Intoxication, psychoses, and self-defence: Evaluating *Taj* [2018] EWCA Crim 1743

By Mark Dsouza[1]

In *Taj*,[2] the Court of Appeal attempted to clarify the law applicable to cases in which D mistakenly acts in self-defence, and her or his mistake was attributable to psychosis (not amounting to insanity), which in turn was caused by voluntary intoxication. I argue that unfortunately, it fell short. To provide clarity, the court ought to have recognised the existence of a common law rule withdrawing mistaken self-defence from D who was mistaken because he or she was suffering an abnormality of mental functioning arising from a recognised medical condition.

Background

Simon Taj began abusing drugs and alcohol as a child. In time, the intoxicants had a detrimental effect on his mental wellbeing. They sometimes caused him to hear voices, and feel paranoid, aggressive, and vulnerable. These effects lingered even after the intoxication wore off.

Having drunk heavily on the night of 29 January 2016 and into the early hours of the next day, on the 31st afternoon, while in the grip of a post-intoxication paranoid psychosis, Taj formed the unshakeable belief that Mohammed Awain, a man that 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. When charged with attempted murder, he pleaded self-defence and defence of others[3], contending that even though he was wrong about the threat that Awain posed, he was entitled in law to the benefit of his honest, albeit unreasonable beliefs as to 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 at the time of the attack, his mistaken belief that Awain posed a threat was attributable to psychosis induced by voluntary intoxication. Therefore, in terms of section 76(5) Criminal Justice and Immigration Act 2008 ("CJIA") it was "a mistaken belief attributable to intoxication that was voluntarily induced", and he could not rely on it.

The defence demurred on the proper interpretation of section 76(5) and drew support from *Harris*[4] in which the Court of Appeal held that the *Majewski*[5] rule did not apply if D was not intoxicated when offending, even though his or her failure to form the mens rea was due to psychosis induced by prior voluntary intoxication, and the sudden cessation thereof. Along similar lines, Taj's defence argued that section 76(5) only prevented persons from relying on their mistaken beliefs as to circumstances if those beliefs had been formed *while* voluntarily intoxicated, and *because of* the intoxication.

The rulings

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[2] [2018] EWCA Crim 1743.
[3] No mention appears to have been made of s.3 of the Criminal Law Act 1967 (use of force in the prevention of crime).
[4] [2013] EWCA Crim 223.
[5] *DPP v Majewski* [1977] AC 443.

The trial judge withdrew self-defence from the jury, ruling that that the phrase "attributable to intoxication" in section 76(5) was not confined to cases in which intoxicants were still present in the defendant's system. He distinguished *Harris* on the basis that in that case, psychosis was induced by the sudden cessation of alcohol after a period of abuse, whereas in *Taj*, the psychosis was caused directly by the voluntary consumption of intoxicants. Taj was convicted and received a sentence of 19 years,[6] and a strong bench of the Court of Appeal upheld the conviction and the sentence.
Three substantive points stand out in the CA's judgment:

1. The CA agreed that the phrase "a mistaken belief attributable to intoxication" in section 76(5) is not confined to cases in which alcohol or drugs were then present in the appellant's system – it 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]). It seemed[7] also to agree with the trial judge's basis for distinguishing *Harris*, viz. that psychosis in *Harris* resulted from abstinence from alcohol, whereas psychosis in *Taj* resulted from alcohol consumption.

2. In the alternative, the CA was prepared to depart from *Harris* and hold that the common law principle that "self-induced intoxication [is] not a defence to a criminal charge" [53] applies equally when the defendant's "state of mind had been brought about by his earlier voluntary intoxication" [57]. It opined that *pace* Hughes LJ in *Harris*, the policy considerations motivating that rule are equally apposite to denials of criminal liability due to conditions that are the immediate and proximate after-effects of voluntary intoxication (at [56]).

3. Alternatively, the court found that in any event, no properly instructed jury could have concluded that the extent of force used by Taj in self-defence was reasonable. It ruled that since an objective standard applies to this evaluation, the defendant's paranoia or psychosis has to 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]).

Problems/comment

Several interesting points emerge from the Court of Appeal's ruling:

a. The court noted that the *Majewski* rule applies when the defendant relies on voluntary intoxication to deny mens rea. It recognised that while *Harris* was clearly such a case, the issue in *Taj* arose in an entirely different context; in *Taj*, the defendant relied on voluntary intoxication to support a claim that he thought the facts were such that he needed to act in self-defence. Unfortunately, the court did not consider whether this difference in context meant that the *Majewski* rule might be unsuitable for direct application in self-defence cases.

   There are reasons to think that might be the case. Unlike the *Majewski* rule, there is a statutory basis – section 76(5) CJIA – for the intoxicated self-defence rule. Additionally, the harshness of the

[6] A custodial term of 14 years, plus an extended licence of five years (under s.226A of the Criminal Justice Act 2003).

[7] At [57]: "…we are not persuaded that the view expressed by Hughes LJ applies to Taj, given that his paranoia was the direct and proximate result of his immediately prior drink and drug-taking." [Emphasis supplied]

Majewski rule is "capped"; when it applies, at worst the defendant is convicted of a basic-intent offence. However, when section 76(5) applies, a possible basis for pleading self-defence is stripped away, leaving the defendant potentially liable for the full offence. Furthermore, according to one view the *Majewski* rule is a rule of *in*culpation[8] – it supplies mens rea for defendants who do not, in reality, have it, and who would therefore ordinarily be entitled to a full acquittal. Section 76(5) on the other hand, is a rule relating to *ex*culpation. The defendant admits to being prima facie guilty of the offence, but makes the exculpatory claim that she or he acted in self-defence, albeit that she or he was wrong about whether a threat necessitating defensive action had actually arisen. Here, the defendant's voluntary intoxication limits the mistakes she or he can rely upon in exculpation.

One might plausibly think that different policy considerations apply to two rules that differ from each other in such key features.

b. The primary basis for the court's ruling – that *Harris* is distinguishable – is arguable, up to a point. The phrase "attributable to intoxication" is certainly open to a broad interpretation, and *Harris* was indeed a case of psychosis stemming from a voluntary cessation of alcohol intake[9] rather that its voluntary consumption. It is also true that prior to *Harris*, no case (including *Majewski*) had expressly said that the *Majewski* rule is limited to defendants who were intoxicated at the time of the offence. However, the court's ruling in *Harris* itself was unequivocal: it held that "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" (at [59]).

   Nevertheless, the primary basis for the CA's ruling seems to have been that the trial judge was right to distinguish *Harris* from *Taj* on the basis that in *Harris*, the defendant's illness arose from his abstinence from alcohol, whereas in *Taj*, it arose from the defendant's consumption thereof. Presumably, this would mean that while illnesses resulting from the recent voluntary intake of alcohol would fall under section 76(5) (and possibly the *Majewski* rule), illnesses resulting from the voluntary cessation thereof would not. As a normative legal proposition, this is defensible, but the CA's judgment contains no solid argument of policy in support of it.

c. The court's first alternative basis for its decision (which must technically be obiter dicta) was that it was willing to overrule *Harris* and to hold that a defensive claim is stripped away not just by extant voluntary intoxication, but also by psychiatric conditions caused by recent voluntary intoxication. 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.

   In support of this the court 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 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

[8] Per Lord Elwyn-Jones in *Majewski*, [1977] AC 443, 474-5; a view not shared by Hughes LJ in *Heard* [2007] EWCA Crim 125; [2007] 1 CrAppR 37.

[9] The condition commonly known as *delirium tremens,* alias DTs.

whether or not they remain present at the time of the offence" (at [56]). It adds that 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" (at [57)] there is no reason to restrict the *Majewski* rule to persons intoxicated while offending.

But against this it is certainly arguable that the rule in *Taj* would represent a significantly greater intrusion into liberty by way of the threat of criminal sanction than the rule in *Majewski* ever was. Under the *Majewski* rule, a voluntarily intoxicated D would have the Damocles's sword of criminal liability by public policy hanging over him or her for as long as he or she was voluntarily intoxicated. Under the *Taj* rule, D would be a legally precarious position not just for that time, but also for the unspecified period thereafter for which he or she continues to suffer the "immediate and proximate" effects of voluntary intoxication. Although the court in *Taj* was at pains to downplay how long this period would last, it is certainly substantially longer than the actual period of intoxication.

Moreover, while it is plausible that the advance of medical science has enhanced medical experts' ability to identify the cause of a psychosis as intoxicant abuse, their improved knowledge does not automatically translate to improved public awareness about the slightly longer-term effects intoxication. The rule proposed in *Taj* is therefore more likely to result in a defendant being surprised by criminal liability, than the *Majewski* rule.

The policy issues that arise here deserve some further thought.

d. If indeed the criminal law's rule on the voluntarily intoxicated ought to be extended to those suffering the immediate and proximate post-intoxication effects of voluntary intoxication, there remains a problem of scope. How recent must D's voluntary intoxication be? The court in *Taj* did offer some guidance – it held that the mistaken state of mind must be "immediately and proximately consequent upon earlier [voluntary intoxication]" – while clarifying that this "does not extend to long term mental illnesses precipitated [by intoxicant misuse]" (at [60]).

   But for how long after being voluntarily intoxicated could one still be suffering the "immediate and proximate" effects thereof? The facts of *Taj* themselves suggest a day or two. But there are 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 a voluntarily intoxicated defendant's legally precarious situation last for a week in some cases? Or longer? The guidance in *Taj* does not give us a clear answer. Given the gravity of the consequences for the defendant that may turn on it, this is a serious concern.

e. The court's second alternative basis for its ruling is also obiter dicta, but this is where the real worry, and possibly also the real solution to cases like *Taj*, lies. The court reaffirmed the well-established position that the defence of self-defence has two limbs: first, one considers whether D genuinely believed it was necessary to use defensive force; and if so, then second, one evaluates whether "the type and amount of force used" was reasonable in the circumstances as D believed them to be.[10] However, it read the second limb as saying that in evaluating the reasonableness of

[10] Section 76(1)(b) Criminal Justice and Immigration Act 2008, read with section 76(10)(c) and section 76(3) thereof. See also *Beckford* [1988] AC 130; *Williams (Gladstone)* (1984) 78 Cr App R 276.

the force used in self-defence, the effects of the defendant's psychosis must ordinarily be discounted entirely. In this, it drew support from its own ruling in a case called *Oye,*[11] which in turn had relied on two pre-CJIA cases, *Canns*,[12] and *Martin (Anthony)*.[13]

Accordingly, although it allowed Taj the benefit of his genuine, albeit psychiatric illness induced, belief about whether it was necessary to use defensive force, his subjective assessment of the scale of the threat was deemed irrelevant to the question whether the force he deployed was reasonable. Instead, the CA referred to the facts a reasonable person would have perceived – including that Awain had not been armed (or done anything to suggest that he was), and that it had been 'entirely [proper]' for the police to be satisfied that Awain was merely an electrician whose car had broken down. Obviously, this was not how Taj claimed to have seen things. But by reference to these facts, the CA thought that self-defence was unavailable.

This reading of the second limb of the test for self-defence is, with all due respect, incoherent[14] and illogical. If the second limb of the test refers to the threat that a reasonable person would perceive, the test for self-defence effectively becomes an objective one; by itself, satisfying the first limb of the test counts for nothing. That would run contrary to settled law,[15] and it is far from clear that the CA in *Oye*, or indeed *Canns* or *Martin (Anthony)* saw itself as changing the law so radically. Certainly, none of those rulings contained the sort of detailed argumentation one would expect in decisions changing longstanding legal rules.

Even if the above interpretation was somehow tenable before the CJIA, now it is certainly not. Section 76 CJIA, which relates only to the second limb of the test for self-defence,[16] makes that clear. Section 76(3) explicitly states: "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 stated exception to that rule is in section 76(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*. In *Taj*, the court's argument on this point was presented in the alternative to applying section 76(5).

Of course, the reference to reasonableness in section 76(3) imports an objective standard that cannot take account of D's psychiatric illness. But that reasonableness standard governs only the comparison of the force that D chose to deploy, and the threat that D genuinely (and possibly due to psychosis, but not voluntary intoxication) perceived. Section 76(4) makes it clear that D's perception of the threat facing him or her need not itself be reasonable.

In fact, in *Oye*, the CA reached conclusions that allowed it to reach its judgment on this very basis (at [48]). It held that D's response was disproportionate even to the threat that he, in his psychotic state, claimed to have perceived – a reasonable (and not psychiatrically ill) person who perceived the threat that D did, would not have responded with as much violence as D. Therefore, the CA in

[11] [2013] EWCA Crim 1725, at [47].
[12] [2005] EWCA Crim 2264, at [19].
[13] [2001] EWCA Crim 2245, at [67].
[14] See for instance AP Simester & ors, *Simester & Sullivan's Criminal Law* (6th edn, 2016) 701.
[15] *Beckford* and *Williams (Gladstone)* above.
[16] Notice that section 76(1) states *cumulative* conditions for the application of section 76, and subclause (b) requires that the question be about the second limb of the test for self-defence.

Oye did not need to rule (at the CA in *Taj* thought it had) that D was not entitled to the benefit of his psychosis-induced mistaken beliefs when applying the second limb of the test for self-defence. Indeed, if *Oye* did make that ruling, then on that point it was, with respect, per incuriam, and in following it, so is *Taj*.

A way forward

People who, due to psychoses, see non-existent threats and feel compelled to respond with force are obviously themselves a threat. And whether or not the psychosis is attributable to voluntary intoxication, allowing such a person to plead self-defence, be acquitted, and potentially do it again, is unthinkable. Yet that is what the test for self-defence seems to demand. So cases like *Taj*, and possibly also *Martin (Anthony)*, *Canns*, and *Oye* pose a real dilemma, especially now that the passing of the CJIA has limited the common law's ability to evolve new rules on matters covered by section 76.

From a public policy perspective, we would want the plea of self-defence to be unavailable where, because D is suffering an abnormality of mental functioning arising from a recognised medical condition,[17] she or he mistakenly believes she or he is under a threat, and responds to it using force. Should the defence of insanity be available (as was the case in *Oye*), the special verdict of not guilty by reason of insanity should result. Otherwise, D should be convicted, and have her of his condition taken into account at sentencing. Where the charge is murder, the grounds for denying D the plea of self-defence would also allow her or him to plead diminished responsibility instead, thereby making sentencing discretion available. Ideally, a case like *Taj* would be decided on this basis alone, with the psychosis being seen as a mitigating factor.

Such a rule could be introduced by legislation, but it is also possible for the common law to evolve it. Section 76 CJIA poses no barrier – it does not occupy the entire field in respect of *when* the plea of self-defence is available. Section 76(1) states cumulative conditions for the application of section 76; section 76 applies when (a) D pleads self-defence, ***and*** (b) the question arises whether the degree of force used by D is reasonable in the circumstances. The question whether the plea of self-defence is available at all to defendants who use force to respond to imaginary threats perceived because of psychoses, does not meet condition (2), and is therefore outwith section 76.

Arguably, in ruling as it did in *Martin (Anthony)*, *Canns*, *Oye*, and *Taj*, the Court of Appeal has already taken steps towards evolving this common law rule. In *Martin (Anthony)* and *Oye*, the court expressly referred to policy reasons for not letting persons who used force to defend themselves against threats that they imagined due to psychiatric illnesses, plead self-defence.[18] Furthermore, *Martin (Anthony)* and *Canns* were both homicide cases in which the defendants who unsuccessfully pleaded self-defence were instead convicted of manslaughter due to diminished responsibility. All that remains is for the court, in an appropriate case, to weave these strands into a new rule of common law. One hopes that this will happen sooner rather than later.

Such a development would clarify and improve the law of self-defence. It would also obviate the need to adopt an expansive meaning of section 76(5) CJIA. And while there is much about the *Majewski* rule

[17] This standard is adapted from the test applicable to the partial defence of diminished responsibility, in s2(1)(a) of the Homicide Act 1957. Each of the conditions suffered by the defendants in *Martin (Anthony)*, *Canns*, *Oye*, and *Taj* would meet this test.

[18] At [66] in *Martin (Anthony)*; [45] and [47] in *Oye*.

that cries out for better elucidation and improvement, perhaps that task too is better taken up in a more suitable case.