisdiction, the question may be raised afresh with the judge following the return for trial.

Fitness to be tried: postponement to see "did he do it"

The question of the defendant's fitness to be tried in any court may be postponed, where the court considers it expedient and in the accused's interest, to see if the prosecution have a *prima facie* case.

If, following the conclusion of prosecution case, the defence application for a direction is granted, the defendant is acquitted.

If the defence application for a direction is refused, the fitness hearing then takes place. (Section 4(7), (8)).

Where deemed unfit: "Did he do it" hearing

Conversely, where the defendant is found unfit, then, before considering treatment, the court may, if asked by the prosecution or the defence, first hold a hearing as to whether the defendant did the act: if the court finds a reasonable doubt, he is discharged (Section 4(8)).

In the latter case, the press are gagged. (Section 4(9)). This is similar to the provision in relation to reporting of preliminary examination is in section 4 Criminal Procedure Act 1967.

Where deemed unfit: adjournment

If the court finds the defendant unfit, subject to the option of a *prima facie* case hearing, the case must be adjourned until further order. (Section 4(3)(b))

Where deemed unfit, but subsequently appearing to become fit: re-entry

Although there is set out in the Act a detailed process for the review of the detention and status of the defendant who is committed for treatment, there is no such process established for the review of the defendant is found unfit to stand trial, but not a suitable case for treatment.

Logically, if the defendant is reported by the Gardaí to have become fit, the matter should be re-entered and his fitness revisited. Such a procedure would seem to be contemplated by the requirements that, having found the defendant unfit, the court must adjourn "until further order".

The procedure outlined in The State (Hayden) versus Good (1972 IR 351@358) could be utilised to bring the defendant back before the court.

Where deemed unfit: adjournment, consideration of care/treatment

Where the court has found the defendant unfit, and, thus to be suffering from a mental disorder within the meaning of the 2006 Act, it may next address the question of whether he also suffers from a mental disorder within the meaning of the Act of 2001 and needs inpatient or outpatient care/treatment in the CMH.

For that purpose, the court may direct that the accused to be examined by a consultant psychiatrist (section 4 (5)) and, if necessary, commit the accused the CMH (Section 4 (6)).

Although the provision is couched in discretionary terms, it is arguable that, in order to properly exercise his discretion, (even where he decides not to direct inpatient or outpatient treatment) the judge should secure appropriate evidence, but this is not an express requirement.

Given the various definitions of medical disorder in both acts, including as they do non-psychiatric ailments, the question arises as to whether evidence from a consultant psychiatrist would be the most appropriate.

It is not necessary that this question be resolved at the same hearing as that in which the defendant was found unfit to be tried.

The case should, ideally, be adjourned to enable appropriate arrangements be put in place with the CMH for the examination of the defendant, and to enable the CMH consider its accommodation resources, and to make representations to the court in that regard.

The consultant psychiatrist must consider whether he is suffering from a mental disorder within the fairly complex matrix in the definition in the Mental Health Act 2001, and whether he needs inpatient or outpatient care/treatment in the CMH.

In simplistic terms, the psychiatrist must consider whether, following the determination that the defendant is suffering from a mental disorder within the meaning of the 2006 Act, either that the defendant is a danger to himself or to the public or that he needs, but will refuse, treatment. (Section 4(5)(c)(i), (ii), Circuit Court, (Section 4(3)(b)(i), (ii), District Court).

The statutory purpose of the examination is not to assess the fitness of the defendant to be tried, but to inform the decision of the District Judge as to any necessary treatment.

If a referral for psychiatric examination is made pursuant to section 4 (6) (a), following a determination of unfitness for the purposes of considering treatment, and the consultant psychiatrist forms the view that the defendant is not suffering from a mental disorder within the meaning of the 2006 Act, or is otherwise fit to stand trial, it is not clear how dilemma thereby arising may be resolved.

It is not clear that the District Judge can then revisit the determination of unfitness, of his own motion.

An appeal pursuant to section 7 might be the answer.

Where the defendant is deemed unfit and has a 2001 Act mental disorder: committal/outpatient treatment?

Where the person has been deemed unfit to be tried and the psychiatrist considers him to suffer from a mental disorder within the meaning of the 2001 Act, and in need of care/treatment, the court *may* commit him for treatment, or direct that he receive outpatient treatment. (Section 4(5)(c)(i), (ii), Circuit Court, Section 4(3)(b)(i), (ii), District Court).

The exercise of the power is discretionary, rather than mandatory.

Remand in Custody

It is not clear that, in those circumstances, the Court would be within its powers to adjourn the prosecution sine die while remanding in the defendant in custody, in the absence of an express provision in that regard.

It would also seem that, if the defendant appears before the district court on a summons, he is not in custody, and the question of the remand, on bail or otherwise, would not arise.

However, section 21 Criminal Procedure Act 1967, which simply provides for a power to remand an accused person does not make any distinction between a defendant before the court on summons or charge sheet.

Section 24 Criminal Procedure Act 1967, as substituted (ultimately) by section 37 Criminal Procedure Act 2010 provides remands beyond the usual 15 days where the defendant is unable to be brought before the court by reason of illness or accident or other good and sufficient reason.

It seems doubtful that, if the appropriate prerequisites for a remand in custody were not present, that the court could properly remand for the secondary purpose of securing a medical examination or to allow time for the defendant's mental condition to resolve, where he has been found unfit to plead.

This is particularly the case given that, in so doing, the statutory obligation of the Mental Health (Criminal Law) Review Board for review of the mental condition of the defendant at six monthly intervals to pursuant to section 13 would not appear to arise.

Where the defendant is remanded in custody, and he is found, in prison, to the suffering from a mental disorder within the meaning of the 2006 Act, he may be transferred to the CMH. (Section 15). This provision, if not utilised as a colourable device, might provide an opportunity to secure evidence from a consultant psychiatrist under section 4 (3).

Section 207 of the Mental Treatment Act 1945 still appears to be extent, which provides that a person detained in a mental hospital and charged with an indictable offence before the District Court sitting in that hospital, may be certified for transfer to the CMH where a *prima facie* case is found that committed the offence, and he is considered to be unfit to plead. It is the Minister who authorises the transfer.

It is not clear where this fits into the scheme of the 2006 Act. Insofar as it sits beside section 208, relation to transfer for special treatment, perhaps it might be regarded as in the therapeutic sphere.

This conundrum is compounded by the fact that, pursuant to section 4 (1), where the question of whether or not the person is fit to be tried arises in the course of criminal proceedings, then at the provisions of the 2006 Act shall have effect.

Bail

In that regard, a further dilemma arises as to whether, if the defendant has been found unfit to stand trial, he can be regarded as fit in to undertake to appear at his trial, to enter into a recognisance, or, in practical terms, to raise bail. Walsh J in State (C) versus Minister for Justice 1967 IR 106 thought that, because the

defendant could not properly comprehend his obligations to turn up, or the implications of signing the recognisance, bail was not an option.

In those circumstances, the question arises as to whether the defendant can properly be remanded in custody, even if it is otherwise appropriate.

Where deemed fit

Where the District Court determines that the defendant is fit, the case proceeds.(Section 4(3)(c))

Following an ordinary Return for Trial, where the Circuit/Central Criminal Court Judge determines that the defendant is fit, the trial continues. (Section 4(5)(d)).

Following an order sending the defendant forward for a fitness hearing, where the Circuit/Central Criminal Court Judge decides that the defendant is fit, the defendant is treated as if he has been returned for trial on the date of the determination.

No mention is made of service of the Book of Evidence.

A curious reference is made to Section 13 Criminal Procedure Act 1967, dealing with summary disposal on a plea/sending forward on signed pleas, when the defendant, having been determined fit to be tried in a case where section 13 applies, "shall be returned for trial".(Section 4(4)(c))

Not guilty by reason of insanity

The verdict is open where:

The accused was suffering from a mental disorder (within the meaning of the 2006 Act),

and

that disorder was such that he should not be held responsible for the act alleged because, either he:

- did not know the nature and quality of the act, or
- did not know it was wrong, or
- was unable to refrain from doing the act.(Section 5(1))

Such a finding is by the court, in other words not the judge alone in the Central/Circuit Criminal Courts. (Section 5(1))

The evidence of a consultant psychiatrist must be heard. (Section 5(1))

There would appear to be no power on the part of the court to direct that the defendant to be examined, or that he attend (by way of committal or otherwise) for examination, or to direct the psychiatrist to report.

This would seem to refer back to the fact that it is at the option of the defendant that this defence is raised.

Indeed, pursuant to section 8, the defendant can, in effect, appeal against a verdict of not guilty by reason of insanity.

In a murder prosecution, the prosecution is entitled to adduce psychiatric evidence to controvert any of the prerequisites for a finding of not guilty by reason of insanity, but not to introduce the question. (Section 5(4)).

This is in keeping with the attitude of the Supreme Court in the previous statutory scheme, in holding that a defendant, even if he was unfit to plead, could decline to raise the defence of guilty but insane, even if this was a device to avoid indefinite detention. (Redmond, 2006 3 IR 188)

Following a finding of not guilty by reason of insanity, if the court considers that the defendant is suffering from a mental disorder within the meaning of the 2001 Act, and may need treatment, it may seek a psychiatric report. (Section 5(3)).

The court may commit the defendant to hospital for the purposes of the preparation of such a report.

The period of committal is, initially, 14 days, which may be extended, but not so as to exceed six months. (Section 5 (3))

If the court is satisfied, having considered the report, that the defendant suffers from a mental disorder within the meaning of the 2001 Act, and needs inpatient care or treatment, the court shall commit him to the CMH. (Section 5 (2))

The mandatory nature of this provision is undermined by the discretionary nature of the provision in section 5 (3) in relation to the initial consideration, which is a prerequisite for mandatory committal provided for in section 5 (2). However, again, although the preliminary provisions are couched in discretionary terms, it may be that, for the proper exercise of the discretion, the judge would be obliged to secure appropriate evidence.

Throughout section 5, the draughtsman has used various different words with various different weights providing for mandatory and/or discretionary actions.

Diminished responsibility

This relates only to prosecutions for murder.

Where the court (again, not just the judge in the higher court) finds that the defendant:

did the act,

and

was suffering from a mental disorder/Criminal Law (Insanity) Act 2006 and

the disorder was not such as warranted a finding of not guilty by reason of insanity but would substantially diminish his responsibility for the act,

A verdict of manslaughter on that ground can be returned. (Section 6(1))

The onus is on the defendant to establish the defence. (Section 6(2)). Conversely, in relation to the defence of not guilty by reason of insanity, the defence can obstruct that question being raised.

Infanticide is subsumed into this process. (Section 6(3))

Again, the prosecution is entitled to adduce psychiatric evidence to the contrary. (Section 5(4))

Appeals

An appeal by the defendant lies in relation to:

A finding that a *prima facie* case is made out, preliminary to a finding of unfitness to be tried. (Section 7)

A finding that the defendant committed the act (where found not guilty by reason of insanity). (Section 8 (1)(a))

A finding that the defendant is suffering from a mental disorder (by reason of which found not guilty by reason of insanity). (Section 8 (1)(b))

The failure of the court to find the defendant unfit to plead (where found not guilty by reason of insanity). (Section 8 (1)(c))

An appeal by the defendant or the prosecution lies in relation to:

A finding of unfitness to be tried. (Section 7 (1), (3)).

A decision relating to the committal the defendant for examination, in the context of consideration for treatment following a finding of unfitness. (Section 9 (1))

A decision relating to the committal of the defendant for examination for the purposes of considering treatment, or for treatment, following a finding of not guilty by reason of insanity. (Section 9 (1))

Appeal outcomes

Appeal against unfit to be tried determination.
Where the lower court first found a *prima facie* case and then found the accused unfit to be tried, the appeal court can first consider the fitness of the accused, and then consider whether it there is a *prima facie* case.

If he is fit and there is a *prima facie* case, the matter goes to trial for the original or any other offence. (Section 7 (2), (3))

If he is fit and there is no *prima facie* case, he is acquitted. (Section 7 (2), (3))

Appeal against not guilty by reason of insanity verdict.
If the he is found not to have done the act, having appealed in that regard, he is acquitted. (Section 8 (2), (7)).

If he has been found not guilty by reason of insanity, and appeals, and is found to have done the act and not to be suffering from a mental disorder (within the meaning of the 2006 Act) with the specified consequences, he is found guilty. (Section 8 (3), (8)). The appellate court has the same powers of punishment as the lower court. (Section 8 (3), (8)).

If he has been found not guilty by reason of insanity, and appeals against the failure of the court to find him unfit to plead, and the appellate court finds him unfit, and then the appropriate provisions (Section 4 (5) (c)) apply (Section 8 (5), (9)).

Committal

The appellate court has the same powers as the lower court in relation to committals. (Section 9 (1))

Mental Health (Criminal Law) Review Board

The 2006 Act establishes this Board, set out its functions and powers.

The DPP may be heard and represented (Section 12(6)(e)). The 2006 Act is silent as to the submissions which may be made, or reports or other materials which may be introduced.

Unfitness to be tried: review of patients

The clinical director of the CMH, where he forms the opinion that a patient is no longer unfit to be tried, must notify the court, and the court must order the patient to be brought before it. (Section 13 (3)),

The clinical director of the CMH, where he forms the opinion that a patient is still unfit to be tried, but no longer needs inpatient treatment, he must notify the Board, in which case the Board must convene a hearing and make an appropriate order. (Section 13 (4), (5))

The Board must ensure that the Clinical Director of the CMH reviews all the patients in the CMH detained for unfitness to be tried every six months, or when instructed by the Minister or when it so decides itself. (Section 13(2)).

The patient can apply to the Review Board (Section 13(8)).

There is no provision for review of those found unfit to stand trial but not detained.

Not guilty by reason of insanity: Review of patients

More or less the same procedure applies. (Section 13(6)).

Conditional release

The predicament of the defendant who had been found not guilty by reason of insanity , and, in accordance with the statutory procedures, detained in the CMH, but who was subsequently found not to be suffering from a mental disorder within the meaning of the 2001 Act, but to be suffering from a mental disorder within the meaning of the 2006 Act could not be released because of the absence of any power to recall the patient, should he be non-compliant with the conditions of his release, probably prompted the 2011 Act. (L, High Court, Peart J, 5/5/10)

Section 13A, inserted by the Criminal Law (Insanity) Act 2010, provides for conditional release by the Review Board of defendants committed under the. An order of conditional release may be revoked or varied. Material breach of the order, where there is a public risk and the defendant needs treatment, the order is deemed revoked, and the defendant unlawfully at large. The Gardaí have the power of arrest, and associated powers of entry, in those circumstances.

Temporary release

The defendant may be temporarily released, with the consent of the Minister. Failure to return means he is unlawfully at large. The Gardaí have the power of arrest, but not an associated power of entry. (Section 13)

Transfer

The Minister is can direct the transfer of the defendant to a specified place, in which case the defendant is deemed still to be in lawful custody. (Section 14). A prisoner may be transferred to the CMH, and back. (Section 15)

Notice to the DPP

The Review Board have, I understand, been sending copies of the findings reached following such reviews.

Such reviews, in so far as they involve persons found not guilty by reason of insanity, do not concern this office, prosecutorial functions having been completed.

No action would seem to be required where the finding is of continuing unfitness to be tried.

Where the finding is that the patient has become fit to be tried, the file would need to be reviewed so as to ascertain whether a prosecution may or should proceed.

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