

K Grady, 'Comment on Blackman [2017] EWCA Crim 190' [2017] 7 Criminal Law Review 559-562

B was originally convicted of murder at common law, over which the courts have extraterritorial jurisdiction by virtue of the Offences against the Person Act 1861 s.9 (see his first appeal, [2014] EWCA Crim 1029; [2015] 1 W.L.R. 1900; [2014] 2 Cr. App. R. 18 (p.244) at [7]). However, this is not the only form of murder which is an offence under English law. Schedule 8 art.8(2)(c)(i) of the International Criminal Court Act 2001 (ICC Act) criminalises “[i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 ... committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”. One such serious violation is “[v]iolence to life and person, in particular murder of all kinds”. The English courts have jurisdiction over this war crime, even when it occurs abroad, provided that the defendant is a UK national, resident or subject to UK service jurisdiction (ICC Act, s.51(2)(b)).

The ICC’s Elements of Crimes – which shall be taken into account by the English courts (ICC Act, s.50(2)) – set out five elements to this war crime which must be proved by the prosecution. The first is that “[t]he perpetrator killed one or more persons”; plainly applicable in B’s case. Secondly, “[s]uch person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.” The victim here was clearly *hors de combat* given, as the first appeal court explained, “[i]t is evident from the findings of the Court Martial and from the video that there was no threat from the wounded Afghan insurgent. He was plainly very seriously injured and had been disarmed.” ([2014] EWCA Crim 1029; [2015] 1 W.L.R. 1900; [2014] 2 Cr. App. R. 18 (p.244) at [65]). The second appeal court agreed, adding that the victim “probably had little time to live” ([2017] EWCA Crim 325 at [11]). Thirdly, “[t]he perpetrator was aware of the factual circumstances that established this status” as *hors de combat*. Here, the victim’s injuries were acknowledged by B asking “[a]nybody want to do first aid on this idiot?” ([2017] EWCA Crim 190 at [21]), and he had personally removed the victim’s weapons (at [19]). Fourthly, “[t]he conduct took place in the context of and was associated with an armed conflict not of an international character.” It seems accepted that the conflict in Afghanistan, at least during the period of B’s deployment, was a non-international armed conflict (see e.g. *Gul* [2013] UKSC 64; [2014] A.C. 1260; [2014] 1 Cr. App. R. 14 (p.196); *Mohammed v Ministry of Defence (No 2)* [2017] UKSC 2, [2017] 2 W.L.R. 327; [2017] H.R.L.R. 1 (p.1)). For conduct committed by combatants, “this requirement of close relation to the hostilities is likely to be satisfied a priori” (I. Xavier, “The Incongruity of the Rome Statute Insanity Defence and International Crime” (2016) 14 J.I.C.J. 793, 812). Fifthly, “[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict.” B must have known that he was participating in an armed conflict in Afghanistan – he had been

deployed as part of Operation Herrick for at least five months prior to the killing ([2017] *EWCA Crim 190* at [13]).

Had B been charged with the war crime of murder, would he have been able to avail himself of the defence of diminished responsibility? Section 2 of the Homicide Act 1957 (as amended by the Coroners and Justice Act 2009 s.52(1)) provides that “[a] person ... who kills or is a party to the killing of another is not to be convicted of murder” where the test for diminished responsibility is met and “shall be liable instead to be convicted of manslaughter.” However, the statute is silent on the question of whether this defence applies only to murder at common law, or could be used in respect of this war crime. For the trial of offences under the ICC Act (subject to two exceptions that are irrelevant here), the English courts “shall apply the principles of the law of England and Wales” (s.56(1)). The Rome Statute which established the ICC contains a part on ‘general principles of criminal law’ but the “[t]he UK ... decided ... not to adopt this, and rely instead on the corresponding principles of domestic law” (R. Cryer, “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 *I.C.L.Q.* 733,740). This presumably means that the normal English defences apply to any domestic prosecution of an international crime. It therefore seems likely that B would still have been able to plead diminished responsibility.

However, the failure to incorporate into domestic law the ‘general principles’ found in the treaty potentially “creates anomalies between the law of England and Wales and that under the Rome Statute which may, in some cases, act to the detriment of the defendant”, particularly as “some of the defences available before the ICC are more generous than their domestic counterparts” (K. Grady, “International Crimes in the Courts of England and Wales” [2014] 10 *Crim. L.R.* 693, 702-3). The only mental capacity defence under the Rome Statute is that of insanity found in art.31. Had B been charged domestically with the war crime of murder, it might have been open to the defence to argue that Rome Statute insanity is also a defence under customary international law and should therefore be treated as part of the common law (see R. Cryer and O. Bekou, “International Crimes and ICC Cooperation in England and Wales” (2007) 5 *J.I.C.J.* 441, 448–449).

Article 31(1) provides that “a person shall not be criminally responsible if, at the time of that person’s conduct... [t]he person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law”. The first part of this test (a mental disease or defect) “covers a wide range of medically-recognized psychiatric conditions” (R. O’Keefe, *International Criminal Law*, (Oxford: Oxford University Press, 2015, p.212) and is comparable to the domestic requirement for diminished responsibility that “D was suffering from an abnormality of mental functioning which ... arose from a recognised medical condition” (Homicide Act 1957 s2(1)). If we accept the findings of the Court Martial Appeal Court (not everybody does, see e.g. *K. Heller, Bad Criminal Law in the*

Alexander Blackman Case (With Addendum), 31 March 2017, <http://opiniojuris.org/2017/03/31/bad-criminal-law-in-the-alexander-blackman-case/> [Accessed 24 April 2017]), then the adjustment disorder from which B was suffering would qualify under both tests.

Secondly, this mental disease/defect must “destroy... that person’s capacity to ... control his or her conduct to conform to the requirements of law”. This latter aspect seems likely to cover similar ground to the English requirement of exercising self-control (Homicide Act 1957 s2(1A)(c)), which the second appeal court found was engaged in B’s case ([2017] EWCA Crim 190 at [112]). However, the Rome Statute’s inclusion of *destruction* of capacity to do those things would appear to be a higher threshold than the *substantial impairment* necessary under English law. As the Supreme Court held in *Golds*, “substantially” in this context means “important or weighty”, which suggests something less than elimination would still suffice ([2016] UKSC 61; [2016] 1 W.L.R. 5231; [2017] 1 Cr. App. R. 18 (p.273) at [27] and [28]). The final element of the English test is that the abnormality of mental functioning “provides an explanation for” D’s conduct in killing (Homicide Act 1957 s2(1)(c)). By contrast, the Rome Statute “does not refer to any specific link between the mental state and the criminal action” (M. Scaliotti, “Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 2” (2002) 2 I.C.L.R. 1 at 26). In consequence, some aspects of Rome Statute insanity are probably easier to establish than domestic diminished responsibility but the requirement for destruction of capacity is stricter than mere substantial impairment.

Diminished responsibility, of course, places the burden of proof (on the balance of probabilities) on the defence (Homicide Act 1957 s2(2)). This reverse burden is impermissible in trials under the Rome Statute (art.67(1)(i)). In consequence, at the ICC the prosecution would have to prove beyond reasonable doubt that D’s capacity to control his conduct to conform to the requirements of law had not been destroyed by a mental disease or defect. And, crucially, the defence of insanity under the Rome Statute is a complete not a partial defence. In B’s first appeal, the question of whether he should have been tried in the English civilian courts, rather than at court martial, was raised ([2014] EWCA Crim 1029; [2015] 1 W.L.R. 1900; [2014] 2 Cr. App. R. 18 (p.244) at [28]-[30]). However, one might question whether he would in fact have been better off tried in The Hague, given the possibility of outright acquittal. This was never a likely proposition, since the case does not meet the jurisdictional requirements for an international trial – the conduct is insufficiently grave to be tried under the Rome Statute (art.17(1)(d)) and the court would have had to find the UK unwilling or unable to prosecute (art.17(1)(a)). In essence, the dock at the ICC is reserved for those committing the most serious of offences and whom no other state has a desire or capacity to prosecute. Yet, it is anomalous that “[t]hose accused of the gravest conduct (and tried at the ICC) may ... be treated more favourably than those whose culpability may, relatively speaking, be at the lower end of the scale (and who are tried

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domestically).” (K. Grady, “International Crimes in the Courts of England and Wales” [2014] 10 Crim. L.R. 693, 703). B might have been acquitted outright had he been tried at the ICC, but that court would never have indicted him because his crime lacked sufficient gravity. All of this is no small irony for a man whose infamous words in the immediate aftermath of the killing were: “Obviously, this doesn’t go anywhere, fellas. I’ve just broke the Geneva Convention”.