Crim.A. 118/53

ZALMAN MANDELBROT

v.

THE ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal
[February 24, 1956]
Before Agranat J., Silberg J., and Goitein J.

Criminal Law - Criminal Code Ordinance, 1936, *sections* 11, 14, 214(b), 216 (c), - *Murder - M'Naghten Rules - Paranoiac - State of trance - Manslaughter.*

The appellant was *charged under* section 214(b) of the Criminal Code Ordinance, 1936, with the murder of one Meir Shifman. He was employed at the Ata textile works in the north of Israel in the year 1951. On December 26, 1951, he went to work taking a loaded revolver with him. At 9.30 a.m. he went towards a fellow employee, with whom he had at one time been friendly, one Luba Kreiner, and fired two shots at her which struck her in the right arm. She tried to run away from the appellant, but tripped up and fell. Shifman, a member of the workers' committee, seeing what had happened threw himself face down on the floor of the works but the appellant came up to him, fired two shots into his head, and killed him. After firing these two shots, he reloaded his revolver, fired further shots at Kreiner and at other persons and then left the place where he had been working.

The appellant was arrested on the following day and charged with the murder of Shifman and with the attempted murder of Kreiner and another. After the charge had been read to him and he had been warned that he need not say anything but what he did say might be used at his trial, he admitted that he was the man who had done the acts that had occurred at the Ata works, one day previously.

At the trial his defence was that he was not of sound mind when he fired the shots at Shifman and he relied upon the M'Naghten Rules as set out in section 14 of the Criminal Code Ordinance, 1936.

The appellant was examined by a number of medical experts who came to the conclusion that he was a paranoiac, that he knew what he was doing and knew that what he was doing was wrong, but after he had fired the first shots he was in a state of trance and that at the moment when he fired at Shifman and thereafter he acted in a trance.

The District Court held that the defence set up under the M'Naghten Rules must, in the light of the medical expert evidence, fail and was further of the opinion, in the light of the statements made by the appellant the day following the killing, that he was not in a state of trance at the time he fired at Shifman. As, however, the element of preparation had not been established he was convicted of manslaughter and sentenced to life imprisonment.

The appellant appealed against the conviction and sentence. The Attorney-General cross-appealed.

Held: by a majority that the appeal be allowed and that the cross-appeal be dismissed.

Per Agranat J., the M'Naghten Rules as set out in section 14 of the Criminal Code Ordinance did not provide a defence in the present case but that section 14 did not exhaust the rights of a paranoiac. Such a person may also rely on section 11 of the Ordinance which lays down that a person shall not be criminally liable for any act or omission which occurred without the exercise of his will. As in the present case the appellant was not capable of exercising any will, he had a good defence to the charge of murder.

Per Silberg J., the court below was wrong in refusing to accept the unanimous and uncontradicted evidence of all the medical experts that at the time of the shooting at and killing of Shifman, the appellant was in a state of trance. The court of first instance was not entitled to refuse to accept this evidence merely on its own belief that certain actions of the appellant at the time of the shooting, of which the experts were aware, seemed to negative their conclusion. Accordingly, as the only evidence before the court was that the appellant was in a state of trance at the time when he fired the fatal shots at Shifman, it could not be said that he knew what he was doing or knew that what he was doing was wrong. The M'Naghten Rules as set out in section 14 of the Criminal Code Ordinance therefore applied, and the appellant had a good defence to the charge of murder.

Per Goitein J., on the medical evidence the M'Naghten Rules did not apply and the court below was entitled to rely upon the statements made one day after the killing by the appellant himself, from which it might be inferred, and the court of first instance was entitled to infer, that the appellant was not in a state of trance when he fired the shots which killed Shifman. It was not for the appellate court to find facts different from those found by the court of first instance when the findings of the judges of that court were based on an appreciation of the evidence. Accordingly the appellant knew what he was doing at the time he fired the shots and knew that it was wrong to fire them. As, at the time, he was not in a state of trance, section 14 of

the Criminal Code Ordinance offered him no defence and since, however, the element of preparation had not been proved, the court below was right in finding him guilty of manslaughter.

Palestine case referred to: -

(1) *Cr. A.* 6/42 - *Asa'ad Ibn Haj Said el Khalil v. Attorney-General,* (1942) 2 *S.C.J.* 88.

Israel cases referred to: -

(2) *Cr. A.* 125/50 - *David Ya'acobovitz v. Attorney-General,* (1952), 6 P.D. 514.
(3) *C.A.* 150/50 - *Aryeh Kaufman v. Binyamin Margines,* (1952), 6 P.D. 1005.
(4) *Cr. A. 46/54 - Attorney-General v. Segal,* (1955), 9 P.D. 393.

English cases referred to: -

(5) *Sodeman v. R.,* (1936) 2 *All E.R.* 1138.
(6) *R. v. James Jefferson,* (1908), 1 *Cr. App. R.* 95.
(7) *R. v. Ronald True,* (1921-22), 16 *Cr. App. R.* 164; (1922) 127 L.T. 561.
(8) *R. v. James Frank Rivett,* (1949-50), 34 *Cr. App. R.* 87.
(9) *Daniel M'Naghten's Case,* (1843), 8 *E.R.* 718.
(10) *R. v. Georges Codere,* (1916-17), 12 *Cr. App. R.* 21.
(11) *Hadfield, (1800),* 27 *St. Tr.* 1281.
(12) *Reg. v. Edward Oxford,* (1840), 173 *E.R.* 941.
(13) *R. v. Hay,* (1911), 22 *Cox C.C.* 268.
(14) *R. v. Fryer,* (1915), 24 *Cox C.C.* 403.
(15) *R. v. Frederick Rothwell Holt,* (1920-21), 15 *Cr. App. R.* 10.
(16) *R. v. Joseph Edward Flavell,* (1925-26), 19 *Cr. App. R.* 141.
(17) *R. v. Alfred Arthur Kopsch,* (1925-26), 19 *Cr. App. R.* 50.
(18) *R. v. Davis,* (1881), 14 *Cox C.C.* 563.
(19) *R. v. Haynes,* (1859), 175 *E.R.* 898.
(20) *Felstead* v. R., (1914) *A.C.* 534.
(21) Reg. v. *Pitts,* (1842) 174 *E.R.* 509.
(22) *Reniger v. Fogossa (1550) 1 Plowd.* 1.

(23) *Reg. v. Charlson,* (1955) 1 *All E.R.* 859.

(24) *R. v. Arnold,* (1724) 16 St. Tr. 695.

(25) *R. v. Bellingham,* (1812), 1 *Collinson on Lunatics,* 636.

(26)*R. v. Charles Aughet,* (1917-18), 13 *Cr. App. R.* 101.

(27) *R. v. Frederick Henry Thomas,* (1911-12), 7 *Cr. App. R.* 36.

American cases referred to: -

(28) *Parsons v. State,* (1886) 81 *Ala. 577; cited in* 70 *A.L.R.* 663.

(29) *Smith v. United States,* (1929) 36 F. 2d. 548.

(30) *State v. Nixon,* (1884) 32 *Kan.* 205; 4 *Pac.* 159; 5 *Am. Crim. Rep.* 307; *cited in* 70 *A.L.R. 677.*

(31) *Monte W. Durham v. United States of America,* (1954) *United States Court of Appeals for the District of Columbia Circuit, No.* 11859, 16.

Levitsky for the appellant.

Rabinowitz, District Attorney, Haifa, for the respondent.

AGRANAT J: Zalman Mandelbrot (hereinafter called "the appellant") was charged in the Haifa District Court with murder under section 214(b) of the Criminal Code Ordinance, 1936, in that on December 26, 1951, at the Ata factory in Ata Village, with premeditation, he caused the death of Meir Shifman. The appellant's defence at the trial was based mainly on a plea of insanity. The learned judges who tried the case rejected the plea, but on the other hand decided to convict the appellant of manslaughter only, under s. 212, after finding that the element of "preparation" had not been proved. In the event, they sentenced him to life imprisonment. Both the appellant and the Attorney-General (hereinafter called "the respondent") have appealed against the judgment.

At the hearings that took place before us the appellant's arguments revolved first and foremost around the finding of the judges of first instance that the plea of insanity had not been proved. I think it right to deal first with that part of the appeal, seeing that if I find that the appellant ought not to be held liable from the point of view of criminal law by reason of the mental disease from which he was suffering at the time of the act, I shall not have to

deal with his other submission concerning the severity of the sentence, nor with the respondent's appeal against the appellant's conviction of manslaughter only, and not of murder.

There being no dispute that the appellant committed the act of homicide which is the subject of the charge I shall, for the purpose of describing the circumstances surrounding that act, content myself with quoting the following passage from the judgment of the District Court:

> "The accused and the deceased were both employed as workers in the spool department of the Ata factory at Kfar Ata. A girl by the name of Luba Kreiner also worked in that department. The department is housed in the large hall measuring 30 by 30 meters, and in the hall are machines for winding the thread on the reels and other machines, in two groups separated by an aisle. The main entrance to the hall is from the south side and along the south wall are a number of tables at which workers are engaged in marking the reels of thread that have been wound in the department, and in packing them in cases. Another aisle separates these tables, from the group of machines on the south side of the hall, and in the aisle the cases, into which the finished reels of thread are packed, usually stand. The incident took place on December 26, 1951, during the morning shift which commences at 5.30 a.m. According to the ordinary work arrangement the deceased Shifman did not have to work in that shift, but on the previous day he had agreed with another workman by the name of Mizrachi to change over with him, at the latter's request. The deceased worked at one of the tables on the south side of the hall, and at the time of the incident was engaged in closing a case and was holding a hammer in his hand. Two other workmen, prosecution witnesses Besser and Appelstein, were working next to him. It was their task to collect the finished reels from the spooling machines and to arrange them inside the cases. Besser was working at some distance from the deceased on the east side, and Appelstein at a distance of several meters from the deceased on the west side. The length of each of

the spooling machines in the hall is approximately ten meters, and at each machine there work four female hands, two on each side, each one attending to half the length of the machine. Luba Kreiner worked that morning next to the spooling machine which was then known as machine no. 6, …facing the machine and the east wall of the hall. Her section was the left-hand (northern) side of that machine. The accused was working that morning in transporting cases containing the unwound thread reels to the spooling machine, and in transporting the finished reels from the machines to the south side of the hall, where they were packed. At approximately 9.30 a.m., he went up to Luba Kreiner, who was standing by her spooling machine, and from a "Tuppee" revolver fired two shots which hit her right arm. At the sound of these shots panic broke out in the factory, and male and female workers began running in every direction. Luba Kreiner herself tried to get away to the south side along machine number 6, but next to the aisle where the cases were it appears that she tripped over some boards that were lying on the floor and fell down. The accused went or ran after her up to that spot. The deceased Shifman, whose place of work next to the cases was only a few meters, diagonally, from the place where Luba Kreiner fell, threw himself flat on the floor, face down. The accused approached him with the revolver drawn in his hand and from a short distance of about half a meter, fired two shots into the deceased's head. The bullets penetrated the skull at two places close to each other, and the deceased died on the spot from a cerebral haemmorrhage. After shooting Shifman, the accused withdrew several paces backwards and reloaded his revolver. In the meantime, Luba Kreiner had managed to rise and was continuing to make good her escape by retracing her steps along machine number 6 until she reached the wide aisle between the two groups of machines, and from there she turned left (westwards). The accused continued to chase after her, and while so doing hit her in the back with four more shots. From those shots she at length fell in the wide aisle, and the accused stood close to her and once more loaded his revolver. At the same time Dr. Otto Weinrib, the department manager, appeared opposite the accused. When

> the accused saw Dr. Weinrib, he fired one shot at him which hit Weinrib's leg. Thereafter, the accused left the hall and continued to walk at an ordinary pace along the internal road of the works to the west side. On his way, he encountered a worker by the name of Zalts, who works in the stitching department, and he turned to him with the question: 'Zalman, what's happened?' Instead of answering him, the accused turned to Zalts and fired one shot at him which missed its mark; he continued walking along the road and entered the offices that are in a hut at the side of that road, opened the doors of the hut as if he were looking for somebody, but did not find what he was looking for, went back once more, continued on his way along the road and disappeared on the west side."

The facts found by the court in connection with the manner of the appellant's arrest after the incident and his being brought to the police station are also of importance, because of the contents of the statements that he then made to the police. These are the judges' findings in that connection:

> "The police began to search for the accused, but he was not found until the next day, December 27, at 12.30 p.m., when he entered the offices of the Kiryat Binyamin quarter, which borders on Kfar Ata. The offices are in the water-tower of Kiryat Binyamin. The accused announced to those sitting in the office that he was the one that had committed the deed in the Ata factory. Mr. Nehemia Rosenberg, an official of the Kiryat Binyamin Committee, got in touch with the police, and a patrol-squad of policemen appeared under the command of Sergeant Patievsky, who charged the accused with the murder of the deceased Shifman and with attempting to murder Luba Kreiner and Dr. Weinrib. The accused briefly replied to the charge: 'I intended to kill Luba and Shifman, but not Otto Weinrib' (see exhibit P/3). He was brought to the police station at Shfar'am and was there charged a second time on the same day, at 4. p.m., by Assistant District Inspector Movshovits. and made a further statement".

The contents of that statement ought to be quoted in full: -

"I understand the charge and the warning and I want to say that what led me to this affair is that the late Mr. Shifman ever since I have worked in that department, was all the time making trouble for me, like when I asked for a rise and he said I was not entitled to it. Two months ago they took me off to paint in the housing estate and they promised to take me back to my department where I had been working. I applied to the late Shifman and he answered me that that is impossible. So I argued if my department is working three days a week and for the other three days they are getting fifty per cent, so I am also entitled just like the other workers. After that, things turned out that for a week and a half I wandered around without work. Now, for the business of Luba. I have been working in that department for about two years, that girl started what you might call 'making up to me', and all the time I put her off. And after that I was in the army and I invited her to a date in Kiryat Motskin and after that we used to meet almost every evening and once I also invited her to my home and she came. And slowly I got what you call mixed up with her. During the time that I went out to the estate to the painting job, we lost touch with one another. Once I turned up at her place of work, and I asked her once more for a date. She did not want to. A couple of days later I turned up once again and she also refused. Once I waited for her at two o'clock when she returned from work and I said to her if she would not meet me then I would do for her and myself together. She agreed to meet me and I had my revolver with me. She begged me not to kill her and for my part I did not have any intention at all of killing her, only of threatening her. And she agreed to meet me a second time. Two months later, when I came back from the estate, I went back to our department, that is to say my department, the spooling department. That business started again, me asking her to have pity on me and to meet me a second time because I was already what you call not all right, at home I had no rest, I did not sleep nights. My wife

> shouted at me that I was useless, whatever I do is no good, and I was already under the influence of Luba's love, and once more I turned to her to have pity on me and on herself and once more she refused and laughed at me. On the 26th in the morning, I took the revolver with me to work and I decided to do what I did. As far as Dr. Weinrib is concerned, I had no intentions. It seems I was a little sort of what you call sort of foggy and all mixed up at the time I fired, then he went by and I had no intention of hitting him at all. About the tall chap who I think works in the stitchery it is also not right like it looked as if I wanted to plug him with a bullet, fact is that there is in our department a chap by the name of Besser who I like just as I liked the late Shifman and he stood in front of me and I did not do anything to him either. That is all."

The main defence at the trial was that the effect upon the appellant of his attack upon Luba Kreiner was to be taken into account in addition to the mental disease from which he was suffering prior to the commission of the criminal acts mentioned. The consequence of both these factors was that he was no longer conscious of what he was doing, or his mind became blurred immediately after he had fired at the woman, so that when he aimed his revolver at the victim Shifman and pressed the trigger, he was in fact acting as an automaton. This version of the facts was supported by the evidence of the appellant himself in court, in which he testified (and once more, we may rely on the judges' summary of his evidence) that, after the first shot at Luba Kreiner, he became completely confused by the shouts that broke out all around him and by the noise of the machines, so that he does not at all remember what he did and what happened to him from that moment until the evening of the same day, at nightfall, when he awoke and found himself on the water-tower at Kiryat Binyamin. Of what happened before he has but a very vague picture in his memory, in which he sees himself standing in front of the water-tower. The appellant went on to describe in his evidence the various attempts that he made at that stage to commit suicide until eventually he lost his nerve and decided to surrender to the police.

The version of the defence is supported principally by the expert opinion of each of the three doctors who gave evidence in the case. The first of them is Dr. Vinik, Superintendent

of the Mental Hospital of the Kupat Holim [1] in Talbieh, Jerusalem, who appeared in the case as a witness for the defence. At the close of all the evidence the court decided, on the suggestion of counsel for the parties, to adjourn the trial in order to enable the appellant to undergo a further examination by two other doctors: Dr. Mengel, Superintendent of the Government Mental Hospital at Bat-Yam, and Dr. Feldman, Deputy Director of the Mental Hygiene Department of the Ministry of Health. After these examinations had taken place, the opinions of the latter two doctors were produced to the court, and the doctors were also examined in court on the contents of their reports. In their judgment, the judges noted that, from the formal point of view, Dr. Mengel appeared as an additional witness for the prosecution, whilst Dr. Feldman was summoned to give evidence as a witness called by the court.

The unanimous opinion of all those doctors was that, at the time of the attack on Luba Kreiner, the appellant had been suffering from the disease of paranoia in a very advanced stage, and that immediately after he had fired at her the first or second shot, he had entered into a state of "trance" such that when he fired at the deceased Shifman, he was acting subconsciously, as stated.

The learned judges accepted the first part of that opinion, namely, the part touching upon the nature of the disease of the mind from which the accused was suffering at the time he carried out the attack on Luba Kreiner, but they were not convinced that, after he had shot her, there was suddenly added to this disease the mental situation of a state of "trance". Counsel for the appellant argued before us that the judges erred in rejecting this latter version.

According to the law of Israel (section 13 of the Criminal Code Ordinance. 1936) every man is presumed, until the contrary is proved, to be of sound mind at all times relevant to the matter in question. It follows that the burden of proof lies on the accused if he pleads that at the time of the criminal act with which he is charged, he was suffering from such disease of the mind that he ought not to be regarded as liable for that act. However, the burden of proof lying on him is no heavier than that imposed on a party in a civil case; in

[1] Kupat Holim - General Workers' Union Sick Fund.

other words, he is not bound to prove more than that his version is the likely one *(Sodeman v. R.* (5); *Khalil v. Attorney-General* (1), at p. 33).

In their judgment, the judges emphasized that they had considered those principles and had acted in accordance with them, and that nevertheless they had come to their conclusion in spite of the consensus of opinion prevailing among the expert witnesses. From a theoretical point of view there is indeed nothing in the law to prevent the court from arriving at such a result. In every criminal case in which the accused relies on a plea of insanity, two questions fall to be considered: -

(a) Was the accused at the time of the act suffering from a disease of the mind, and what was that disease ?

(b) Is it right to absolve him from criminal responsibility in consequence of his suffering from the mental disease at the time of the act ?

The determination of each of those two questions is within the sole jurisdiction of the judges hearing the case (I am not dealing here with the power of the court of appeal to interfere with the findings of those judges). It is true that whenever the opinions of the expert doctors who have given evidence are identical as regards the factual questions concerning the defence of insanity, such as whether the accused was suffering from a mental disease, the kind of disease, whether he knew the nature of the act and that the act is prohibited, the court will be disposed to hold, generally speaking, in accordance with those opinions (see *Khalil's* case (l), and the case of *R. v. Jefferson* (6)). But there is no compulsion to do (see *R. v. True* (7), in which the jury brought in a verdict against the opinion of the four expert doctors who testified as to the nature of the mental disease from which the accused was suffering, and whose evidence was not contradicted). For example, if the court is convinced that the doctors have given their opinion on the basis of a mistaken appreciation of the facts surrounding the accused's act, or have disregarded certain factual details relevant to the case in question, it may be right in such cases not to take their opinion into account (see the observations of Goddard L.C.J., in *R. v. Rivett* (8)).

Again I must emphasize that the fact of the accused's labouring under a grave mental defect at the time when the event, the subject of the charge, took place, so that "from the medical point of view" he is not to be regarded as responsible for his actions, does not always constitute a sufficient answer to the further question that the court must put to itself, namely, whether, by reason of that defect, one of the criteria laid down by law exempts the accused from punishment. This particular approach of the local law which is, in this respect, identical with that of the English law, is aptly demonstrated in the extreme language once used by McCardie J. in his charge to the jury in the above mentioned case of *True* (7):

> "Insanity from the medical point of view is one thing; insanity from the point of view of the criminal law is something different. Doctors exist for the purpose of healing physical and mental ills. Judges... exist for the purpose of protecting the life, property and peace of the community."

This approach to the problem is of considerable importance in this case, for even if, as is admitted, the attack on Luba Kreiner, which also led eventually to the killing of Shifman, originated in the disease of paranoia from which the appellant suffered at the time and from which he is suffering to this day, nevertheless, if the judges were right in rejecting the doctors' version that he passed into a state of "trance" before he shot the deceased, neither of the criteria laid down by the legislator in section 14 of the Ordinance as being essential to the upholding of a plea of insanity is, as we shall see later, applicable to the appellant.

In order properly to examine the grounds which led the judges to reject the version of a state of "trance" that the doctors had adopted, it is desirable that we should clarify for ourselves the nature of the disease of paranoia from which the accused suffered. For the sake of convenience only, I quote here the passage in which Dr. Angus MacNiven, a recognised British expert in this field, described the features of this disease in his article, Psychosis and Criminal Responsibility, published in the collection of essays, Mental Abnormality in Crime (edited by Radzinowicz and Turner, p. 8 et seq.). At p. 26, he writes:

> "Paranoia is a chronic mental illness which develops gradually over a long period. The delusions which are a characteristic symptom are well systematised. It is an essential characteristic of the illness that the

memory and intellectual process are well preserved. The essential core of the personality is preserved. In many cases a study of the patient's life shows that his general attitude to others has been one of suspicion, and that he has always been ready to attribute enmity and hostility to those with whom he has been associated. Persons of this type often appear shy, timid and sensitive, but these outward characteristics often conceal an underlying feeling of self-importance and a desire to lead and to dominate. Sometimes one finds that the patient has an exaggerated idea of his own abilities, and that his failure through incompetence to realize his ambition appears to be the starting point of a delusional system, the purpose of which seems to be to explain and excuse his failure in life.

Not infrequently a painful experience over which the patient has brooded until its true significance has been completely distorted, appears to have been the focus round which his morbid thoughts had developed... a failure...in business may initiate, in a predisposed person, a searching ruminative state of mind which gradually develops into a chronic delusional state.

Although many paranoiacs are querulous, suspicious and aggressive, many maintain friendly relations with those with whom they are in contact, and even with persons whom they believe are taking part in their persecution...

In these cases which form a majority, the illness is of gradual development, and there is usually a prodromal period during which the patient is uncertain about the truth of the delusional ideas which are slowly taking form in his mind. He is alert and suspicious. He feels that his suspicions are well founded, but he is willing to agree that the incidents which have aroused them, may be capable of an innocent interpretation.

This ebb and flow process may last a long time, and even when the illness is fully developed, periods of acute mental tension during which the patient is entirely dominated by his delusions may alternate with periods in which the morbid ideas appear to be in abeyance. When conviction has replaced suspicion, the patient may be forced to act in accordance with his delusional ideas, what action he will take will depend upon the nature of his delusions and upon his general character...

If he is by nature aggressive, his first protest may be an attack upon his aggressor. If he is timid he may decide to flee from his imaginary persecution, or he may, in a state of despair, commit suicide...

For them (paranoiacs) the whole world is hostile and menacing, and every one is an active agent in their persecution. Everything they hear has a double meaning. Every action done by anyone in their presence is misinterpreted as an insult, or a symbolic assault. They are mocked and humiliated. Their characters are besmirched, and life for them is a continuous battle against tyranny and persecution.

The paranoiac's persecutors may be a single individual but usually it is a body of persons...

Offences against the person may arise from different motives. They may be the result of the patient's natural impulse to retaliate upon his persecutors and mete out to them the punishment he believes they deserve, or he may resort to crime from altruistic motives. He may believe he is benefiting his country or the world by killing a tyrant. He may commit his offence not out of ill-will towards the victim, but because he has failed to obtain redress for his injuries by constitutional means, and at last he comes to the conclusion that by committing a crime which will lead to his arrest or trial, he will have an opportunity of ventilating his grievances in Court. The offence may be premeditated and carefully planned, or it may arise out of the impulse of the moment.

> A man who believes that his wife is unfaithful to him, and outraged by her denials of his accusation, may strike her impulsively, or he may lie in wait for her paramour and kill him..."

Another expert, who investigated 66 paranoiac cases (see the book, Forensic Psychiatry, by W.N. East, at p. 194), writes:

> "In these forms of insanity crimes of violence may be postponed for many years, in spite of the provocation to which the patients are subject as a result of their imaginary persecutions, if they retain their auto-critical faculty. These, however, may become so dominating that volition is ultimately dethroned. And the subjects of delusional insanity, particularly the persecutory and jealous cases, should be regarded as potential homicides always, and the more dangerous if they have tried legitimate means of defeating their enemies and rivals, believe their threats are unheeded, consider they are above the law and indicate by their words and actions that they are losing self control."

In the light of those descriptions, which correspond precisely with what was contained in the opinions of the doctors who gave evidence in our case, I can summarise the principal features of the said disease as follows:

> (a) This is a chronic disease that develops gradually and over a long period of time;
>
> (b) The characteristic symptom of the disease is the existence of a series of delusions, concentrated on an erroneous central assumption;
>
> (c) Subject thereto, the memory and reasoning faculties are preserved;
>
> (d) The paranoiac develops within himself feelings of suspiciousness, persecution and enmity, towards those with whom he comes in contact,

but that does not prevent friendly relations being maintained with his imaginary persecutors outwardly and over a long period of time;

(e) An exaggerated estimation of his capabilities on the one hand, and the lack of success in realising his ambitions or in becoming satisfactorily adjusted to life on the other, are likely to serve as the primary basis for the establishing of feelings of discrimination and persecution by others in the mind of a mentally deranged person of this kind;

(f) In the further development of the disease, the feeling is aroused within him that his whole universe is full of enemies and detractors, and so he is likely to interpret every action done by others as an attack on his interests. For him, his life takes on the nature of a lengthy and continuous struggle in relation to his persecutors, and even against tyranny and for the cause of justice in general;

(g) When the development of the illness reaches the "difficult" degree or "advanced stage", the paranoiac is likely to commit a serious crime, including homicide, because of the feeling that he is forced to act in accordance with his delusions;

(h) The crime may he committed according to a programme planned in advance, or it is possible that it will originate in a sudden, internal impulse, in both of which cases the criminal outburst will derive from the loss of control over the will or its weakening to a considerable extent (I shall return to this subject later).

Anyone reviewing the appellant's life-story, and observing his reactions to the various events that have occurred therein, will become aware of the fact that those reactions coincide with the phenomena symptomatic of a paranoiac whose derangement has reached the stage of serious development. A precise analysis of the various stages in that development, based on the evidence of the appellant, of his relatives and workmates, as well as upon the many examinations of the appellant conducted by Dr. Mengel out of court, may

be found in the written opinion presented by that doctor (exhibit P/15); but for the purpose of our discussion, I shall again content myself with the summary of these matters found in the judgment of the learned judges who write as follows:

> "The source of the accused's mental disorder appears to be an inheritance from his father, and his mode of life which was inducive to the development of the disease; the hard childhood of an orphan who grew up in the Diskin Orphanage in Jerusalem, and after that many years of military service as a supernumerary policeman and a soldier under difficult external conditions which prevented him from achieving rest and reward. From this soil sprouted psychopathic symptoms in the accused, nourished by inferiority complexes and expressing themselves in suspiciousness and feelings of deprivation in his relations with the world around him. Those feelings increased with the passage of time and turned into illusions of wrongdoing and persecution, in his private life, in his work relations in the Kordana plant where the accused worked from 1949, and afterwards in the Ata factory. The accused began to fight against his surroundings.
>
> While he was at the Kordana plant, the accused lost his temper, shouting and threatening the manager of the plant, Dr. Rakoshi, without any objective justification for his behaviour. The accused was then dismissed from his work, and only after great endeavours was returned to work in another place, in the spooling department in Kfar Ata. Here, too, he continued to have a constant feeling of being frustrated and persecuted, and lived in a world of his own which he filled with delusions and in accordance with which he interpreted whatever took place around him. To that must be added the fact of his relationship with Luba Kreiner. On this subject, there is a profound contradiction between the description given by the accused and the version of Luba Kreiner. She does not deny that friendly relations existed between her and the accused, whereas the accused attributes to those relations a much greater importance and contends that, at first, Luba Kreiner attracted

> him towards her, and afterwards, when he had already surrendered to her influence, threw him over and left him. It is impossible to decide whose description is the more correct, but there is no doubt that from the subjective point of view and in the structure of morbid thoughts in which the accused lived, this affair had a decisive effect on the development of his disease and upon the final outburst, on the day the tragedy took place. Even before that day, the accused's disorder had developed from a psychopathic condition into genuine paranoia and, as the accused's actions that very day testify, he must now be regarded as a danger to his surroundings."

That description of the systematic delusions that have developed in the appellant's mind in the course of his life and which are characteristic of the disease of paranoia in the serious form in which he was suffering prior to carrying out the attack on Luba Kreiner proves, as everyone admits, that that illness ought to be regarded as the principal cause of the attack. However, it is no less certain that those same paranoiac disorders serve equally as an element in the further attack that he made on the deceased Shifman who, as a member of the workers' committee at the Ata factory, belonged to that same group of people which constituted the object of the delusions of frustration and persecution which took control of the appellant. If so, why were the abovementioned doctors unable to rest content with that explanation, and why did they find it necessary to explain the outburst against the deceased Shifman by the fact that the accused suddenly passed into a state of "trance" which means that the appellant was at that moment acting under a clouding of his consciousness, in fact, like an automaton ? There are, indeed, three grounds for this diagnosis of the doctors:

First, they considered that the deceased Shifman - by reason of his being a member of the workers' committee at the factory - ought in particular to have been regarded by the appellant as his good and devoted friend, seeing that it was Shifman who had helped to have him taken back to work after the dismissal resulting from the quarrel that had broken out between him and the plant manager at Kordana; it was he who had assisted the appellant to obtain housing on easy terms and had even signed promissory notes for him in order to make the deal possible; it was he who had seen to it that the appellant would not be out of work when there was a shortage of raw materials at the factory.

That ground did not recommend itself to the judges, in the light of the phenomenon, characteristic of a paranoiac, that in his mind even his best friends often become his enemies and detractors; and on the other hand, Shifman belonged to that same group of persons, the workers' committee, in whom the appellant saw his persecutors.

That view of the judges is supported by the description of the disease of paranoia above quoted, but even Dr. Vinik testified that "a person may also concentrate his hatred on a person who takes an interest in him and assists him, such as a doctor, friend and so on" (p. 171 of the record). Dr. Feldman (p. 216) and Dr. Mengel (in his written opinion, p. 3), too, gave evidence in a similar vein. Moreover, a passage in the statement (P/8), which he made to the police the day after the event, in which he said, "Shifman ever since I have worked in that department, was all the time making trouble for me...", provides additional proof of the negative attitude of the appellant towards the deceased.

Secondly, the doctors considered that the passages in the appellant's evidence (pp. 81, 110, 130), where he states that after he had fired the first shot at Luba Kreiner he became so confused that he did not know at the time what he was doing and after that did not remember how he behaved, ought to be believed. In this connection, they relied on their evaluation of what the appellant said to them when he was examined by them. Dr. Mengel, for example, said in his evidence:

> "As a psychiatrist, I believe in the facts he described to me and that he acted in an obvious state of clouding of the consciousness and did not know what he was doing" (pp. 213-214).

Neither did this basis for the doctors' conclusion convince the judges, in the light of what the appellant said in his two statements to the police. In the first statement (P/3), he distinguished between Luba Kreiner and Shifman on the one hand (viz., those whom, according to him, he wanted to kill), and Dr. Weinrib, whom he did not intend to kill, on the other. In his second statement (P/8), he mentioned the worker Besser as one whom he also liked "just as I liked the late Shifman and he stood in front of me and I didn't do anything to him either".

Regarding what the appellant said in his first statement, the judges note that, even assuming that he had heard from Nehemia Rosenberg, the official who was present when the appellant appeared at the office in the water-tower at Kiryat Binyamin and who said to him, "A pity about Shifman", and perhaps also from the other officials in the same office, that he had attacked the deceased and Dr. Weinrib, "it is odd that the accused showed no signs of surprise or agitation when he was suddenly informed that he had hit two more people". As for the remarks of the appellant in the second statement, the judges had difficulty in understanding how the appellant knew, the day after the event, about the fact (which was proved in the case) that when he fired at the deceased, the worker Besser was standing in front of him, if in fact the appellant was acting in a state of "trance" and under a clouding of the consciousness. After all, that is a state of mind which would make him particularly unlikely to remember what he did after he had fired at Luba Kreiner.

That reason of the judges is strengthened by Dr. Vinik's statement (at p. 151) that a person who has fallen into a state of "trance" remembers, after he awakens, only "a few stray details of what he has done" during that time (see, too, the similar evidence of Dr. Mengel at p. 211). In his book, "Criminal Law" (p. 345), the learned Professor Glanville Williams goes further, remarking that only if "the accused has totally forgotten the mischievous act, there will be a tendency to say it was committed in a dream state".

When the doctors were examined in court on the contents of their opinions, they discounted the appellant's remarks in his statements to the police, and counsel for the appellant has followed in their footsteps in his submissions to us. But it seems to me that there is considerable justification in the judges' approach when they say that the words spoken by the appellant the day after the event have a value that cannot be overlooked, to the extent that they provide us with evidence as to his memory of what happened after he had fired the first shots at Luba Kreiner, and therefore also evidence that, at that period of time, he had not fallen into a state of trance at all. In his profound research in the field with which we are concerned here, Mental Disorder and the Criminal Law, Professor Sheldon Glueck writes (at pp. 367, 368), that when one comes to apply, in relation to a paranoiac defendant pleading insanity in a criminal case, the tests whether he knew at the time of the act what he was doing or that his act is forbidden, then:

> "If a narrow interpretation of these tests is taken, then language or actions on the part of the defendant, prior to, during, or after the offence, which, to the layman, and considered apart from the whole medical and social history of the defendant, would indicate the existence of such knowledge, may be regarded as conclusive proof that normal knowledge actually existed at the time of the offence."

True, he adds that:

> "If the precaution is taken to explain to the jury that the knowledge of the paranoiac is necessarily colored by the patient's entire warped judgment and his intellectual and emotional absorption in his delusional beliefs, it is less likely that miscarriages of justice will occur."

Admittedly, this addition is of no importance in relation to the question of the value of the statements of the accused after the criminal act as proof that he committed it at a time when he was fully conscious. It should also be noted that the judges' approach in this matter does not differ from that of the Court of Criminal Appeal in England in the case of *Rivett* (8), in which it relied on the remarks of the accused to his friend after the commission of the crime as proof that he knew, when committing it, what he was doing and that the act was forbidden (loc. cit. (8), pp. 94, 95).

On the other hand, the statements made by the appellant to the doctors a long time after the incident in question, and on the basis of which they drew their inference that at the time he was in the grip of a state of "trance", requires cautious evaluation, in the light of the well-known phenomenon that people claiming that they cannot remember the wrongful act that they have committed, as it were, during a clouding of the consciousness, are often no more than pretending (see Dr. Vinik's evidence at p. 165). Also from this point of view, therefore, the judges' attitude in rejecting the second ground that served as a foundation for the doctors' conclusion receives cogent support.

The third ground was that, at the time of the incident, the appellant fired, as Dr. Feldman says in his opinion (p. 3), "without rhyme or reason at whoever crossed his path". The judges countered that argument, at least insofar as the moment when the shots were fired at the deceased Shifman is concerned, by relying on the evidence of the worker Besser (at p. 79), that:

> "The accused ran in the direction of Shifman. His object was Shifman. The accused deliberately went over to Shifman, and Shifman did not happen to be in front of him."

They also referred to the evidence that the accused did not continue to march like an automaton, but "turned round and continued to chase after Luba Kreiner while she was escaping and to fire at her in particular out of all the male and female workers that were still in the hall of the spooling department". That, continue the judges, "indicates the opposite of just running amok". They explain the shot fired at Weinrib by saying that that man, as distinct from Shifman, who threw himself flat on the floor when he heard the first shots fired at Miss Kreiner, appeared in the direction of the appellant "as an interrupting factor", indeed, they do not completely reject the possibility that at that stage the appellant's mind had already become a little clouded from the shots he had fired up to then and from the panic that had broken out around him. But the essence of the judges' reasoning is based, equally in relation to the third ground of the doctors' version, on the contents of the statements that the appellant made to the police, contradicting as they do the existence of a state of "trance" and complete loss of memory, as has been stated.

The judges' reasons, here set out, seem to me to be sufficiently logical in themselves as to justify our refusing to interfere, as judges sitting in an appellate capacity, in their finding on this point. But even aside from that, I think that that finding may be supported on two additional grounds. First, the trance version hardly seems consistent with the disease of paranoia one of the characteristic symptoms of which is. as we have observed. that the power of the person Iabouring under it is generally preserved, and that. subject to his systematic delusions, his powers of reasoning are equally preserved. Whereas the state of trance is, according to Dr. Feldman (on p. 217), tantamount to "a collapse of the ego", in

the case of the paranoiac (as Dr. MacNiven emphasizes), 'the essential core of the personality is preserved."

Dr. Feldman admitted this obstacle to the trance version, when he says (ibid.):

> "In this case, there is a certain difficulty, and that is that on the one hand you have a paranoiac, process, a thing that develops very slowly and is unlikely to affect the clarity of the consciousness, and on other hand, a state of trance, that is, a loss of consciousness for the limited time in which something happened that cannot be understood in the light of the assumption of a paranoiac set-up".

Secondly - and this is the main point - the appellant's attack on the deceased Shifman can be explained by the disease of paranoia alone, not only because of the inclusion of that victim in the class of the appellant's imaginary persecutors, but also, following upon this phenomenon, because of the disease dominating him to the extent of depriving him of his will-power or of weakening it in considerable measure. We shall return later to that explanation, which was put forward by Dr. Mengel as a possible alternative.

It follows, therefore, that neither of the two tests mentioned in sections 14 of the Ordinance, the existence of each of which suffices to absolve from criminal responsibility, existed here. Those two tests, as is well known, originate in the replies of the English judges in 1843 to some of the questions put to them by the House of Lords, in consequence of the case of Daniel M'Naghten (9), for the purpose of clarifying the rules in force in relation to the defence of insanity. It would be right, therefore, to interpret those tests in the light of the English judgments that expound the "M'Naghten Rules".

The first test is whether, at the time of the doing of the act, the accused was incapable, by reason of the disease of the mind under which he was labouring at the time, of understanding what he was doing. The meaning of that test is that, if the accused did not know, at the time of the criminal act, the physical nature (as distinct from the moral nature) of that act - that is to say, in our case, that he is using a fatal instrument in such a way as to

be likely, by that act, to kill someone - he is absolved from responsibility (see the case of *Codere* (10); see also Glanville Williams' above-mentioned book, at pp. 318-319).

Having rejected the trance version, and taking into account the phenomenon that the paranoiac's reasoning faculties are unaffected (apart from the influence of his delusions), I must clearly hold that the appellant knew at the time of the act that he was firing at Shifman and that by means of that shot he was likely to cause his death.

The second test is whether, at the time of the doing of the act, the accused was incapable, by reason of the mental disease, of knowing that he ought not to do the act. "Ought not", means ought not from the moral point of view. The standard of morality is not measured according to the peculiar outlook of the accused but according to the outlook of reasonable men. In other words, the standard in question is an objective one. If, for example, the accused knew at the time of the act that he was carrying out on action in contravention of the law, then he knew that he ought not and should not, from the moral point of view, carry it out (the *Codere* case (10)).

Here, too, it is clear that once the trance version is rejected, the evidence does not show that at the time that he killed Shifman, the appellant did not know that his act was one that he ought not to do. The fact that he gave himself up to the police indicates the very opposite. Neither does the evidence of the appellant assist him. He testified (on p. 142) that, after he had given evidence to the police, he met Dr. Kelly, and in response to the latter's question, "If I were in your place, what would I deserve?", said to him: "Death". Again taking into account the symptom of the disease of paranoia that was mentioned last, it must be inferred from that answer that also at the time of committing the fatal act in question he knew of its improper nature from the moral point of view. As East said (at p. 204): The offender suffering from systematic delusions "often knows what he is doing and also that he is doing something that the law punishes". Dr. Vinik, too, testified (on p. 154) that when a paranoiac offender carries out a dangerous action "he may know that what he is doing is contrary to the laws of society".

Counsel for the appellant submitted in the alternative that, if the trance version is not accepted, then the cause of the attack on Shifman ought to be found in the loss of control

over his will-power, which in its turn originates in the paranoiac disorder. The judges rejected that argument, both from the factual and from the legal point of view.

I shall deal first of all with the question of fact. I am of the opinion that in their attitude to this question, the learned judges were mistaken. Having discounted the explanation regarding the addition of the state of trance to the appellant's mental condition, they had no choice but to accept the same alternative explanation that Dr. Mengel regarded as a possible explanation of the appellant's outburst against the deceased, namely, that his paranoiac disorder dominated him to the extent of depriving him of his will-power or of weakening it to a considerable extent.

(a) In this connection, Dr. Mengel wrote in his opinion (see p. 7 thereof):

> "Another pathological situation was also within the realm of possibility, namely, that the deceased Shifman...could have provided the accused with an object for the expression of his paranoia, and fallen victim as one of his imagined foes; and also in the face of such an account ofthe circumstances, it would be clear that if so, the accused would have been acting not of his own free will, but underthe constraint of overpowering motives of disease over which he had lost his control".

And in his evidence in court, he said (on p. 212):

> "At times, the psychopath knows what he is doing, but he is powerless to gain control over the pressures of his sick impulses, because they are stronger than the forces of control. I cannot dismiss the possibility that that is what happened".

Dr. Vinik also testifies (on p. 154):

> "A paranoiac gives expression to his illness at the same moment as the feeling of frustration and the fight for justice dominates him to the extent

> of depriving him of the will to wage open war against his consciousness...He can give effect to that by the most difficult acts and by the most dangerous means even to the extent of killing men".

b) The remarks of MacNiven have already been quoted above to the effect that when the disease of paranoia has developed to the stage where conviction replaces suspiciousness, "the patient may be forced to act in accordance with his delusional ideas"; so also the remarks of East, that "the imaginary persecution... may become so dominating that volition is ultimately dethroned".

To those two views must be added the remarks of Professor E.R. Keedy, in his article, "Insanity and Criminal Responsibility" (published in the Harvard Law Review, Vol. 30, p. 535, at 559), that:

> "In the persecutory stage of paranoia where the patient has a delusion that persons are trying to injure or annoy him, a homicidal impulse frequently develops".

In order to illustrate his remarks, the learned Professor quotes the case of *Daniel M'Naghten* (9), a paranoiac who suffered from imaginary persecutions and was acquitted of the charge of murder on account of a plea of insanity, seeing that the medical evidence, as Keedy emphasizes, "was to the effect that at the time of the shooting he had no self-control" (ibid.).

(c) The learned judges identified the plea of loss of self control with the plea of "irresistible impulse", and rejected it, from the point of view of fact, on the strength of one solitary reason, namely, that, when "Dr. Vinik was asked, in accordance with the well-known English test, whether in his opinion the accused would have acted the way he did even if a policeman were at his elbow... the answer was that it was difficult to determine that". Admittedly, the judges also bore in mind Dr. Vinik's reservation, that in his answer he was referring only to the first shot fired at Luba Kreiner, whereas as far as the shooting at the deceased Shifman was concerned, "the presence of a policeman would not have made any difference". However, they did not take that reservation into account, since it was based

on the version of the "trance" and "amok" theory, and they had already rejected that version.

In my opinion, that reason of the judges is not based on firm ground, since Dr. Vinik was not required to express an opinion, so far as the stage prior to the shooting of the deceased Shifman is concerned, whether that reservation still held good on the assumption that the trance version is untenable. If the question had been posed to him in the light of that assumption, I have no doubt that he would not have altered the content of his qualified reply. I infer that from the statement in his evidence, that:

> "It may happen that such a patient might, at the time of an outburst, recognise, feel the domination of the destructive forces within him and feel that he is powerless to withstand them, and will warn the others not to come into contact with him and leave him alone and keep away from him. On the one hand, he is in control of himself when he warns and admonishes others, and on the other hand, he is not in control of himself as regards the action itself. Until the action, he can control himself, but at the time of the action he has already lost his balance and the power of control over his will" (p. 155).

It follows from this evidence that that doctor would distinguish between the stage prior to the first shot at Luba Kreiner and the stage that preceded the shooting of the deceased Shifman, and would hold, even without any connection with the trance version, that immediately after he began to fire at the woman, and as a result of that action, the appellant lost his self-control.

(d) The judges' decision on the facts on this point is mistaken from another point of view also. We saw earlier, when the features of paranoia were described, that a paranoiac may commit a criminal act as the result of a sudden internal impulse that he is powerless to resist, but that he may also carry it out with premeditation and in accordance with a programme worked out in advance. Now in the latter case, too, the paranoiac offender should be regarded as having acted the way he did for lack of choice; because the delusions so dominated him, that he could see no way out other than to act according to them. From

that point of view, he committed the crime when in fact he was not master of his own free will.

The matters that were noted in the Report of the English Royal Commission on Capital Punishment (1949-1953) may serve to clarify that approach. After criticising (at p. 110, paragraph 314) the use of the term "irresistible impulse" as "too narrow" and "misleading", in that it seems to refer only to cases where the commission of the crime by the person suffering from a mental disease originated in a sudden impulse that moved him to act thus, the Commission draws attention to types of mentally sick persons, among them paranoiacs, that did the wrongful act in accordance with a programme worked out by them in advance, "coolly and carefully". Now the Commission regards such types of patients, too, as persons whose mental disease has affected their will-power (paragraph 315), and it formulates a test the use of which is likely to result in the absolving of those "offenders" from criminal liability. The test is whether (paragraph 317):

> "at the time of committing the act, the accused as a result of disease of the mind... was incapable of preventing himself from committing it."

Finally, the Commission quotes the case of an act of one Ley, whose behaviour testified to his being "a typical case of paranoia" and who, as a result of that disease, killed a man after he had planned the execution of the fatal plot for some considerable time. That man, it held, knew indeed the nature of the act and that it was forbidden, but it may nevertheless be argued that he was not capable of avoiding the realization of his criminal programme since he was incapable, on account of his delusions and the world of other false values in which he lived, of desiring, or of making an attempt, to avoid committing the crime - he was not capable of evaluating properly those moral considerations that have the effect of restraining a sane man (p. 111, paragraphs 319-320). Had he, accordingly, set up the defence of insanity, there would have been room, according to the said test, for absolving him from criminal liability. The Commission emphasises, however, that they might perhaps have come to the opposite conclusion by applying the well-known test of Lord Bramwell (which the judges in our case favoured), that if the insane person (who knew in fact what he was doing and that his act was forbidden) would not have "yielded to his insanity if a policeman had been at his elbow", he cannot be relieved of responsibility.

According to that test, it held, only those defendants that have acted in a state of semi-consciousness, automatism and frenzy, will escape conviction. (In another part of the Report, note is made of the fact that in England, the latter test has in practice been abandoned for some time. p. 103; see also the criticism levelled at it by MacNiven, from a different point of view, in the above mentioned article, p. 53; and the disapproving remarks of Guttmacher and Weihofen on the same matter, in their book Psychiatry and the Law, p. 411).

(e) The remarks of Dr. Mengel (on p. 213) may be understood in the light of this approach when he states that even if the appellant had contented himself with shooting Luba Kreiner in order to kill her, "then, too. he would have done what he did in consequence of a psychiatric condition, and would not have been in a condition to be able to control what he was doing". He arrived at the conclusion notwithstanding his assumption that the appellant "had determined to put an end to that woman" (loc. cit.). We know from the evidence of the appellant, that he had brought the revolver that he used on the day of the incident from his home - a fact indicating a prior planning of the fatal programme against Miss Kreiner - and we know also that Dr. Mengel had before him a copy of his evidence on which he based his conclusions (p. 209). This version of the doctor, namely, that in planning the attack on Miss Kreiner, the appellant was acting in a state of lack of self-control, can only be understood in the light of the explanation that his disease had brought him to the stage where he was incapable of acting otherwise than in accordance with the dictates of his sick delusions and the world of "justice" in which he lived, that he was incapable, even at the time of committing that act, of being influenced by ethical considerations that are calculated to restrain a sane man from committing it. By which I mean that he could not control himself even in the primary stage of the attacks that he made on the day of the incident.

(f) The last quoted approach, too, is calculated to rebut the judges' attitude in relation to the question of fact that was argued. But in our case, I see no reason for calling that approach in aid. When one reads together the observations of Dr. Mengel and Dr. Vinik, which I considered in paragraphs (a) and (c) above, then there is only one conclusion to be drawn from them: that in any event, at the stage when the first shots were fired at Luba Kreiner, the effect of this act upon the appellant was added to his paranoiac state, so that at the same time, there were liberated "the pressures and the sick impulses that are stronger

than the powers of control". as Dr. Mengel says, and he lost "his balance and the power of control over his will", as Dr. Vinik words it (the third doctor, Dr. Feldman, confined himself to the trance version). The necessary conclusion is, therefore, that when he attacked the deceased Shifman and killed him, the appellant did so while in a state of lack of self-control, lack of ability to act according to his free will.

So much for the question of fact. Were the judges right in the attitude they adopted as regards the question of law? If we consider this question from the point of view of the "M'Naghten Rules", and therefore from the point of view of the tests laid down in section 14 of the local Ordinance, we shall have no alternative but to accept their decision.

1. Those who, in the countries in which the "M'Naghten Rules" apply, favour the view that in insanity cases it is proper to recognise the plea of "irresistible impulse", do so from three different points of departure. One school of thought holds that the common law includes a third test additional to those laid down by the rules, namely, that the accused will not be liable if it appears that in consequence of the disease of the mind under which he laboured, he was not in a position to control his behaviour. The reasoning behind this view is threefold. First, in their replies to the questions of the House of Lords, the judges did not intend at the time to present an exhaustive account of the law applying to the problem of insanity, and did not intend to exclude the possibility of the effect that the mental disease is liable to have on the volitional and emotional systems. For in the proviso to their statements in reply to the second and third questions - the reply containing the tests whether the accused of unsound mind knew what he was doing and that he ought not to do it - they added an important reservation, being that, when directing the jury to decide according to the above stated tests, the direction ought rightly to be accompanied with such observations and corrections as the circumstances of each case may require" (Stephen, "History of Criminal Law", Volume 2, p. 159; also Glueck, p. 180). Secondly, one of the fundamental elements of criminal law is that no accused person may be judged guilty unless the act, the subject of the offence with which he is charged, was specifically "voluntary", and so if he was labouring under a disease of the mind which prevented the existence of that element, then he is not liable (see Kenny, "Elements of Criminal Law", edited by Turner, at pp. 24, 80; also Keedy, in the aforementioned article, at p. 548). Thirdly, the common law does not constitute a system of law frozen in its tracks; rather it continues to develop in accordance

with the experience of life and the teachings of medical science in general. Now that science teaches us that the "mind" of man is not divided into individual compartments unconnected one with the other, but is a singe unit, that is, a combination of reason with the systems of will and emotion, between which there is constant, mutual activity. Therefore, what appears on the surface as a partial impairment of the reason (as in the case of systematic delusions), is nothing but a symptom of the mental disease affecting the "mind" as a whole, including the will and the emotions. This phenomenon, whenever it exists, must be taken into consideration, and by reason thereof, the accused person of unsound mind is to be regarded as not responsible for his acts (see Glueck pp. 172-173, 265-266).

As authority for the view that the common law embraces the above stated test, in addition to the M'Naghten tests, those in favour of this approach usually point to the judgments given: -

(a) Before the giving of the judges' replies, in the cases of *Hadfield* (11), (Russell, Vol. 1, p. 49); *Daniel M'Naghten* (9), above referred to ; *R. v. Oxford* (12), (Glueck, p. 153) ;

(b) Afterwards - in the cases of *R. v. Hay* (13); *R. v. Fryer* (14), and *R. v. Holt* (15). Counsel for the appellant relied on these last three judgments in the present case. In the case of *Hay* (13), Darling J. directed the jury to bring in a verdict of "guilty but insane" if they believed the medical evidence, which had established that the accused knew "he was firing a revolver, and that it was wrong to do so, but that owing to disease of the mind he was unable to control the homicidal impulse which dominated him".

(c) The same test has been accepted by courts in some of the States of the United States (see A.L.R., Vol. 70, p. 663 et seq.). The leading judgment is that in *Parsons v. State* (28); see also *Smith v. U.S.* (29).

(d) And in South Africa also (see South African Criminal Law and Procedure, by Gardiner and Landsdown, 5th ed., Vol. 1, p. 67).

To my mind, it is quite clear that, within the framework of the local section 14, at all events, there is no room for adding as a third and independent test, the test of inability to

control the will-power as a consequence of the disease of the mind. The reason is that, in laying down the rules mentioned in that section (and from the medical point of view, that indeed is the weak spot in them), the legislator put the emphasis on the impairment of the system of reasoning faculties, as distinct from the volitional and emotional systems. The test, as has been stated, is whether the accused by reason of his mental disorders, did not "understand" what he was doing or, alteratively, did not "know" that his act was forbidden. In criticising the "judges' replies" from the scientific point of view, Glueck writes (loc. cit., p. 172) that they do not take into consideration the fact that:

> "The cognitive mode of mental life can hardly be said to be disturbed without this also being an indication of the disturbed condition of the inseparable emotional-volitional life of the accused."

That applies equally to the identical tests laid down in our section 14, and it follows therefrom that its language leaves no room, *ex vi termini, for* the addition of another test, namely, that which absolves from criminal liability on account of the injury inflicted by the mental disease on the will-power.

In fact in the courts in England, the view has recently become crystallised that the "M'Naghten Rules" are exhaustive on the question of insanity, and it has accordingly been held in a number of cases there, that the law is not to be extended by the addition of a rule providing that the accused will be absolved from liability if driven to committing the offending act by an impulse originating in a disease of the mind (see, in this connection, *R. v. Flavell* (16);*R. v. Kopsch* (17); *Sodeman v. R.* (5); *R. v. True* (7), obiter).

The judges in our case indeed placed their reliance on those English precedents. I shall return later to deal with the question whether in section 14 the local legislator intended to include provisions of an "exhaustive" character. What I mean to establish at this stage is only that, within the framework of those provisions, at all events, no room is left for applying any additional tests.

2. The second school of thought that urges the taking into account of a mental disease affecting the accused's will-power, claims to remain within the limits of the M'Naghten

Rules. Its point of departure is that, so long as the medical evidence points in that direction, it is proper to absolve a man from liability if the interval impulse that drove him to commit the crime and which originates in a disease of the mind was sufficiently powerful so as completely to destroy the ability to distinguish between right and wrong. In his book, Glueck writes (at p. 239):

> "In some of the States where the irresistible impulse rule does not obtain, some courts make a rather questionable concession to the principle, by saying that if the irresistible impulse is the result of mental disease sufficient to override reason and judgment, and to obliterate the sense of right and wrong, it will excuse from criminal responsibility. This doctrine seems to be the expression of a transition stage between the exclusive right-and-wrong rule rigidly applied, and the judicial recognition of the fact that there is more to mental activity than its cognitive mode, and that the law itself, when treating of criminal intent, considers volitional capacity as necessary as cognitive capacity."

The American court established a rule in accordance with this "compromise" approach in *State v. Nixon* (30); and in the light thereof, Greer J. explained the purport of his remarks when, in his direction to the jury in the above mentioned case of *Holt* (15), he lent his authority to the test of "irresistible impulse". He meant (so he said afterwards in the case of True (7)), that "if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was 'wrong'. In this event, 'uncontrollable impulse' would bring the case within the rule laid down in the *M'Naghten* case" (see *R. v. True* (7), at p. 167).

Finally, it is possible to explain away the verdict of acquittal brought in by the jury in the case of *Daniel M'Naghten* (9), according to the same approach. It will be recalled that the learned Professor Keedy regarded that decision as authority for the existence of the test of "lack of self-control" as an independent test, in that - as he explained in his article (pp. 558, 559) - on the one hand there was no evidence that the accused could not distinguish between right and wrong and, on the other hand, it was proved that at the time of the

criminal act, he was deprived of all self-control. If that view is right, there is indeed an inconsistency between the verdict of acquittal and the direction of Tindal C.J. who presided over that case, and who confined himself to the test of the ability to distinguish between right and wrong. In fact, if we closely examine the medical evidence, as summarised in the English Reports, at p. 718 (9), we find that it established no more than that a man labouring under a sick delusion might succeed in appreciating right and wrong, but that in the case of the accused M'Naghten, "it was a delusion which carried him away beyond the power of his own control, and left him no such perception". Such a finding, therefore, enables the inconsistency existing between the verdict of acquittal and the judge's direction to be cleared up, in that it connects the fact of the destruction of the will-power (by the mental disease) with the test of loss of ability to distinguish between right and wrong. That is the true meaning of the verdict of acquittal in that case, and it is perfectly consistent with the outlook of the second school of thought.

This school of thought would take into consideration, therefore, the effect of the mental disease on the accused's will-power, but only to the extent that that influence has in itself resulted in the utter destruction of his ability to distinguish between right and wrong; and in that special way, claims to remain faithful to the M'Naghten Rules and not to exceed their limits. Indeed, whatever the value of that approach may be, in our case I find it impossible to draw any assistance from it, having upheld, on the facts, the judges' conclusion that the appellant knew, when he fired at Shifman, that his act was morally wrong.

3. The third school of thought, too, is in favour of the general aim of remaining loyal to the M'Naghten Rules, but demands the granting of a "wide" or "liberal" interpretation to those rules. The doctrine is that a man, whose mental disease has impaired his willpower, is likely to be in a state of inability to weigh, in a rational manner, the significance of the act that he is about to do, whether it be a physical significance or a moral significance. It may be that in the "narrow" sense, he knows that the act will result in the killing of a man and that a prohibition of the law applies to it; yet nevertheless, because of the weakening of his volitional powers and the injury to his emotions, his reasoning faculties also fail him (in that state of "momentary anger"), to the extent that he is unable to appreciate properly the true nature of his criminal action or that it is prohibited. From the broad point of view, it cannot

be said of such a man that he "understood" what he was doing or that he "knew" that his act was improper in the moral sense, and for that reason he does not bear responsibility according to the M'Naghten Rules either. The foundation-stone of that approach is once more the modern medical theory regarding the insoluble connection between the reasoning, volitional and emotional faculties of man, so that if one kind of faculty is impaired, it means that the other kinds are impaired also.

Stephen, who favoured the test of lack of self-control originating in a mental disease as an independent test (the first school of thought), but was not certain whether it was included in the existing law (see History of the Criminal Law in England, Vol. II, p. 149, note l), also belongs to the third school of thought. He expounded his doctrine in these words (ibid., at p. 170):

> "The power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration, and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending or referring to such considerations, or from connecting the general theory with the particular fact, deprives him of the power of self-control.
>
> Can it be said that a person so situated knows that his act is wrong. I think not, for how does anyone know that any act is wrong except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong ?"

Again, at p. 171:

> "If the words 'know' and 'wrong' are construed as I should construe them . . . . . the absence of the power of self-control would involve an incapacity of knowing right from wrong."

Finally (ibid.):

> "Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."

Stephen J. put this theory into practice in the spirit of that approach - a kind of "practise what you preach" - in his direction to the jury in the case of *Reg. v. Davis* (18); and many instances of its application may be observed today, too, particularly with regard to cases of paranoiacs and their systematic delusions (see "Criminal Law", Part 2, by P. Dickstein, at pp. 399, 400; *also Glueck,* at pp.366-367). Stephens explains the verdict of acquittal in *Hadfield's* case (11), mentioned above, in the light of that approach. The facts were: Hadfield laboured under a fancied notion that he had received an order from Heaven to sacrifice his life in order to save the world. Accordingly, he decided to shoot King George III during the latter's visit to the theatre, in order that he might afterwards be prosecuted in a criminal court for that act, convicted and sentenced to death. In the event he missed the target and was arrested. At the trial, he was defended by the famous lawyer Erskine, whose attractive arguments (which at the time marked an important turning-point in the rule of insanity in England) moved Kenyon C.J. to direct the jury to absolve the accused from responsibilty (see "History of the Criminal Law", etc., p. 59). Hadfield, says Stephen, did in fact know the nature of the act - that he was firing a loaded revolver at the King. Moreover he knew of the prohibition imposed by the law; in fact it was that very knowledge that led him to effect his plan of which - or so he anticipated and even desired - the immediate result would be his conviction under the law of treason and his execution. But, Stephen goes on to hold, "I could not say that such a person knew that such an act was wrong. His delusion would prevent anything like an act of calm judgment in the character of the act" (ibid., p. 167).

The fact is that many of those who are opposed to an amendment of the M'Naghten Rules by adding the test of "irresistible impulse" place their reliance on the same view, that the existing tests can take the "wide or liberal" interpretation of Stephen. For example, in

the debate that took place in the House of Lords on a Bill drafted in the spirit of such amendment (following on the recommendation of the Committee of Experts presided over by Lord Atkin), Lord Haldane explained his opposition to the Bill in these words:

> "I have never heard of these rules embarrassing any judge who really had a case before him in which justice required an acquittal or prevented him from giving such direction to a jury as would enable them to apply these rules in cases.... when the impulse was so dominant as to deprive a person of freedom or of any realisation of what he was doing."
>
> (This is quoted from East's book, at pp. 67-68,)

Can this somewhat attractive view afford us any assistance when we come to interpret the language of the legislator in section 14 of the local Ordinance ? I have given serious consideration to this possibility, for applying such a free interpretation of the rules provided in that section would certainly deliver us from the network of difficulty in which the present appeal has enmeshed us. I say "network of difficulty" since, on the one hand, there can be no doubt that the appellant, at the time when he shot the deceased, was suffering from a mental disorder which had already reached very serious proportions, to the point of depriving him of his will-power; it was that disorder which provided the cause and the reason for that act; and justice and common sense would require that we relieve him of responsibility for it. On the other hand, it has been found that he understood what he was doing and he knew the prohibition of the law. The approach last mentioned is attractive because by bestowing a "wide" or "liberal" interpretation on the words "to understand" and "to know" in section 14, we could relieve the appellant from punishment within the framework of the tests laid down in that section.

However, I cannot see that the way is open to us to call that particular solution in aid. For if we interpret the terms "to understand" and "to know" in section 14 in the sense of "properly appreciating" or "weighing quietly and in a rational manner", we shall only confer on them a far-fetched and artificial interpretation, in place of the simple meaning that the words convey. If the appellant knew at the time of the act that he was aiming a loaded revolver at the deceased and that by pressing on the trigger a bullet would escape which was likely to hit the victim and to kill him, then he "understood", in the language of ordinary

man, the physical nature of his act. If he knew at the same time that he deserved punishment for his behaviour, then he "knew" - again, in the language of ordinary men - that it is improper from the general moral point of view. It is a different matter altogether to say that, in consequence of the impairing of the volitional and emotional system, by the disease of the mind, the appellant passed into a state of "momentary anger" in which he was deprived of the ability to appreciate properly or to weigh in a quiet and rational manner the extreme significance of his lethal behaviour or its far-reaching effects. And it is a different thing entirely to hold, as the Royal Commission held in relation to the case of Ley, that the systematic delusions of a paranoiac are so likely to dominate him as to render his mind no longer open to counter-persuasion and he will, for that reason, lose the capacity to refrain from carrying out the criminal plan dictated to him by the delusions. But, neither of these constitutes the tests that the legislator provided in section 14, in which the emphasis was placed on the element of absence of "knowledge" in its ordinary meaning. From that "narrow" point of view, the disease of paranoia, as we have seen, does not produce an absence of knowledge in the man who is suffering from it.

I have analysed at some length each of the three opinions referred to in order to answer the question whether, in our case, the argument of lack of self-control caused by a disease of the mind can be included within the framework of the rules laid down in section 14. The upshot of this analysis is that, from the point of view of those rules the negative answer of the learned judges to the question is well-founded.

But, having reached that last conclusion, the complex matter in which we are engaged has not, to my mind, been solved. The question still remains at the forefront of our attention: whether the tests stated in section 14 in fact serve as complete and exhaustive tests, or whether there is room in our criminal law for applying the principle, of which the foundation is laid in section 11 subsection (1) of the Ordinance, which provides as follows:

> "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

I emphasise the words "act or omission which occurs independently of the exercise of his will", and the question I pose is this: whether, in the light of the requirement proceeding therefrom – "the requirement of the exercise of the will in committing the criminal action" - it would not be right to assert that the local law envisages the use, as regards the defence of insanity, of a test distinct and separate from those provided in section 14, namely, the test of inability to control the will-power originating in the mental disease of the accused.

Now, this question renders it necessary to return first of all to another, similar question, one we have already hinted at, namely, whether there is not in first something in the assertion of the "first school of thought", that we can scarcely suppose that on the problem of insanity, the common law would not also recognise the last mentioned test, and not give it the authority of an independent, self-supporting test and, that being so, the M'Naghten Rules cannot be regarded, on any account, as being complete and exhaustive in this field? It seems to me that, in this instance, we would be best advised to act as we have acted in the past whenever we have sought to solve other problems concerning criminal law, namely, by having recourse first of all to the fundamental approach of the common law to the problem with which we are engaged, seeing that that law, as this court has declared from time to time, constitutes the source from which the legislator drew in enacting the provisions of the local Ordinance.

It will surely be asked : how is a fresh examination possible, in this country, of the question whether the common law regards with favour the plea of "irresistible impulse", where the accused is relying on the defence of insanity, when that question has already been given an authoritative answer in the negative by the English courts in judgments in which it has recently been considered - judgments such as *Flavell* (16), *Kopsch* (17), and *Sodeman* (5) (vide supra). I am not of that opinion, if only for the reason (and at this stage, I confine myself to that reason alone) that in England today, in life and in first, that negative answer does not correspond to actual practice, in the vast majority of cases. By that I mean that there exists ample evidence that in recent years English courts of first instance have succeeded in giving effect to the argument, so long as there is sufficient ground for doing so in the body of evidence. Even in those few exceptional cases where the plea had been proved, yet for all that rejected, the court occasionally drops a hint as to the possibility of commuting the sentence of the convicted man (see, for example, *True's* case (7), at p. 170).

Even without such a suggestion, the Home Secretary in England in cases of that kind and after all the trials at the various instances have been completed, would usually carry out a fresh medical examination (something that the law empowers him to do), and if the results of that examination were to justify it, would also recommend that the extreme penalty be not exacted. So, for example, Lord Atkin asserted in a lecture that he gave in 1925 to the Medico-Legal Society:

> "The illustration of the law is very much more generally liberal than would be the case if it were carried out in strict accordance with the letter. In practice, the judge, the counsel, the jury, the witnesses and all concerned are desirous, in case of uncontrollable impulse, to acquit the accused on the ground of insanity." (Quoted from *"The Modern Approach,* etc.", at p. 416.)

Moreover, in 1953, the Royal Commission, in the Report mentioned above, after reviewing the evidence placed before it on the question of the actual application of the M'Naghten Rules as exhaustive rules, held that:

> "The broad conclusion... from this evidence is that,...in cases where their strict application would result in a manifestly unjust verdict they may be 'stretched' or even ignored, and that nevertheless cases do occur – though no doubt rarely - in which the effect of applying the Rules is that sentence of death has to be pronounced on a prisoner whom it would be clearly wrong to regard as responsible for his act. This does not mean that anyone who is certifiable as insane would ever be executed. It was generally accepted by our witnesses that the safeguard of the statutory medical inquiry after conviction ensured that no one who was definitely insane would now be executed."
>
> (p. 85.)

Having regard to that shaky and not very firm standing enjoyed today in England by the aforementioned "negative" rule -a kind of "rule that nobody teaches"[1)] or at all events, that "nobody observes" - I am of opinion that those judgments in which that rule was laid down need not prevent us from investigating afresh, as if it were a *prima impressionis,* whether the fundamental approach of the common law to the defence of insanity requires us to turn a favourable ear to the plea of irresistible impulse above referred to.

Accordingly, let us open that investigation.

A. The common law looks at the problem of insanity in two ways: it is basically an ethical-legal approach. Its ethical assumption, and that even in days gone by, is that if, when he committed a wrongful act, a man was labouring under disorders of the mind in such a way as to make it unreasonable to hold him responsible, it would not be right to convict him, still less to inflict punishment on him. Thus, as early as the reign of King Edward I (1272-1307), this approach could be perceived in the repeated recommendation of the jury, when they were satisfied that the accused was mad when committing the act, that he be pardoned; and at the beginning of the fourteenth century, after the granting of a pardon, as a consequence of recommendation on that ground, had become a matter of course, the plea of "lunacy" in murder cases acquired the status of a defence as of right, absolving the accused altogether from criminal liability (see Holdsworth, "History of English Law", Vol. 3, pp. 312-316; also, Stephen, Vol. 2, p. 151). At the beginning of the seventeenth century, Coke gave pungent expression to that ethical notion, when he wrote (Institutes, Part III): *"Furiosus solo furore punitur"*. That that was not a mere notion, detached from the outlook of his generation, appears from the words that Shakespeare put into the mouth of the hero of his play:

> "... Hamlet is of the faction that is wronged; his madness is poor
> Hamlet's enemy".

[1)] Based on the Talmudic phrase that there may be such a law but we treat it as obsolete.

That special approach, originating in a sense of justice and fairness, has remained applicable in England, so far as the question of insanity in criminal law is concerned to this day; and a straight line may be drawn between Coke's epigram I have cited and the account of the same principle by the Royal Commission in 1953. So, the assumption of the Commission as to "the continuance of the [said] ancient and humane principle that has long formed part of our common law" is of importance (Report, p. 98).

If we pause here for a moment and examine the question before us from the standpoint of that fundamental principle, namely that it is a problem of justice and morality which accounts for the person of unsound mind being absolved from responsibility, for otherwise punishing him for his criminal act is like punishing him for his madness, against which our sense of justice revolts, then it would be difficult, if not impossible, to reject the defence of inability to control the will-power and to withstand an internal impulse, when it has been proved that the existence of that mental state is accounted for by a disorder from which the accused was suffering at the time of the act. In his article, "The Royal Commission and the Defence of Insanity" (Current Legal Problems, 1954, p. 18), Glanville Williams writes :

> "...it is generally felt to be unjust (or inhumane) to punish one whose powers of control are seriously weakened by mental disease. An insane person, said Maudsley, has the right to claim the privilege of his disease, and the compassion which attaches to affliction in civilised lands."

Guttmacher and Weihofen also note (in their above-mentioned book, p. 412), that:

> "Justice does not call for retribution from one who did not act from choice. On this premise, irresistible impulse should be accepted as a defense, for there is no justice in punishing a person for what he could not help."

True it is that, while it was concentrating on the ethical aspect of the problem, the common law directed its attention (and in the time of Coke and his predecessors, it was natural that it should so do) only to the object of "retribution", and, as it were, ignored another penal object, deterrence. The first object - that the sense of justice should be

satisfied - excludes the approach that the sinner shall not profit thereby" [1]) from application to the insane offender; on the contrary, the sense of justice demands, as we have seen, that the insane offender in particular should not be punished. But, does a result such as that coincide with the social aim of the protection of life and property through the threat of the law to punish all who break it? Does not the object of "that others may hear and fear", therefore, require that we should reject the defence of "irresistible impulse" no less in the case where it originates in a disease of the mind? This argument indeed, being bound up with the principle of deterrence as a fundamental aim of the criminal law, served as a guide, in the second half of the previous century, to certain individual English judges in their rejection of that defence. So, for instance, in the case of *Reg. v. Haynes* (19), Bramwell B. said, in his direction to the jury:

> "But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it... But if the influence itself be held a legal excuse rendering the crime dispunishable, you at once withdraw a most powerful restraint - that, forbidding and punishing its perpetration." (Quoted from the collection "Cases on Criminal Law", edited by Turner and Armitage, pp. 64, 65.)

I do not think that argument can survive examination. The principle of "deterrence" or "restraint of the law", when serving as an end of the criminal law, has two sides to it. One is that the man about to carry out some vile crime is likely to hold back on recalling to mind the threat of the law to punish him heavily if he puts his plan into action. The other side of it is that the fact of the offender's being punished is liable to serve as an example and a warning to others. These two aspects together are no more than two sides of the same coin: the desire to restrain the committing of offences. Those who criticise the aforementioned argument for rejecting the plea of "sick impulse" must take into account both those aspects of the principle of deterrence, and their reply to those protagonists of the admonitory character of the criminal law as a foundation for that negative approach must, therefore, be

[1] Culled from an ancient Talmudical source.

a double one. Indeed, such a reply, that knocks the ground from under the "objectors", was once more given by Guttmacher and Weihofen, when they said (ibid.):

> "An individual who labors under irresistible impulse cannot be deterred and so there is no purpose in holding him criminally responsible."

And at p. 413:

> "Nor is the punishment of such a person very valuable as an example to others. The average man is not exposed to increased inner temptation at seeing a person go unpunished who could not... avoid his act. On the contrary, punishing such a person is likely to be repugnant to the average man's sense of fairness and justice."

These last words restore us to the healthy approach of the common law, which, in its relation to the insane offender, prefers the human aspect to the object of deterrence. Indeed, the fact that the convict Haynes (19) was in the end pardoned by the king (see Turner and Armitage's Collection, at p. 65), rather weakens, from the functional point of view of the criminal law, the argument about "the restraint of the law", used by Bramwell B. in the above mentioned case. Finally, even if we assume (I, for one, do not share that view) that one cannot be entirely certain that the threat of the criminal law might not succeed, in a certain case of "sick impulse", in influencing behaviour, even then the conclusive consideration is bound to be the one tied up with the sense of justice which all feel, and not in the consideration that perhaps the fear of punishment may, for all that, have the effect of turning the scales, in the thoughts of the person labouring under such an impulse, in favour of deterrence and restraint. Even Glanville Williams, who is party to the view concerning the possible influence of the criminal law even in the case of "sick impulse", agrees that that should not constitute a decisive consideration. "In practice", he writes in his above mentioned article (ibid.),

> "criminal punishment is not governed exclusively by the deterrent theory; the deterrent theory is modified by a notion of justice; some value is

> attached to the personality of the killer... Even those lawyers who think that insane impulse should not be a legal defence now generally concede the propriety of executive intervention to avert punishment."

B. So much for any answer to the present question, in the light of the ethical side to the approach of the common law to the defence of insanity. The other aspect - the legal one - is: the accused, who was suffering from a disease of the mind at the time of committing the criminal act, will not be punishable simply because his disorder had the effect of negativing the existence of a criminal mind or "mens rea", the element that the criminal law has postulated in regard to the vast majority of serious offences. This way of dealing with the problem - which is bound up with positive criminal law - was once more indicated at the time by Coke, when he laid down (vide his Institutes, supra, ibid.):

> "...For in criminal causes, as felonie, etc., the act and wrong of a madman shall not be imputed to him, for that in those causes, actus non facit reum, nisi mens sit rea, and he is amens... sine menti, without his mind or discretion."

This view, too, that exemption from liability on account of a mental disorder is like exemption by reason of the absence of a criminal mind, has remained to this day in England a corner-stone of the institution of insanity on the criminal side, as the judgment in the case of *Felstead v. R.* (20) testifies. Explaining there the true meaning of the verdict "guilty but insane", Lord Reading states, at p. 542:

> "That is not a verdict (holding) that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence... this verdict means that, upon the facts proved, the jury would have found him guilty of the offence had it not been established to their satisfaction that he was at the time not responsible for his actions, and therefore could not have acted with a 'felonious' or 'malicious' mind, which is an essential element of the crime charged against him."

He adds:

> "The indictment of the appellant was for 'feloniously' and 'maliciously' wounding (the victim) with intent to do some grievous bodily harm. It is obvious that if he was insane at the time of committing the act he could not have had a *mens rea,* and his state of mind could not then have been that which is involved in the use of the term 'feloniously' or 'maliciously', for *'crimen non contrahitur, nisi voluntas nocendi intercedat'."*

We learn there from that the common law, on the strength of the principle of "mens rea" which it championed, made the accused's conviction dependent upon the fact that his mental faculties were working properly at the time of the act; accordingly, whenever a mental disease has impaired those faculties to the extent that one of the elements of that principle is absent, the upshot ought to be exemption from criminal liability. Indeed, in the case of *Ya'acobovitz* v. *Attorney-General* (1), at p. 545, I noted that:

> "The concept of "mens rea" as an element required in every offence originating in the common law, demands that the prosecution prove at least these two things : (1) that the accused voluntarily carried out the action which is the subject of the charge; (2) that at the time of the act, he foresaw the possibility that the result which the law prohibits might spring from that conduct of his."

In that case, indeed, much was said concerning the second element - foreseeing the forbidden result - whereas here, the case calls for the placing of emphasis on the first element, volition.

(1) In my judgment (ibid (1), at p. 545), I added these words:

> "Intention' means that at the time of the act, a person not only foresaw what was to come but also desired it... It is necessary to prove criminal intent as regards most offences, that is to say, in addition to a voluntary action, anticipation accompanied also by a desire to cause the outcome which is forbidden."

"Criminal intent", therefore, constitutes a more complex notion than "criminal mind" in its aforementioned meaning, in that "volition" plays a part in it (the criminal intent) even as regards the injurious result and not only as regards the immediate action that served as the means for causing that result. We are accustomed to saying that A "'intended" to do a certain act, whereas, assuming that that act does not constitute by itself the object of the legal prohibition with which we are concerned, we will not attribute to that man a "criminal intent", if he did not have in mind, as the final aim "desired" by him, the injury that will flow from his act and which the criminal law is designed to prevent. If A, holding a loaded revolver in his hand, waves it in the direction of B only in order to frighten him, and a bullet happens to fly out and causes the latter's death, we will not attribute to A a "lethal intent". in that he did not "intend" such a result, that is to say, did not wish it. But on the other hand, it is true that where a volition exists regarding the injurious outcome, there in any event exists a volition in respect of the means by which it is obtained (Salmond, Jurisprudence, tenth edition, p. 380) - whence the saying: "He who wills the end wills the means".

In our case, in order to commit the felony of murder, of which we are asked by counsel for the respondent to convict the appellant, there is required, inter alia, a "lethal intent" (see section 216(a) of the Ordinance), that is to say, a volition regarding the fatal result, and of necessity also a volition regarding the action likely to lead of itself to the same result; in other words, a "criminal intent". The lighter offence of manslaughter, however, of which the appellant was convicted by the District Court, is satisfied, in addition to the foreseeing of the anticipated danger to the life of the victim or to the soundness of his body, by the existence of a volition only as regards the criminal action. Accordingly, "volition" relating to the criminal action constitutes an element common to both those offences. But for the purposes of the trial of the restricted question before us at this stage, there is no point in separating the two aspects of volition. It will be recalled that the question is whether the defence of insanity is available to a person criminally charged either with murder or with manslaughter, where it has been proved that in fact, on the one hand, he was aware of the fatal result likely to flow from the act that he was about to do, whereas, on the other hand, he lacks volition, in that the mental disease that afflicted him has released powerful forces lying dormant within him and has forced him to act in the way he has acted. The facts

hypothesised in order to establish that question mean, therefore, that the element of volition is absent "all along the line", both as regards the result and as regards the action, in that in consequence of the mental disorder, the accused has been deprived of the capacity of avoiding the act that was to enable the realisation of that aim. Thus, as we established earlier, those facts are identical with facts in our case. It follows that hereafter we shall concentrate on the "voluntary element" of mens rea, without separating the two aspects of this element, as stated.

(2) Even if the phrase "the foreseeing of the prohibited outcome", in place of the expressions "knowledge", "understanding","capacity to understand", and the like, is a relatively modern phrase in use for describing the intellectual element that the notion "mens rea" entails, the fact is that the need for the presence of the "voluntary" element, in its plain meaning, has been referred to over and over again in English legal literature throughout many generations. In the middle of the seventeenth century, Hale wrote ("Pleas of the Crown", Vol. 1, pp. 13-15):

> "Man is naturally endowed with these two faculties, understanding and liberty of will... The consent of the will is that which renders human actions either commendable or culpable... Where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses."

Blackstone, who wrote in the latter half of the eighteenth century, also referred to the same principle of volition ("Commentaries", Vol. 4, Chapter 2); so, too, Stephen, more than a hundred years later ("History of the Criminal Law of England", Vol. 2, p. 97), and even Holmes, at about the same time (in his book "The Common Law", p. 54). In our times, Turner stated it (see Kenny, "Elements of Criminal Law" edited by him, p. 24) in these words:

> "In cases in which a man is able to show that his conduct, whether in the form of action or of inaction, was involuntary, he must not be held liable for any harmful result produced by it."

Those authorities suffice to show that we are not speaking of a single or chance ruling, but of a principle that has become a firm foundation of the common law and which started back in early days (the idea of *voluntas nocendi is mentioned as* early as the writings of Bracton, who wrote in the thirteenth century; vide Keedy's above mentioned article, at p. 548, note 43). If in England, therefore, the rule of insanity on the criminal side has become crystallised through a neglect of the voluntary element, that phenomenon should be regarded as a serious departure from the system that struck roots in that branch of the law a long time ago and which has continued in it till this day.

(3) What is meant by "the voluntary element"? First of all, it is important to note that when they talked of "volition", common lawyers were referring, in the main, to the process in which a person exercises a "choice" between alternative objectives. and therefore also a "choice" between alternative lines of conduct. Their basic approach, again a completely ethical approach, apparent also from the remarks of Hale which I have mentioned, was that every normal man is endowed with a "free will", and is able, therefore, to choose between right and wrong, between conduct that is proper from the moral point of view and conduct that the criminal law (giving expression to the rules of morality) looks upon with disfavour. So they called an offender the man who was faced with the choice of doing "as one should", and yet went and misbehaved and did wrong; in the language of Maimonides (Hilchot Teshuva, Chapter 5, Halacha "A"):

> "The right is given to every man: if he wishes to follow the good path and to be righteous, he is free to do so; and if he desires to follow the path of evil, and to be wicked, he is free to do so".

Professor Roscoe Pound once wrote (quoted by Glueck, p. 111):

> "Our traditional criminal law thinks of the offender as a free moral agent who, having before him the choice whether to do right or wrong, intentionally chose to do wrong"

According to that viewpoint, "will" means, not just will, but free will, and "volition" means, not only a muscular movement, but an action preceded by free choice. "Willed movement", comments Perkins (in his article, "Rationale of Mens Rea", 52 H.L.R., on p. 912), "always has a voluntary element and hence the phrase voluntary act' is merely tautological as so applied." There is perhaps no need to state, that experts in psychology also recognise today the function fulfilled by "choice" as regards the process of volition (see the book "Psychology", by Harvey A. Carr, at p. 314). But, while English lawyers in the past placed the emphasis on that factor, those engaged in research in the above-mentioned field today also take into account the "striving or conative tendency" working in any case within every person and frequently aiming at giving relief to the emotions. In his book, Glueck writes (p. 114):

> "The striving or conation... is of the very essence of mental life, and continues constantly. The volition is merely a more strongly felt striving, as the result of judgment or choice between alternatives; in other words, the volition necessarily implies the entering of conscious intelligence into the compound mental experience."

Thus, that mode of thought of giving preference to the action of an utterly intellectual faculty, or "choice", in the process of volition, is what led astray the shapers of the rule of insanity on the criminal side in England, as will become clear later in this judgment.

Secondly, a distinction should be drawn between an "unwilled" action and an action carried out as the consequence of compulsion, that is to say, between the contention that *mens rea* is lacking by reason of the absence of volition, and the defence of constraint or duress. When a particular person threatens to injure the life or property of another if the latter does not commit a criminal act, the possibility of "choosing" is indeed restricted, but it does exist within certain limits. If the man to whom the threat is directed yields and commits the act demanded of him, it means that he has acted "of his own free will", since even if that criminal act is not "desired" by him, even less desirable to him - at least so he considered - is the loss of his life or property; so he chose to follow a line of conduct that led to the outcome less objectionable to him (see Stephen, pp. 101-102). Accordingly, it is understandable why the defence of necessity was limited in its application to a limited

number of cases - those where the threat is of injury to life or limb, as distinct, for example, from the threat of injury to property (see section 17 of the Criminal Code Ordinance). On the other hand, however, it is equally clear that nothing in that same restricted approach adopted by criminal law to the problem of necessity, hints at a narrowing of the principle of *mens rea* in the sense of the voluntary element therein, a principle that logically requires exemption from liability in every case that is unaccompanied by the element of "choice" or "free volition" of the act, the subject of the offence charged.

Thirdly, the fact is that in the past, in order to illustrate an action that was "not voluntary" and was for that reason bereft of any criminal character, some of the English authors and judges were content to quote an example of the kind where the hand, arm or body of another person is used as the instrument by means of which the injurious result was caused. Take for example, Hale, who wrote in his work (Vol. 1, p. 343):

> "If A by force takes arm of B and the weapon in his hand, and therewith stabs C, whereof he dies, this is murder in A, but B is not guilty."

As early as 1842, in the case of *Reg. v. Pitts* (21), the English judge explains to the jury that "A man may throw himself into a river under such circumstances as to render it not a voluntary act; by reason of force, applied... to the body..."

It is in fact very doubtful whether it is possible in cases of that kind to attribute even the criminal act to a person whose body, or part thereof, has served as an instrument in the hands of another, and whether the question of volition arises there at all. But it is very likely that the start of the "voluntary element" is to be found in a case concerned with facts of that kind (an example similar to that quoted by Hale was cited as early as 1550 in the case of *Reniger v. Fogossa* (22); see Keedy's article (*loc. cit.),* and *vide* Russell on Crime, tenth edition, p. 29). Nevertheless, such words of illustration ought not to be regarded as indicating a tendency to restrict the rule of exemption from liability by reason of the absence of volition only to that class of cases in which physical force exerted by another constituted the cause of the criminal act; for a person will equally be exempt if his criminal action was not accompanied by will as a consequence of his being stricken with a particular mental condition that is quite unrelated to external physical influence. In other words. there is no

justification (and this equally applies to the provision to be found in section 11 of the local Ordinance) for limiting the generality of the "voluntary" principle, as it has developed in England in the course of time and the meaning of which, as Stephen stated, is that "no involuntary action . . . amounts to crime" (Vol. 2, p. 100). "I do not know indeed", he goes on to comment, "that it has ever been suggested that a person who in his sleep sets fire to a house or caused the death of another would be guilty of arson or murder".

Only a few months ago, in the case of *Reg. v. Charlson* (23), a man was acquitted in England of a charge of causing grievous bodily harm to his son and maliciously wounding him, in view of the medical evidence which raised the possibility that he was suffering from a cerebral tumour, and as consequence of that condition was acting, at the time of the deed, as an automaton without self-control, even though he did not raise the defence of insanity at his trial. After dealing with the standard of mens rea required for each of the offences contained in the indictment, Barry J., in his address to the jury, cited the example of the man who, while in the throes of an epileptic fit causes another's death. That man, as he said, would not be punishable since he was acting as an automaton without any control or knowledge of the act which he was committing" (ibid., at p. 862). In likening such a case to the matter being tried before him, the judge arrived at the following summary:

> "The question is whether the accused knew what he was doing when he struck the blows. If he did not know...if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit then no responsibility rests on him at all..." (Ibid. p. 864 (23).)

See also the remarks of Professor Jerome Hall in his book, "General Principles of Criminal Law", p. 388:

> "...movements in the course of an epileptic seizure no more constitute volitional conduct than does slipping on an icy walk..."

Fourthly, the cases last mentioned, namely, where a person commits a criminal act in his sleep or during an epileptic fit, are truly cases in which that person was acting without

cognisance or consciousness. That indeed is the fact that determines that there is a lack of self-control, seeing that volition involves the presence of cognisance or consciousness. A person who extends his hand without sensing that he is doing so is not making a voluntary movement-he lacks consciousness. All criminal behaviour, according to Glueck (p. 98), entails:

> "...the exercise of the capacity for *conscious,* purposive, and therefore voluntary action."

"Free volition", he says (pp. 104-5), means:

> "The capacity to express, partially inhibit and consciously guide the innate tendencies to purposive action."

Again (at p. 107):

> "The state of mind includes the *consciously* controlled striving tendency which we call volition."

However, the opposite is not true, that is to say: the absence of volition does not necessarily involve the non-presence of cognisance or consciousness. Those who claim that the defence of insanity extends to "a sick impulse that is irresistible", wholly assume, as we have seen, that the accused was fully conscious, and even aware of the injurious result liable to flow from his future conduct, yet nevertheless was unable to avoid it because, at the time of the act, he was not in control of his will-power. "Where there is consciousness", notes Glanville Williams (in his book, p. 13), "a party is capable of 'acting' even though he is subject to an uncontrollable impulse. An act presupposes will, but not 'free' will." As stated, the body of evidence in our case indicated an identical factual situation. Accordingly, from the stand-point of the principle of *mens rea,* in the sense of the voluntary element involved therein - from the standpoint of the *system* of the common law on the criminal side - there exists no *logical* reason, as distinct from practical considerations that perhaps demand a different conclusion, for not absolving from responsibility even in cases of that kind. That, too, was propounded by Professor Glueck when he stated (p. 117):

> "...According to the *theory* of criminal law, an impulse shown to have been irresistible is just as destructive of the intention and volition necessary to constitute the mental element of a criminal act, as *unconsciousness* of the act, or mistake of fact."

That indeed is the consistent approach of Somerville J., in the case of *Parsons v. State* (28), which is, as stated, the leading case in the United States, and in which the argument of "sick impulse" was accepted. After noting that there are two basic elements necessary before there can be legal liability for any offence: (a) the ability of the mind to draw distinctions and (b) freedom of the will, the judge added :

> "If, therefore, it be true, as matter of fact, that the disease of insanity, can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will and thereby destroy the power of the victim to choose between the right and wrong, although he perceive it – by which we mean the power of volition to adhere in action to the right and abstain from the wrong - is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not..."

Fifthly, I do not overlook the fact that, among those engaged in research in jurisprudence, there exist two views regarding the place to be allotted to the voluntary element in criminal conduct. One view says that "volition" constitutes an element belonging to the "act", or, as Salmond says, act means "any event which is subject to the control of the human will"; accordingy "volition" constitutes one of the basic elements of the *actus reus* - meaning that, without volition, we will not attribute even the offending act to the accused (see Professor Jackson's article in the book, "The Modern Approach etc.", at p. 270 et seq.). On the other hand, the other view says that volition, being a mental element, belongs to the principle of *mens rea,* for otherwise, as Glanville Williams states *(vide his* book, p. 14), we should render the legal distinction between "act" and "state of mind" empty of all content. Wigmore, too, is party to this view (Evidence, second edition, Vol. 1, section 242),

when he holds that "the specific will to act, i.e. the volition exercised with conscious reference to whatever knowledge the actor has on the subject of the act" constitutes "the distinct element in criminal intent".

Although I am inclined to the latter view, I do not attribute great importance for the purposes of the present case to this difference of opinion.

(1) Even the protagonists of the "act theory" - the first view - do not deny that, as regards volition, we are referring to an obvious mental element the existence of which is requisite for the completion of the offence, and so if the finding of that element is negatived by a mental disease, there can be no justification for regarding the person possessed of such a disease as punishable.

(2) This requirement of the criminal law has been specifically laid down following on the development of the doctrine of mens rea and under its influence.

In that matter, Turner commented (in Russell, pp. 29-30):

> "This requirement (that his actions must have been voluntary) was a natural development from the original conception of *mens rea,* for it is not easy to detect wickedness where ...a man's mind and will are not directed to what he is doing; it would therefore not seem improper to employ the expression *'mens rea'* to describe the particular element in criminal liability which must be proved against the accused person."

And the question of insanity, with which we are dealing, also fits in with the traditional approach of the common law towards "mens rea".

I am in a position, therefore, to sum up my remarks at this stage in this way: From the standpoint of the legal aspect by which the common law observed the defence of insanity, this matter is to be regarded as pertaining to the question of the existence of "mens rea"; that fundamental principle has always necessitated the presence of volition in the accused at the time of the criminal act; the fact that this element was, through the influence of serious

mental disorders to which he was at the time subjected, absent, suffices logically to justify his relief from punishment.

C. As stated, the English rule of insanity did not succeed in developing in the spirit of the previous conclusion. The lawyers who had a hand in the shaping of it, would lay down from time to time, as the test by which to determine the existence of a mental disturbance sufficient to absolve from responsibility, only formulate expressly referring to an impairment of the reason and the understanding, as distinct from an impairment of the will and the emotions. Take each of the tests prevailing at any given time on this problem and you will find that this and no other was the way the question was treated. This applies, for example, to the distinction once made by Hale between "utter" madness, which relieves from punishment, and "partial" madness, which does not so relieve, and to the essence of the test which provided for the discovery of madness of the first kind, namely, a standard of understanding below that of a healthy youth of the age of 14. The same emphasis on defect of the reason characterises that test that Bracton mentioned long before, and which was adopted in 1724 by Tracy J., in the case of *R. v. Arnold* (24), namely, that a person will not be regarded as punishable who "do not know what he is doing, no more than... a brute, or a wild beast"

(quoted in the collection of judgments, "Criminal Law Cases", by Michael and Wechsler, p. 809). It applies to the well-known formula of Hawkins, who wrote at the end of the eighteenth century - the formula of "a natural disability of distinguishing between good and evil" (Pleas of the Crown, sixth edition, Vol. 1, section l), which in 1812, became, in Lord Mansfield C. J.'s direction to the jury in the case of *Bellingham* (25), a test of the absence of ability to distinguish between right and wrong. "If a man were deprived", he says :

> "of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man, so destitute of all power of judgment, could have no intention at all" (quoted in the above mentioned collection, p. 808).

Erskine, too, who in securing the acquittal of his client Hadfield, succeeded in disproving Hale's distinction and saw in a sick delusion "the true character of insanity", took pains to point out in particular the impairment of the reasoning system. Even the conclusions of persons suffering from delusions are sometimes "sound and reasonable", he said, but "the premises from which they reason, when within the range of malady, are... false" (Russell, Vol. 1, p. 49).

Such is the kernel (I have no intention of making an exhaustive historical analysis) of the idea along the lines of which the rule of insanity ultimately took shape in the form of the famous M'Naghten Rules, in which, too, the emphasis was placed, as stated, on the disturbance of the system of cognitive senses, as distinct from the disturbance to the volitional and emotional systems.

It is very evident that those rules, like the tests and formulas that preceded them, contain one weak point important to our case, namely, the formulists' assumption that man lives in fact by his reason alone, that is to say, that that element in his personality alone guides his behaviour and directs it; whereas we know today, insofar as the psychological theory of our times teaches us so, that man's 'ego' constitutes a unit combining the systems of the reason, the will and the emotions, without any possibility of separating them, and that in the mental process, both the systems last mentioned accordingly fulfil functions no less - and perhaps even more – important and powerful than those that the cognitive senses fulfil. However, in order to elucidate my remarks, it seems advisable, at this juncture, to quote a little of the criticism that has been levelled at the M'Naghten tests, in the light of the findings of the psychological-psychiatric science of modern times.

In a highly significant judgment delivered about a year and a half ago by the Federal Court of Appeals in the District of Columbia of the United States, in the case of *Durham v. U.S.A.* (31), Bazelon J. said, at pp. 16-17:

> "The science of psychiatry now recognises that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong

> test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behaviour...
>
> Nine years ago we said: 'The modern science of psychology ...does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go'."

In that decision, a passage was quoted from the strong language employed by Professor Glueck in reference to the same matter, and in which he gave the M'Naghten tests the name of "knowledge tests". These are his words:

> "It is evident that the knowledge tests unscientifically abstract out of the mental makeup but one phase or element of mental life, the cognitive, which, in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumption of an outworn era in psychiatry; (1) that lack of knowledge of the 'nature or quality' of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved..."

Finally, in the Report of the Royal Commission which I have already mentioned, it is noted (p. 113, s. 324):

> "The gravamen of the charge against the M'Naghten Rules is that they are not in harmony with modern medical science, which is reluctant to divide the mind into separate compartments - the intellect, the emotions and the will - but looks at it as a whole and considers that insanity distorts and impairs the actions of the mind as a whole. The existing

> Rules, which so patently divorce the reason from other mental functions, are peculiarly open to this objection, and it would manifestly be lessened by the addition we have suggested."

That criticism suffices to reveal to us the real reason why in their endeavour to define the rules touching the question of insanity, common lawyers ignored the voluntary element implied in "mens rea" - an oversight that is almost without precedent in the other problems of the English criminal law. The truth is that they did not pretend in any way whatsoever to disown the actual need for this element in the body of the offence, but under the influence of the misleading notions prevalent in the world of medical science of their time, they were possessed of the idea that, in the realm in which the mental process in a man exists, the government is *entirely* in the hands of the reason, and that the will and the emotions serve only as "satellites" of the former, and are subordinate to its rule. Nowadays, as stated, there is a disposition to think otherwise, namely, that those three systems, between which a constant mutual activity is going on, constitute a combined unit that is not capable (save for purposes of analysis and explanation) of separation or division, and that it is very likely that it is just the will and the emotions that occupy the important place in the mental side of life, whilst the "ability to understand", "consciousness", "knowledge" and the like are no more than auxiliary instruments made available to the other systems (Glueck, p. 251).

So we have seen that when the consciousness is impaired to such an extent that a person does not know (or only half-knows) what he is doing, and also when his ability to distinguish right from wrong is impaired, the power of free will is in any event weakened to a considerable extent if not extinguished entirely; and so, insofar as the various formulators of the tests regarded one of these conditions as justifying exemption from criminal liability, then by the same token they were in fact taking into consideration the requirement that the criminal action be accompanied by the voluntary element, Wherefore there is no cause for quarrelling with the words of Hale when he says:

> "And because the liberty of choice of the will presupposed an act of understanding to know the thing or action chosen by the will, it follows that where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."

However, when he concluded that only the negativing of the totality of the power of reason justifies the removal of liability, in that only in the existence of a situation of that sort is there evidence of the absence of volition, he was mistaken, just as afterwards the judges in the replies in the case of M'Naghten (9) were mistaken when they contended that only the lack of ability to understand what is going on or the incapacity for knowing that the conduct is prohibited suffices to negative the presence of volition and by reason thereof to relieve from punishment. It follows that the formulists necessarily ignored the voluntary element in "mens rea" in relation to the case where volition is absent, despite the non-impairment of the systems of reason and understanding in one of the meanings formerly mentioned. This, then, is the explanation for what is lacking both in the M'Naghten tests and in those that preceded them and paved the way for the crystallizing of the English rule of insanity in its present form. (For the view that the methods known as faculty psychology and phrenology, which are nowadays out-dated and outmoded, were observable at the time in the drafting of the M'Naghten Rules, see Guttmacher and Weihofen, p. 418).

So now that the ground has been removed from under the medical findings that served as the assumption and the foundation on which the settling of the present rules was based, and the weakness which we have pointed out in them has been made apparent, there remains no logical reason to prevent us from turning to the traditional method of the common law in the matter of insanity, from either of its points of view; that is to say, there exists today no logical reason restraining us from recognising the test that enables exemption from criminal liability in circumstances where the accused performed his deed in a state of lack of self-control in consequence of the mental disease that afflicted him at the time. For it is on this that the common law "prides itself" (so it is repeatedly declared in every generation), that it never rests on its laurels, but knows in every age how to take into account the ever-developing *and* everchanging facts of life, and the development of science in general (see *Kaufman v. Marginess* (2), at pp. 1032-1033).

D. Do there exist any other considerations calling for a different conclusion. This is the occasion for reconsidering the judgments that were delivered in the cases of *Kopsch* (17), *FIavelI* (16), and *Sodeman* (5), and to which reference was made in an earlier part of this judgment; perhaps the judges in those cases had in mind considerations such as these when

they rejected the defence of "sick impulse". In point of fact in the actual words employed in setting out the reasons *for* their negative conclusion, nothing is mentioned in express or specific language, not by so much as a word, that might suggest a consideration of the kind stated. In the case of *Kopsch* (17), Hewart L.C.J. contented himself with expressing his disapproval of "the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive". As to why in fact things would so turn out, the learned Chief Justice was silent and gave no explanation. In *FlavelI's* case (16), Sankey J. refused to adopt the argument that the M'Naghten Rules were alterable "in the light of modern medical opinion", only because it had been dearly laid down that those Rules are exhaustive of the law applicable on this question. Finally, in the case of *Sodeman* (5), an appeal to the Privy Council on a judgment given by the Supreme Court of Australia, Lord Hailsham was unwilling to depart from the rulings laid down in *Kopsch* (17) *and FlavelI* (16), for otherwise "the effect will be that different standards of law will prevail in England and in the Dominions."

Nevertheless, it is quite certain that the negative approach on the part of the judges in England to the plea of "sick impulse" was nourished in the past on the consideration that it is impossible, or at least exceedingly difficult, to distinguish between an impulse that a person labouring under a disease of the mind is incapable of resisting (an irresistible impulse) and one that he simply avoids resisting (an unresisted impulse). That consideration was also bound up with the fear lest the "judges of fact", being laymen, might easily be led astray by a defence camouflaged under the name of "sick impulse", instead of appreciating that the real motive for the criminal outburst is referable to anger, a will to revenge, enhanced sexual lust and such-like distractions. Outward evidence of the great weight attributed to these latter considerations may be found in the remarks of Lord Hewart made in the House of Lords some year-and-a-half before he delivered the judgment in the case of *Kopsch* (17), and in which he gave his reasons for opposing the aforementioned recommendation of the Atkin Committee. The following are his observations, presumably reflecting, in equal measure, the ground of objection of the ten judges, of whom he declared on that occasion that they partook of the same view:

> "In practice if this new limb were to be added to the alternatives in the rules in McNaghten's case it would be impossible to distinguish between

> the impulse of the person said to be suffering from mental disease, and the impulse of the ordinary offender who is moved to commit a crime for the desire for gain or revenge" (quoted in East's book, p. 67).

In a similar spirit Lord Cave voiced his objection to that recommendation:

> "I am seriously afraid that the last result may be that in many cases crimes caused either by sexual passion or by anger and vengeance which today meet with just punishment, may escape punishment altogether" (ibid., p. 68).

I think that those considerations, today and in the State of Israel, are of little or no value whatsoever.

(l) An impulse that cannot be overcome, and caused by a disease of the mind, constitutes a phenomenon the existence of which is undoubted by the professional psychiatrists of our time *(vide* Glanville Williams' book, p. 342; also Keedy's article, p. 550); the present case (along with other cases) proves that. For that reason, no court of any kind can with impunity adopt an attitude of refusing to distinguish between conduct, the cause of which lies in an impulse of this sort, and a plain angry, vengeful or sexual outburst.

(2) Neither should it on any account be thought to be beyond the capacity of a court properly to distinguish between the two, in view of the progress of medical science in this field, and the existing facility with which its knowledge and assistance in this connection may be made available, by means of expert and experienced psychiatrists, to the professional judges, to whom in Israel the task of investigating the genuiness of a plea of sick impulse is entrusted. The judges in our case, for example, were so assisted, and in the course of the trial, sufficient opportunity was given for the carrying out of a satisfactory examination of the appellant (Dr. Mengel examined him no less than 28 times), and for the presentation of an expert opinion, the contents of which were, as has already been stated, most thorough and comprehensive. Moreover, if it is contended that the present case is exceptional, an account of its obvious circumstances, whereas in the majority of cases, the court is likely to encounter diagnostic difficulties liable to confound every endeavour an its part to appreciate

the true nature of the impulse in question, then I must, in reply, refer to the considered opinion of the Royal Commission (Report, p. 109, section 313), that:

> "We do not think it would be impossible, though no doubt it might often be very difficult. Nor do we believe that recognition of the irresistible impulse would be likely to lead to unjustifiable verdicts of insanity in cases of crimes prompted by anger… or sexual passion, provided that it was always made clear to the jury that they must be satisfied not only that there was an irresistible impulse but that the impulse was due to disease of the mind."

(3) Experience abroad teaches us that in the past, the plea of sick impulse has provided an accused, who had "nothing more concrete to rely on", with an excuse or pretence only in cases where the offence with which he is charged involves the death penalty (Guttmacher and Weihofen, p. 414). Now that that punishment has been abolished in Israel in regard to the offense of murder, it seems reasonable to assume that the danger of "camouflaging" has decreased to a considerable extent. Furthermore, I attach great importance to the conclusion once expressed by Cardozo J. as to the fruits of the experience of several of the States of the United States in which the test of sick impulse has been adopted, namely:

> "I am not aware that the administration of their criminal law has suffered as a consequence" (Selected Writings, p. 387).

(4) I do not deny that from time to time, "border-line" cases are liable to come before the court, and that in such cases, it may well have difficulty in arriving at the true nature of the impulse or motive occasioning the criminal outburst; indeed, in such cases, it is bound to tread most warily before deciding on its final diagnosis. However, this difficulty involved in the task of judging does not justify (as a local authoress recently commented) "the application of the same, harsh law" to the offender "who deliberately chose to follow the pursuits of his heart", and the sick person, who perpetrated his offence "on account of an impulse that gained complete control over him" ("The Criminal of Unsound Mind", by M. Ben-Porat, "Law and Cases" for 1955, No. 17, p. 7). In other words, the admission of the possible existence of complications and stumbling-blocks in the path of making the factual

diagnosis is one thing; the recognition of the existence of a legal rule exempting from criminal responsibility by reason of "sick impulse" is another.

Nor should it be forgotten that the phenomenon of "borderline" cases is not a special feature of the present problem of the criminal law, for it has forever been the habit of that law to draw lines, every one of which is indeed clear and definite by itself, whilst the question whether certain conduct falls on one side or other of the line is not always amenable to easy solution.

(5) I have not overlooked the observations of my learned colleague, Goitein J., when he stated in his judgment in *Attorney-General v. Sepal* (4), at p. 414, as follows:

> "By concealing the unconquerable urge under cover of the subjective test, we are injecting the doctrine of the irresistible impulse into the law... If that doctrine is suitable for us, it is for the Israel legislator to enact an express law in connection therewith."

However, I think that my colleague was not referring to the impulse of which the cause of its gaining control lies in a disease of the mind, for in the remarks following thereon, he does not deal with that kind of impulse (see for example, paragraphs 10-11 of his judgment), and that kind, moreover, was not under consideration in that appeal. Indeed, in that connection, I need do no more than draw attention to the words of the Royal Commission, that:

> "No responsible person has ever proposed the recognition of irresistible impulse except in conjunction with insanity or mental disease. The general consensus of psychiatric opinion does not regard an aggressive psychopath or a sadist - and still less a person who is merely hot-tempered or sexually unrestrained - as suffering from insanity or mental disease.... ." (ibid. pp. 109-10).

The subjection of the aforementioned test to that reservation, namely, that it only concerns the impulse flowing from a disease of the mind, must of necessity, therefore, result

in the removal (or in the considerable reduction) of the fears of abuse of the plea of "irresistible impulse", and as stated, there is no connection between that test, as subject to the said reservation, and the observations of *Goitein J.* in the *Segal appeal* (4).

(6) Finally, it would be convenient to mention also at this juncture the words of the Supreme Court in the time of the Mandate, that "the defence of 'uncontrollable impulse' in insanity cases is one not known to English law, and the only test is that as stated and laid down in M'Naghten's case" *(Khalil v. Attorney-General* (1)). Now, even if I assume, as I am inclined to think, that by those remarks the court was intending to suggest that the local law followed English law, nevertheless, it is quite evident to me that no greater weight ought to be attached to those remarks than to an *obiter dictum* not necessary to the actual decision. For in the event, the court decided in that appeal to recognise the defence of insanity on which the appellant had relied, for the appellate court found on the basis of the medical evidence, that in the case of that appellant the test of "inability to distinguish between right and wrong" had been satisfied. (ibid., p. 92).

So we perceive that even the "practical" approach to the problem before us does not suffice to justify, in a suitable case, not using the "volitional' test in regard to a defence of the kind in question. On that ground, in addition to the ground concerning its lack of consistency in the day-to-day life of the law, the rule laid down in English case law cannot serve as a guide for us; whilst the "opposite" view expressed, in the wake of that ruling, in the local judgment remains as I have said, an *obiter dictum.*

E. So ends the investigation I have conducted into the English rule applying to the problem in question. In the course of that inquiry, we have given our attention to: (l) the ethical-moral aspect of the common law on the defence of insanity; (2) the principle of "mens rea", in use in that legal system in this field also, while at the same time emphasising the voluntary element contained therein; (3) the findings of modern medical science relative to our case; (4) the "practical' considerations on which those who reject the plea relating to sick impulse have placed their reliance. We undertook that inquiry with but one object in view: in order that we may be able to answer the question whether the provision in Section 11(1) of the Criminal Code Ordinance justifies, and even requires, the employment in a suitable case, as regards the said defence, of the volitional test, or whether the use of that

test is impermissible because the test embodied in section 14 are the only ones applicable. The conclusion which necessarily follows from the analysis that we have made in each of the four stages of our investigation is, that the local criminal law does indeed justify and require, by virtue of the said provision in section 11(1), the removal of the criminal liability from an accused in relation to whom it has been proved that, at the time of the act, he was prevented from controlling his will-power by reason of the disease of the mind under which he was labouring at the time.

But that conclusion cannot yet be final, and our labours will not be complete, unless we call attention to certain provisions in the local legislation, which may possibly reveal signs or hints pointing in the direction of a different, opposite conclusion. I have in mind the first provision in section 4 of the Criminal Code Ordinance; the one contained in the proviso to section 14; and the text of section 54(1) of the Criminal Procedure (Trial upon Information) Ordinance.

Section 4 of the Criminal Code Ordinance: I need not advert to the second provision in this section, since in our case we are not concerned with the construing of a term or terms, mention of which is made in the body of that Ordinance, as was the case, for example, in the appeal of *Segal* (4). As has been suggested, however. the first provision, referring us to "the principles of legal interpretation obtaining in England", is important for us. To the group of words in quotation-marks I attribute the meaning that, when we come to construe what is written in any one of the sections of the Ordinance, we are bound to take into consideration the same principles that an English court would apply, when trying to interpret the intention behind the written law that it is dealing with. Now, as is well known, one of the principles of interpretation is that whenever there exists a contradiction between two provisions belonging to one written law, then if the application of the one provision is limited to a special group of matters - a kind of *lex specialis* - whilst the other provision is general and relates to all the material constituting the subject matter of the law - a kind of *lex generalis*- then the latter is rejected in favour of the former; that is to say, preference is given, to the extent to which the particular matter mentioned therein is concerned, to the special provision, and the general provision is interpreted as referring to the other matters to which it may suitably be applied.

The pertinence of that principle to our case might possibly be this : since the exemption from criminal liability on account of mental disease is mentioned only in section 14, and even the heading, "insanity", appears in the margin of that section alone, then it is in the nature of a "lex specialis", designed to apply to the kind of cases in which the accused seeks an acquittal on account of the mental disorder that affected his behaviour, whereas section 11(1), which embodies the voluntary element of "mens rea", does not expressly mention either "mental disease" or 'insanity", or (aside from the exception coming at the beginning) any other special matter. In a situation such as that, must we not take the view, when speaking of a plea of madness based on a mental disease, that the "general" provision in section 11(1) is rejected in favour of the "special" provisions in section 14, and is it not essential, therefore, to regard the latter as exhaustive and all-embracing ?

Secondly, the second part of section 14 read

> "But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

The question is whether that language does not also reveal a tendency to confer a meaning of "exclusiveness" on the tests set out in the first part of that section.

Thirdly, in subsection (l) of section 54 of the Criminal Procedure (Trial upon Information) Ordinance, in which the form of the verdict of "guilty but insane" is laid down, the legislator directed that that is the form to be used if it appears to the court that at the time when he perpetrated the criminal act, the accused was, by reason of the disease of the mind then affecting him, "incapable of understanding what he was doing or of knowing that he ought not to have done the act, etc." This provision was enacted some three years after the enactment of the Criminal Code Ordinance, including section 14 thereof (Official Gazette 964, dated November 23, 1939, p. 115); and so the question necessarily arises whether there may not be in the subsequent provision some evidence of an approach on the part of the legislator (which would, of course, be entirely consistent and unambigous), namely, that only if there is present in the accused one of the conditions mentioned in the

two laws together, will there be room for recognising the defence of insanity which he has set up, whilst the provision in section 11(1) aforesaid is entirely foreign to that defence and is inapplicable to it.

I have considered most carefully each of these three possible "objections", and my final opinion is that there is nothing in any of them, nor in their "combined effect", which can unfavourably affect the conclusion I had come to before I took them into consideration. I shall set out the reasons that led me to dismiss them.

The first "objection": I respect the principle of interpretation mentioned above. But the present case is hardly a suitable one for its application. First of all, the principle that a special provision takes precedence over a general provision is taken into consideration, as stated, only when there exists between the two a contradiction that cannot be settled in any way, so that the application of the general provision would of necessity mean the total exclusion of the special provision. But, if there is no complete contradiction between the provisions in question, and there is no need to hold that the legislator disclosed a lack of consistency in relation thereto, the court is bound to aim, as far as is possible, towards giving effect to all parts of the law under consideration (see the authorities collected in Craies, fifth edition, pp.205-206). Thus the recognition, on the basis of the provision in section 11(1). of the pertinence of the above mentioned "volitional" test to the defence of insanity creates no inconsistency whatsoever between that provision and the provisions contained in section 14, in the first part, in that here we are speaking of a test supplementary to the ones provided in that section, and therefore of the addition of a test that stands in no contradiction whatsoever to the other two.

Secondly, I do not think that in enacting the first provision in the mid section 4, the legislator intended at the time that the court here should accord to the principles by which the written laws in England are customarily construed, a greater value than that accorded them by the courts of that country; and everyone knows that the character of those principles (as distinct from "the general rules of law", that are more strict) is elastic, and their task, at the very most, is to create a "presumption" in favour of a certain meaning in the event of the language of the provision under consideration being ambiguous and capable of more than one interpretation (Craies, p. 8). In other words, those principles are designed

only as guides to enable us to understand what is inferential, but they cannot override, or deflect us from, the clear and express language of the provision of a law. (*ibid*.) Thus, the drafting employed by the legislator in section 11, subsection (1) (in which he insisted on the presence of the voluntary element in "mens rea" by the side of the criminal act, with the reservation that this requirement does not apply to the provisions relating to negligent acts or omissions alone) is so clear and express as to make it hard to imagine that he intended to place a further restriction on the application of that "voluntary" requirement or to negative its importance as regards the case where the defence of madness is based on the extinguishing of the free will as a result of a disease of the mind. In other words, the "broadness" of the principle of volition emerging from what is said in the aforementioned subsection, on the one hand, and the exception introduced by the legislator to the application of that principle, on the other, suffice, when taken together, to explain away the non-reference to the terms "mental disease" and "insanity", either in section 11 itself or in its marginal note.

The second "objection": In my opinion, the provision contained in the proviso to section 14 is no more than a warning that "medical madness" is one thing, whilst "legal madness" is quite another; that the tests laid down in that section were not intended to cover all the cases where the presence of any kind of mental disorder in the accused has been proved; and that it is possible for him to bear criminal responsibility even if he were thought, in the minds of doctors, to be a person who was at all relevant times "of unsound mind". But, the drafting of that provision does not oblige us to interpret it as laying down in absolute form that only if one of the tests stated in section 14 existed can there be room for relieving from punishment the person labouring under a disease of the mind. Had the legislator also included, for example, the 'volitional test', in that said section, the addition of the above mentioned provision would still not be superfluous, as Stephen's wording shows (see his book, "History of the Criminal Law", etc., Vol. 2; at p. 149). The reason is that here we are in a province the limits of which are far from clear - the field of "mental abnormality" - and the question whether the mental disorders afflicting a particular accused have reached a degree justifying the removal from him of criminal responsibility, is likely, as in all cases where the question of responsibility is one of degree, to arouse differences of opinion and to involve conclusions that are not agreed upon (see the observations of the Royal Commission at p. 100 of the Report, section 285). For that reason, the legislator

came to warn us that a disease of the mind alone is not sufficient to produce an acquittal if none of the tests set out in the first part of section 14 is present in the accused. But those words of warning ought not to be regarded as designed to negative the value of the aforesaid volitional test, that, is to say, that one must not deduce from them an intention to impose criminal liability on a person whose mental disorders have brought a loss of control over the will-power. True it is that that last test is not mentioned together with the other two set out in the body of the provision in question, but this phenomenon may be explained thus, that in the first part of section 14, the legislator concentrated our attention only on the "cognitive" tests, whereas he included the volitional test in the provisions of another section - in the provisions of section 11(1). Hence what is written in the proviso to section 14 cannot make any difference either way as regards the question of the exhaustive nature of the tests laid down in the first part.

The third "objection" : I have not the faintest doubt that when he enacted the provision in section 54, subsection (1), of the Criminal Procedure Ordinance, the legislator's mind was directed only to the tests that he had provided earlier in section 14 of the other Ordinance. Nevertheless, I am of the opinion, that that provision alone, having regard to the fact that it deals only with the form of verdict to be given in a case of insanity, cannot narrow the area of application of the provision found in the said section 11(1) and requiring that the criminal action be accompanied by free volition. For if that is not so, then you are in effect compelling a construction - by means of a provision having a purely procedural import which cuts down the scope of a provision having a substantive import of real importance - and that cannot be so. I should equally have reached the conclusion even if section 54(1) had not in the meantime been repealed (see section 31, subsection (3), of the Treatment of Mentally Sick Persons Law, 1955).

Thus, weighed against each of the three "objections" dealt with, and even against their "combined effect", is the approach that demands, first, that we should repel with distaste the idea of punishing a man whose act derives solely from his madness, and, secondly, that we should regard the rule on this question as being part and parcel of the central theme underlying the whole of the criminal law both here and in England, namely, "mens rea", with all the elements contained therein, including the "voluntary" element. From this point of view, the observations of my colleague, Silberg J., in the *Sepal appeal* (4) are directly in

point in our case: "Before us.... lies a question of method and attitude and not [just] a question of meaning and interpretation" (p. 411). So, indeed, decisive for me are the method and the attitude, according to which punishment is for those who, when they committed the criminal act, were healthy in spirit, a concept entailing volitional capacity, too, and not only rational and intellectual capacity. Any other approach implies the limiting of the rule and its confines to the area of operation of two tests, narrow in outlook and strict in character, as Lord Bramwell frankly admitted, when he said:

> "The present law lays down such a definition of madness, that nobody is hardly ever mad enough to be with in it....."

Accordingly, when in our times, the local legislator has left us, in section 11(1), an opening wide enough to enable us to escape from the narrow path, let us make use of that opening, and move on to the broad highway.

Accordingly I can summarize the rule in this connection as follows:

If it has been proved that -

(l) at the time of the act, the accused was incapable of reventing the conduct with which he is charged;

(2) as a consequence of being deprived of his will-power or its weakening to a considerable extent;

(3) by reason of the disease of the mind under which he as labouring at the time; then he will not be regarded as punishable and will be absolved from criminal liability.

Since I decided above that, from the point of view of the facts of the case, all these elements were present in the appellant in this case, the result is that he is absolved from criminal liability both as regards manslaughter, of which he was convicted, and as regards murder, of which we were asked to convict him by counsel for the respondent. We are

thereby relieved of the necessity of going into the merits of the cross-appeal, the foundation for which has in any case collapsed.

It remains for me to deal with a short procedural point concerning the form of the verdict which we must return, as well as the "manner of treatment" which we must settle. As I have already mentioned, on July 6, 1955 the Treatment of Mentally Sick Persons Law, 1955, was published (Statute Book, No. 187), in which the legislature, in section 31, subsection (3), repealed section 54 of the Criminal Procedure (Trial upon Information) Ordinance, and replaced it with the provisions of section 6 of the amending Law. This change, therefore, came after counsel for the parties had concluded their submissions before us. Section 6, subsection (b), of the new Law reads as follows :

> "Where an accused person is brought to trial, and the Court finds that he has done the criminal act with which he is charged, but decides. .... that by reason of his having been ill at the time of committing that act he is not liable to punishment, and that he is still ill, the Court shall order that he be admitted to a hospital."

But for this alteration in the Law, we might well have been involved in a certain procedural complication, on account of the form of the verdict "guilty but insane" being dependent on the conditions stated in the now-repealed section 54(1), and on those alone. Then, the question would have arisen, what form indeed should the verdict take in a case such as the one before us. Admittedly, it has already been noted above that that difficulty could not have affected the actual question of criminal liability. So, the said language of the provision of the new Law relieves us of the task of solving that problem, though only on the assumption that we are directed to apply that new provision in our case. I am of opinion that we are in fact bound to do so.

As for the form of the verdict "guilty but insane", the explanatory remarks of Lord Reading in the case of *Felstead* (2), as we saw above, made it plain that the meaning of that phrase is that the accused is entirely absolved of criminal responsibility, that is, in the language of the said section 6(b), "he is not liable to punishment". From that point of view, therefore, the Israel legislator has produced nothing new by this amendment. For all that, it

is well that it repealed the former phrase, for it was illogical and confusing and originated in England by pure chance.

As for the "manner of treatment" that the Court ought to determine for the accused whose plea concerning insanity has been accepted, the legislator has made a fundamental alteration in its amendment, seeing that from now on, the court is bound to order the accused's committal to a mental hospital, if it has found that he is still suffering from a mental disease, whereas under the repealed provision it had no alternative, but to confine itself to the giving of an order for the accused's detention for such period as the Minister of Justice deems fit. But that revising or amending provision has no punitive content whatever, but rather is designed to secure for the accused who is of unsound mind the treatment he needs, on the one hand, and, on the other, for the public the protection to which it is entitled.

That being so, my opinion is that we must act in accordance with what is set out in section 6, subsection (b), of the new Law.

In the light of the above, I propose that the following order be made:

(a) The appeal is allowed and the cross-appeal dismissed:

(b) The conviction and sentence are quashed:

(c) The appellant is not punishable, by reason of his having laboured under a disease of the mind at the time of the act;

(d) The appellant shall be committed to a "hospital" within the meaning of the Treatment of Mentally Sick Persons Law, 1955, unless it is submitted that after the conclusion of counsel's argument, the appellant's condition changed for the better. In that event, the case shall be returned to the Haifa District Court with a direction to act in accordance with section 6, subsection (d), of the said Law for the purpose of determining whether an order for hospitalisation should be made under that section.

SILBERG J. I have read with great care and with the greatest interest the profound and brilliant judgment of my learned colleague, Agranat J.

I fully concur in my learned colleague's attitude towards the question of irresistible impulse *de lege ferenda,* but to my infinite regret I am unable to agree with his view as to the *lex lata* of the State.

2. My reasons are as follows.

Those who expect to see in the law in general, and in criminal law in particular, a proper reflection and faithful image of the scientific achievements and moral outlook of our generation, will agree that, since the M'Naghten Rules, as defined in the middle of the l9th century, do not correspond with the experience of medical science of today, it is desirable to "improve" and adapt them whether by redrafting or by supplementing the language, to the standard of our modern outlook. Since then, several barriers have fallen and several false notions have been dispelled. The organs of the body are not divided into separate parts as the scholars of the old school thought, and the supposed division between reason and will, the thought and the deed, has also disappeared. As men of scientific experience, we have become enlightened and we know that all the expressions of a man's personality emanate from a single source, and although from the functional point of view, special "cells", as it were, have been devised, the mutual dependency and compensatory influence between them break down all barriers and make them into one integral unit; so that if one of them is impaired, it will become apparent in the other two. The cognitive senses cannot be dimmed without engendering the dulling and blunting of the volitional and emotional systems, and those systems cannot be damaged without affecting the capacity and activity of the guiding intellect. For the mind, whether acting in sanity or in lunacy, is comprehensive and all-embracing and constiutes the whole of the traditional trio: the reason, the will and the emotions all together. So we, the men of this generation, are not prepared to regard the M'Naghten Rules as the ultimate revelation, and our moral feeling rebels at the idea that those two tests - the tests of "intellectual lunacy" - should alone determine the sanity or insanity of the offender, when we come to examine his criminal responsibility.

3. Those M'Naghten Rules are, in fact, far more dangerous here than they are in England itself. There in England, their motherland (as well as in the United States of America), this "devil" is not so frightening; for, "If Providence created the M'Naghten Rules, it created the jury as their antidote". No matter what direction the judge may give to the jury, whenever the accused really seems to them to be insane, they frequently find him "not guilty", even if his insanity could not be brought within the framework of the M'Naghten Rules. This not infrequent occurrence has already been noted, whether it be with satisfaction or in a mood of challenge, by the witnesses who gave evidence before the Royal Commission (see the Report of the Commission, pp. 82, 83, 102). That, no doubt, amounts to a certain evasion of the law, but the members of the jury appear to have acted, rightly or wrongly, on the assumption that "better a sin with a good motive than a virtue with a bad one" [1] and so they presented the presiding judge with a *fait accompli.* (And he, no doubt sometimes says amen to that *fait accompli.)* Such, however, is not the case in our country, where the jury system does not exist. The judge is bound to apply the law, even if the law does not seem to him to be moral; he is obliged, as a result of what is written in section 14, to examine the accused's insanity according to the test in the M'Naghten Rules, and according to that test alone; and the result is that he is liable to send to the gallows (in offences the penalty for which is still death) or to sentence to imprisonment for life, a man who, in Shakespeare's language, as quoted by my learned colleague, did not himself commit the act, but his "enemy", his madness.

4. So it seems that the M'Naghten Rules, as adopted by the Palestinian legislator (with a slight change of phraseology that is of no practical importance) in section 14 of the Code, are liable to disturb our judge's peace of mind and to place him in a difficult moral dilemma. But may be here we might do some law-making of our own, extending the legislation, and applying the M'Naghten Rules, against the scientific background of today, to insanity that is not only of the intellect; or more accurately, treat the man with the irresistible impulse - if it is but founded on mental diseased - as one who does not know the nature of his act.

I agree with the opinion of my learned colleague, that from the purely legal point of view, we are not free to follow this path of extension by interpretation. This would amount

[1] A parody on a Talmudic epigram.

to a straining of the simple meaning of the said rules and an impermissible betrayal of the interpretation given them - except in a few instances - by the judges of England for over a century. It may very well be and I am ready to assume in fairness to the learned judges that had they foreseen in the stars that which was then hidden in the medical science of the future, they would have formulated those rules in wider terms, in a way that would also have embraced what we today describe by the name of "irresistible impulse". But they did not know of it, and this lack of knowledge resulted, where an offender's insanity was concerned, in placing the emphasis on the "absence of knowledge", that is to say, not on the "clouding of the understanding", a likely consequence of the diseased impairment of the volitional and emontional systems, but on actual lack of knowledge, a lack of knowledge on the part of the reason, the comprehension, the intellect, about the nature of the act itself or of the evil in it. We cannot therefore give the extended meaning to include irresistible impulses, which was not intended by the draftsmen of the Rules and which the Rules themselves do not allow for.

5. With that I reach the question whether or not it is possible to bring the rule of irresistible impulse within the shelter of our law by means of the provisions of section 11(1) of the Code. Again I would emphasize that I am not discussing this question *de lege ferenda,* but *de lege lata. My* colleague, it will be recalled, answered the question in the affirmative, and I frankly confess that it is not with a light heart, but only after serious consideration, that I have eventually decided to differ from his considered opinion. The following are my reasons for disagreeing:

(a) I doubt whether the words, "which occurs independently of the exercise of his will", that my colleague refers to, are capable of comprehending an act originating in that irresistible impulse. The exact wording of the section is as follows:

> 11(1). "Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

From the context, namely, the proximity of the words quoted to "an event which occurs by accident", and the reference at the commencement of the section to the provisions relating to negligence, it appears that here it means an act or omission which "occurred" not through the will at all. For example: A man jumped from the roof and hit and injured another, and the man who made the jump did not see, nor could he, in the circumstances of the case, have foreseen, the presence of the victim there. Here there has been a harmful act not by the will of the man who jumped, and according to our assumption, he is not guilty of negligence either, and so he is entirely absolved from criminal responsibility. The proviso emphasised in the opening words of the section, too, will not apply, of course, to an impulsive urge that cannot be overcome, and even that is something of a key, however inadequate, to the meaning of the Code.

(b) Even if we had overcome, and "for the sake of convenience", I should have been prepared to overcome, the linguistic difficulty, we are still faced with a much more serious problem. It seems to me that if we give to the provisions of section 11(1) the interpretation suggested by my colleague, we shall find that the main point is completely missing here, namely, mention of the basic condition that the cause of the accused's "involuntary" act must be his mental disease. Now, in section 14, which propounds the M'Naghten Rules, the legislator makes it a condition that the reason for the accused's lack of knowledge, either as regards the act itself or as regards the 'evil" in it, shall be his mental disease - in the language of the code, "through any disease affecting his mind" - whereas here in section 11(1), that condition is not mentioned at all. Can an act done in consequence of an impulsive urge that cannot be overcome go unpunished even where the cause thereof is not specifically a disease of the mind or insanity? It is clear that it cannot, and even my colleague does not of course disagree with that. No-one, not even the most liberal-minded expert doctor, has ever claimed that a strong carnal lust or a perverted thirst for blood might also constitute a ground for acquittal in sexual offences or murder. So the question is, why did the legislator repress his foresight here and fail altogether to mention that essential condition?

Let it not be said that this essential prior condition is so simple a matter and so much taken for granted that the legislator saw no reason for wasting words over it, for it is not so! In the appendix to the Report of the Royal Commission (pp. 407-413), several laws are quoted that recognise *expressis verbis* the rule of irresistible impulse, and in all of them

(apart from the French code, in which this point is not quite so clear) the condition, so "taken for granted", is written down black on white. For example :

> "A person is not criminally responsible for an act done or an omission made by him - .....
>
> II. When such act or omission was done or made under an impulse which, *by reason of mental disease,* he was in substance deprived of any power to resist."

(Section 16 of the Tasmania Criminal Code)

> "When the accused or the prisoner was at the time of the act *in a state of madness* which made him incapable of controlling his actions, he may not be sentenced to any punishment?"

(Article 71 of the Belgian Penal Code)

> "Any person *suffering from a mental disease...* who, at the time of committing the act, is incapable of appreciating the unlawful nature of his act or of acting in accordance with this appreciation cannot be punished."

(Article 10 of the Swiss Penal Code)

The law prevailing in South Africa, as formulated by the experts that testified before the Royal Commission, is as follows:

> "A person is not punishable for conduct which would in ordinary circumstances have been criminal if, at the time, *through disease of the mind* or mental defect -
>
> (a) .....

(b) he was the subject of an irresistible impulse which prevented him from controlling such conduct."

If our legislator had wanted to hide away the rule of irresistible impulse within the folds of section 11(1), it does not seem to me that he would have spared himself the task, but would have emphasised, in two or three words, the causal connection between the deed and the malady.

(c) Last of all - a more substantive consideration. It seems to me that from the point of view of the real content of the rule, also, section 11(1) ought not be regarded as its proper "home". The rule of irresistible impulse is not made entirely of one pattern, and not all the protagonists of that theory mean the same thing. There are those who say, for example, that the urge does not have to be impulsive, or sudden, but that it suffices if, as the result of a disease of the mind, of course, the accused did what he did under the latent influence of "strange forces": false yearnings, hallucinations, delusions, that have succeeded little-by-little in paralysing his self-will. The British Medical Association, which apparently supported this view, formulated before the Royal Commission the "third limb" of the M'Naghten tests in these words: the accused will be absolved from punishment if, as the result of a disease of the mind, he was at the time of the act "incapable of preventing himself from committing the act" (Report, pp. 110-111). The Commission examined that formula in the light of the case of a paranoiac madman by the name of Ley, who plotted a deed of assassination over a long period of time "reasonably and intelligently", and when he was tried, it appeared that throughout that period, he had been living in a twilight world of hallucinations and fantasies; and the Commission reached the conclusion that that formula would have been wide enough to cover Ley's act, and would, had he put forward the plea, have saved him from the shadow of the gallows.

"It seems to us reasonable to argue that the words 'incapable of preventing himself' should be construed so as to cover such states of mind; that they should be interpreted as meaning not merely that the accused was incapable of preventing himself if *he had tried* to do so, but that he was incapable of *wishing or trying* to prevent himself..: If each of

Ley's acts is considered *separately,* it would be difficult to maintain that he could not have prevented himself from committing them. Yet if his course of conduct is looked at as a whole, it might well be argued that, as a result of his insanity, he was incapable of preventing himself from conceiving the murderous scheme, incapable of judging it by other than an insane scale of ethical values, and, in *that* sense, incapable of preventing himself from carrying it out." (My italics) (Ibid., p. 111.)

With this very approach in mind, and in order that the revised M'Naghten Rules "should cover most of the cases where a defence of insanity ought to be admitted", the members of the Commission gave their approval to that formula and suggested it to Her Majesty (p. 276). If the English legislator gives his approval to that formula, too, a criminal of Ley's sort would be relieved of punishment. It is possible that he would not be acquitted even before an English court unless the judges of England also adopt the extended interpretation given to that formula by the Royal Commission. He would certainly not be acquitted if his judges were, for example, South African or Tasmanian judges, for their law indeed recognises lunacy that is not solely intellectual as a ground for acquittal, but, as we saw above, restricts it to an act committed through impulse, in the sense used in ordinary parlance, namely, a more or less sudden urge.

Thus we observe that even this modern rule is not of unequivocal content, and it leaves room for many distinctions, disagreements and doubts. *A fortiori* several times over if, as regards the law in this country, we try to read it into the provisions of section 11(1). Our legislator uses neither the word "impulse" nor the phrase "incapable of preventing himself", but employs a colourless, neutral formula: "an act which occurs independently of the exercise of his will". Not only does that formula not solve the problem of the paranoiac, Ley, but leaves us to grope in the dark as far as other kinds of strange conduct are concerned. Who will relieve us of the doubt as to the meaning of the word "occurs" - does it mean suddenly, or not necessarily so? And what exactly did the legislator mean when he spoke of "the exercise of his will"? Was he referring, for example, to that "spiritual lunatic" à *la Hadfield* (11), who regards himself as having been sent by Providence to remove out of the way a

> certain person (not necessarily a ruler or monarch) that is, according to his crazy notions, delaying the coming of the Redeemer, and who carries out the "commandment" coolly and after considerable planning. Such a person, I think, would be "qualified for insanity" according to the Royal Commission's test; he would certainly not be so according to the South African or Tasmanian test; but it is very doubtful -- the answer may be yes or no - whether he would fall within the compass of the formula of our law. It might be argued that his insanity is concentrated on one point only: his regarding his victim as one who is frustrating the happiness of the whole of humanity; but in the light of this false vision, his desire is quite "natural", almost "sane", and I do not know whether one could properly say here his will had not been exercised, within the sense of the said section.

To sum up, the basis of section 11(1) is not broad enough to cover the rule of irresistible impulse, for it does not fit the articulation of the rule. The content of the section is not clear, its language is incomplete, and the consequence would be, not the solution of problems, but their increase. I also think - and I have already expressed my view above - that the M'Naghten Rules as they stand are out-of-date and must be extended by the addition of a test about "non-intellectual" lunacy, the volitional or emotional lunacy. But exactly how that extension is to be made, to what extent and on what terms - I am not ashamed to admit I do not know. Even the Royal Commission heard 160 witnesses before it defined the new, third test. I think it would be better, therefore, if we left that task, full of pitfalls, to the legislator and did not introduce the rule, in an incomplete form, into the framework of section 11(1) of the Code.

6. Now let us examine whether the appellant ought not to be regarded as unpunishable from the point of view of section 14 of the Code, namely, under the tests of the M'Naghten Rules themselves. A not-so-common thing in criminal jurisprudence occurred here: three doctors, great experts in the same fired, gave evidence before the court; the three of them unanimously expressed the opinion that at the time of the act, namely, at the moment of shooting of the deceased, the appellant was "in a state of trance", yet nevertheless, the three learned judges rejected that opinion and decided what they did. Now, these were the experts' words:

"I imagine that (the appellant) had no intention of harming Shifman... for he was in a state of trance...When, in answer to a question by the court, I said that if a policeman had been standing in front of the accused, he would not have fired, I was referring to the start of the shooting, before he started firing at Luba, but afterwards, when he fired at Shifman, the presence of a policeman would not have helped - not even a regiment of policemen, for then he had already entered into his world of fantasy, into a state of 'amok'." (Dr. Vinik, on pp. 167, 168, 172, 173).

"It seems likely, you see, that the patient (he is referring to the appellant) was acting under a clouding of the mind strong enough to become a state of trance, and in such a state, a man does not know what he is doing...It is difficult to determine when this state of trance began, but it must be presumed to have started after the second shot that he fired at Luba Kreiner... the moment he acted against Shifman, apparently he was not acting in full consciousness." (Dr Mengel, on pp. 210, 212).

"I am most certainly of the same view, that at the time when he fired at the victim, he was in a state of trance ...as to the fact of the state of trance, there was no doubt in any of us... I know that Dr. Mengel, Dr. Meir, Dr. Vinik, Dr. Kulcher and myself dealt with the accused, and I do not think the accused could have misled all five of us ...The result of the first shot was like that which caused the bursting and collapse of his 'ego' which impelled him into the state of trance. We examined his behaviour and acts at the time of the incident and after it, and we reached the conclusion that it could not be otherwise than that with the first shot the accused entered into a state of trance... An action like that of the accused while in a state of trance negatives any possibility that the accused knew what he was doing, and it is clear that there can be no talk of his being able to distinguish between good and evil to any extent whatsoever." (Dr Feldman, on pp. 216, 217, 220, 221, 222).

These are the words the doctors repeated in their evidence to the court, but the learned judges paid no heed to them, and, as stated, rejected the united opinion of all three experts. Certainly, on the ground of legal principle, there was nothing to prevent them from so doing. The court is not bound to accept the opinion of an expert or experts, even when there is no other, contrary opinion against it. But, was there also any justification for their refusal to accept it in the case before us? Let us not forget that we are dealing here with a difficult psychological question, descending to the very springs and bed-rock of an insane person's lunatic and torn soul, a question which the "common sense" of an ordinary person - and that includes a judge - does not have the requisite instruments for investigating properly. Can common sense expect to repress and contain within its down domain the tortuous struggles of lunacy and madness, and does it constitute the right measure and sole standard by which to gauge the diagnosis that the doctors have established? Obviously not! We may well imagine an instance where the judge would be absolutely justified in rejecting the doctors' version, even in a problem as difficult and complex as this, and even if the greatest experts in the world gave evidence on it. I am referring to the case where the judge's question and the expert's reply are not on the same level: both of them are indeed employing the language, "responsibility", but the one (the judge) is thinking of legal responsibility, whilst the other (the doctor) is thinking of medical responsibility, and as a non-lawyer, he does not appreciate that there exists a difference and a distinction between them. In such a case, which is by no means a rare one, the judge rejects the doctor's opinion not as incorrect, but as irrelevant. But such was not the position in the present case. Here the question was confined to one point only: whether the accused, who is undoubtedly a dangerous paranoiac, had at the time of the act entered into a state of trance as a consequence of that disease or not. If in fact the doctors were right in their affirmative reply to that question, then it is clear and beyond doubt that he "did not know the nature of his act" in the strictest, most "M'Naghtenist" sense of the expression. It follows that the learned judges rejected the doctors' version, not as irrelevant, but as incorrect. The question is, were the learned judges entitled to establish that negative medical diagnosis in relation to the present appellant?

I am bound to remark that the learned judges did not diverge from that triple evidence lightly, just like that - in an off-handed sort of way. They examined it from several angles and enumerated four grounds for rejecting it. We here, however, are relieved of the

necessity of examining all those grounds, since the judges themselves attacked decisive importance only to the fourth and last ground, which is based on the appellant's statements to the police.

> "The matters we have enumerated hitherto", the judgment lays down, "certainly shakes our belief in the version of the complete trance at the time when the shots were fired at Shifman, but we would not have rejected that version entirely on those grounds alone. We must, however, weigh in the balance the accused's statements to the police, and they, in our opinion, settle the matter with complete certainty."

Continuing, the learned judges raise a number of questions, of which the cardinal point in all of them amounts to this: if in fact the appellant had entered into a state of trance and forgetfulness at that moment, how is it that in his statements to the police, he remembered several facts? But further on, the learned judges themselves settle - with some difficulty or without any difficulty - the bulk of those queries, until eventually there remain but two of them that, according to their opinion, completely destroy the trance version. They write:

> "The trance version, in our view, is completely destroyed by the very things the accused said in his second statement to Assistant District Inspector Movshovits, about the attitude of the deceased Shifman towards him: that Shifman was causing trouble for him and he regarded him as his enemy. We see no way of getting round those statements, for they were spoken perfectly logically, though with the logic of the accused while under the influence of his false notions. And if there remains any other spark of doubt, then that, too, disappears in the face of the accused's remarks about Besser, whom he liked 'just as I liked the late Shifman and he stood in front of me and I didn't do anything to him either'... One question stands out here that has no answer: if the accused was acting in a state of trance, how did he know that Besser was standing in front of him? How is it possible to argue that the accused did not know what he was doing at that moment?..."

With all due honour and respect to the learned judges, it does not seem to me that those two queries are of sufficient force to rebut and destroy the experts' version. As for the logic in the manner in which the appellant addressed his remarks to Assistant District Inspector Movshovits, I fail to see how that detail can disprove retroactively the state of trance he was in thirty hours beforehand. *A propos* of that, a lack of logic is by no means one of the distinguishing signs of a paranoiac. On the contrary, in certain cases, his insanity expresses itself, if one may say so, specifically in the "hypertrophy of logic", in an excess of "intellectual" picking at and raking up of things that a normal person regards as having no substance.

As for the second query, as to how he, while under the influence of dreams and trances, could remember the fact that Besser stood opposite him during those fatal minutes, that too, cannot, in my view, swing the scales against the appellant. For as the experts testified, the trance does not completely and utterly erase the memory of what was done at that moment, and the man can remember afterwards certain details or parts.

> "Forgetfulness is not absolute in the case of a patient like this, and he can remember certain parts and individual details of what he did." (Dr. Vinik, p. 151).

> "After awakening from that state (of trance). he can remember individual details or individual parts" (Dr. Mengel, p. 211).

Those two experts' views touching the possibility of such partial recollection was not disproved, and in my opinion, there was no foundation for denying or even doubting the correctness of that scientific finding. That being so, the second query raised by the learned judges is automatically settled, and it follows - at least in my opinion - that there is not, nor ever was, any decisive consideration for rejecting the trance version.

7. The fact that the court below did not, in point of fact, believe in the trance version, cannot prevent us as a court of appeal from accepting it. No question of the witness' demeanour at the time of giving his evidence arises here. The question is a legal, logical one; all the same thought processes and considerations designed to determine a matter one

way or the other are laid before us, just as before the court below, so that there is no room here for relying on the well-known rule, that the court of appeal will not be inclined to upset findings of fact made by the court that tried the matter. Authority for that, if authority is needed, may be found in the case of *Jefferson* (6).

8. The conclusions I have reached, therefore, are that the defence has succeeded in proving, to the extent of the proof required of it in a question of this kind, that when he fired at the deceased, the accused was, in consequence of his mental disease, "incapable of understanding what he was doing", within the meaning of section 14 of the Code, and is accordingly not punishable, as stated in the opening words of that section.

As for the form of order, I would adopt all that was said by my colleague at the close of his judgment.

GOITEIN J.: Having read the judgments of my colleagues Agranat and Silberg JJ., I feel like a dwarf standing between two giants; but with all due respect to my learned colleagues, I have difficulty in agreeing with the conclusions of either of them. On the one hand, I incline towards my colleague Agranat J.'s version, that the circumstances of the present case and the facts thereof do not enable us to apply the provisions of section 14 of the Criminal Code Ordinance. On the other hand, I differ from his conclusion, which holds that we can find refuge in this case in the provisions of section 11 of the Ordinance. On that point, I would adopt the view of my learned colleague, Silberg J. and I, too, am of opinion that section 11 is intended to deal with an entirely different set of facts from that which has been disclosed to us in this case; and unless we are prepared to twist the meanings of the text, we cannot fit into section 11 the facts and findings established by the court below. On this point, I agree with the observations of Silberg J., in their entirety, and I do not have to add very much to what he has written. At the same time, I cannot accept another conclusion arrived at by Silberg J. This court is in no position to differ from the court of first instance regarding the facts and findings of the latter and that court is free to make such decisions on the facts as it thinks proper and attach such value and weight to the evidence of experts and other witnesses as it considers right.

2. After reading the judgment of Agranat J. I can see the desirability of the Israel legislator seriously reconsidering the question of the criminal responsibility of persons who are not of sound mind at the time of committing a criminal act. The doctrine of "irresistible impulse" may or may not be one that Israel judges ought to apply, but I have already expressed my opinion in *Attorney-General v. Segal* (3), that the merits or lack of them in the introduction of a certain doctrine into Israel law is not a matter for the judiciary, but a subject to be examined and decided upon by the Knesset[1)] alone. Such a grave and difficult problem ought not, in my opinion, to be settled by the judge. It is not for him to wear the cloak of the legislator - and, sitting on the bench of the lawmaker, to decide what is desirable for the public on the one hand and, on the other, for the prisoner standing his trial. The court would not be carrying out the duty imposed upon it if it were to follow such a course.

3. The problem of "irresistible impulse" has for some time been disturbing the thinking of the best lawyers in the most advanced countries, and it has met with a variety of answers. Many of those answers are to be found in the judgments delivered abroad and in the writings of legal or medical experts throughout the world. The problem requires a thorough-going investigation and clarification and the Knesset is the body qualified and capable of taking the steps necessary for the enactment of a law based on the conclusions and achievements of the sciences of medicine and law. I am very far from being an expert on these complex investigations into the mind of man, and I would consider it highly improper to usurp the place of the Knesset and myself lay down the law.

4. It is obvious to me that judges are not automata and they are not bound to follow blindly the furrow ploughed by previous generations. They must take into account the achievements of modern science and its progress just so long as recognition of the changes that have come about in the scientific conceptions of mankind is compatible with the interpretation of the law which alone binds the court. But whenever we cannot accept the findings of science without disregarding entirely the provisions of the law, we must not allow ourselves to be beguiled into giving decisions that undermine the legal edifice. We are subject to the law as it is and not as we would wish to see it.

[1)] knesset - the Parliarment of Israel

5. Section 14 of the Criminal Code Ordinance originated, as is wellknown, in the M'Naghten Rules that were formulated in England more than a hundred years ago. The judges who were asked at that time to give their opinion on the question of insanity from the legal point of view, complained at the time at having to reply to abstract legal questions, and openly declared their dislike at being asked to answer questions not related to a concrete case and without hearing the parties. One of the judges expressed his fear even then lest the M'Naghten Rules become thereafter a source of inconvenience to the general public, because instead of being rules constituting part of a decision given in a particular case - a decision that the judges had arrived at after hearing the arguments and counter-arguments of the parties - they were no more than airy expressions of opinion, detached from and unconnected with any concrete instance. Since then, the judges' replies, which as stated, came to be called the "M'Naghten Rules", have been subjected to the severe criticism of judges and lawyers. This criticism became the sharper with the discoveries of scientific research into the mind that sprang up in the school of Sigmund Freud, and which advanced and spread during his lifetime and after his death. At the same time, we must not overlook a vital fact which invests the M'Naghten Rules in Israel with a status very different from that of the same Rules in other countries. Section 14 of our Criminal Code Ordinance was not drafted in the l9th century, but in 1936. At that time, the voices of criticism that had been directed at the M'Naghten Rules had already been heard throughout the world. Nevertheless, those principles were included in the code of criminal law that was published in that year, and ever since then the Israel legislature has found either no need or no opportunity to introduce any alteration into the provisions of the section. The Israel legislature has hitherto shown that it is quite wide-awake and knows what the modern world needs in its treatment of the problems of criminal law. The revolutionary change in the law by which the death penalty for murder was repealed in Israel, is a particular case in point. Doubtless the defects in the M'Naghten Rules and their unsuitability to the scientific discoveries of our time are well known to the Israel legislature, and I feel sure that it will seize a proper opportunity of going deeply into the law and of finding a satisfactory solution to this problem - a solution that will reflect scientific notions on the one hand, and will answer the needs of the public on the other. Had the Israel legislature been anxious to throw over the M'Naghten Rules, it could of course have done so when enacting the Military Justice Law, 1955, which is a code of criminal law applying to persons subject to military law. It can hardly be regarded as accidental that the legislature preferred to retain, even as

regards soldiers, the provisions of section 14 by referring us, in all that concerns that section - like the remaining sections relating to the fundamental principles of criminal responsibility - to the provisions of the general criminal code. As late as in 1955, therefore, we see that the legislature wished to retain section 14 as it stands, and as long as it considers that the provisions of that section should be applied and does not find it necessary to alter them, we have no alternative but to apply them.

6. I do not have to take up much time in explaining why the provisions of section 14 cannot be applied to the present case. That task has already been expertly and skillfully carried out by my learned colleague, Agranat J. I have no quarrel with the conclusions at which he arrived in that part of his judgment. But our paths divide when we come to interpret section 11 of the Criminal Code Ordinance. Section 11 deals with the question how far intention or motive can influence the measure of criminal responsibility. That is made clear by the headnote found in the margin to the section: "Intention; motive". We cannot, in my view, separate the main part of section 11(1) from its proviso. The main part speaks of acts or omissions arising out of negligence, whilst the proviso deals with acts that occurred not by the will of those who performed them or which occurred as the result of accident, that is to say, acts and events that occurred in a manner independent of the will of the doer of the acts. That and that alone is the scope of section 11 and the legislature had no intention whatsoever of settling, by means of that section, the question of the criminal responsibility of persons who are not of sound mind and whose will-power is impaired as the result of their mental disorder. If the legislator had had the intention attributed to him by my colleague Agranat J., he would not have refrained from giving clear expression to it in a special section, or at least in a special subsection. At all events, he would not have slurred over such a provision leaving the real meaning to be read between the lines, when he came to set out the rules of criminal responsibility for acts done negligently or accidentally and not by the will of those performing them. Not only that: this problem should have come up for solution after section 13 (the section providing that every person is presumed to be of sound mind so long as the contrary is not proved) the place singled out by the legislator for dealing with the questions connected with soundness and unsoundness of mind from the legal point of view. I do not imagine that any legislator in drafting the sections in question would jump from one subject to another, and it seems to me that the first place in the Ordinance where the legislator adverts to the question of the effect of a person's soundness

of mind as a factor in his criminal responsibility is section 13, and in no previous section whatsoever. Only after the legislator has laid the foundation for the presumption in section 13 concerning everyone's soundness of mind, does he pass on to deal with persons whose soundness of mind is impaired by reason of insanity or drunkenness, which is also regarded by the legislator as a special form of insanity.

I do not propose to do more than to add these reasons to the grounds that my colleague, Silberg J., has enumerated in his judgment, and I would only add that, to my mind, any attempt purporting to extend the application of section 14 by means of words found in section 11(1) is a little too daring, and one which finds no support in the language or import of the law.

The Palestinian legislator undoubtedly knew in 1936 of the existence of the problem of "irresistible impulse", and if indeed it was his intention to extend the scope of section 11 in order that it might include provisions for settling that problem, he would certainly have found appropriate phrases, and would have made use of words more suitable than the words, "independently of the exercise of his will", found in section 11(1).

7. The real intention of section 11 can be best appreciated after an examination of the basic literature dealing with the principles of criminal law. We find a striking precis of this point in Kenny's book, "Outlines of Criminal Law" (sixteenth edition, edited by Turner). On p. 23, the author deals in detail with the question of "voluntary conduct". By way of demonstration, the author quotes the example of B holding A's hand, and with his superior strength, causing A to wound C with a knife which is in A's hand. The author adds that in centuries past, A was absolved from criminal liability an the strength of the argument that the act was not that of A, whereas today we arrive at the same conclusion by recognising that A's act was not done by A's will and was not accompanied by any mental intention.

In that paragraph, Kenny employs the term "intention" - that is the "intention" appearing in the margin of section 11 of our Ordinance. The author adds, at the same place, that a person can make use of precisely the same argument in his defence, if he is overwhelmed by an attack of epilepsy at the time when he does the act of which he is charged. The same applies to a somnambulist or to one who is in such a state of

intoxication, that he does not at all know what he is doing. According to Kenny, we must examine in each of these cases what was the intellectual state of the accused at the time of the act, and in the event of the latter proving that his conduct at that moment was not conduct originating in his will, he will not be responsible for his acts and their consequences. Kenny elucidates his meaning by giving further examples, and he mentions, inter alia, the case where a person kills another neither by his fault nor by his will, the case of doing an act while walking in one's sleep and *"some cases of insanity or intoxication"*. These last words, italicised by me, amount to an apparent corroboration of Agranat J's observations, and they seem at first sight to reinforce the construction accorded by him to section 11. But a close examination of the authorities mentioned there leads us to a different conclusion. I am referring to the following two English judgments : *R. v. Hay* (13); *R. v. Fryer* (14).

After reading those judgments I am satisfied that they do not justify the conclusion that the author deduces from them. In *R. v. Hay* (13), Darling J. said in his direction to the jury no more than this, that:

> "if they (the jury) believed the evidence of Dr. Dyer (the prison medical officer) they would be justified in finding the prisoner guilty of the act charged, but insane at the time of committing it so as not to be responsible according to law" (p. 269).

We should add that the doctor replied to the questions he was asked during cross-examination, by saying that in his opinion, the accused knew at the time of the act that he was firing a revolver and that his act fell within the class of prohibited acts, but that owing to the disease of the mind that was affecting him, he was incapable of overcoming the homicidal impulse which had taken possession of him.

However, whosoever takes the trouble to read the remarks of the doctor in his examination-in-chief, will discover that in the opinion of Dr. Dyer, the accused was of unsound mind both at the time of the act and at the time of the trial. Accordingly it is difficult, if not impossible, to find in that judgment corroboration for the view that the judge

or the doctor were talking in that case about an act that was not dependent on the will of the doer, as distinct from an act committed through insanity.

8. In the second judgment, *R. v. Fryer* (14), Bray J., in his direction to the jury, declared that no real doubt had arisen on the question whether or not the accused had committed the criminal act with which he had been charged. Continuing his summing-up, the judge asked the jury to consider the accused's frame of mind at the time of doing the act. He adds:

> "What does 'insane' mean? The definition is based, according to our law, on this - that the accused laboured 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 Then there is an alternative - or if he did know the nature and quality of the act he was doing, he did not know that he was doing what was wrong.
>
> That is the recognised law on the subject; but I am bound to say it does not seem to me to completely state the law as it now is, and for the purpose of today I am going to direct you in the way indicated by a very learned judge, Fitzjames Stephen, and follow his direction – that, if it is shown that he is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to control his actions, I think you ought to find him what the law calls him - 'insane', because it seems to me, if there is such a disease of the mind, not caused by any accident, but an actual disease of the mind,such as to deprive him of the capacity of controlling his actions, in my opinion a jury should find him insane, if that is shown to have existed at the time of doing the act" (p. 405).

Let us now examine the evidence on which the judge relied when he directed the jury in the way he did. According to one witness, the accused knew that his act fell within the class of a prohibited act, but did not completely understand what he was doing. In the witness's opinion, the accused did not at all appreciate the gravity of his act. Another witness said that, in his opinion, the accused did not understand the nature and quality of his act, and did

not know that his act was wrong. This latter evidence clearly brought the accused four-square within the limits set up by the M'Naghten Rules.

9. The common denominator in these two cases was the defendants' lack of knowledge as to the nature of their act. Even if it be said that there is nothing to support such a conclusion, then the fact cannot be overlooked that here, we are considering not judgments, but directions to the jury. In any case, I do not think that it is possible to discover the slightest hint that the doctrine of the involuntary act of the accused was even being considered in these cases.

10. A recent English judgment dealing extensively with this problem and which is also mentioned in Agranat J's judgment, is *Reg. v. Charlson* (23). There questions arose which have much in common with the questions with which we have had to deal in this case. In that case, too, light is thrown on the legal questions involved in Barry J's directions to the jury. The accused, Charlson, who, until the day of the act, had acted towards his son as a kindly father, picked him up, took him to the window, struck his head with a mallet and threw him out of the window. The boy remained alive, and the father was charged with three offences, namely:

a. causing grievous bodily harm to his son with intent to murder;

b. causing grievous bodily harm with intent to cause harm ;

c. unlawfully and maliciously inflicting grievous bodily harm without any specific allegation as to his intention.

In the course of trial, the accused did not plead that he was of unsound mind at the time of the act, but said that at that moment, he was acting under the clouding of the faculties that deprived him of any control over his actions. The accused was acquitted on all counts. It was proved at the trial that his mother had died of cerebral haemorrhage, whilst his mother's sister had suffered from a cerebral tumour which had later caused her death, and his sister had died of meningitis. There was, therefore, some ground for assuming that the accused also suffered from some similar disease, although it was not proved that at the

time of the act, the accused had been suffering from any such disease. On the other hand, it was proved that shortly after the act, the accused spoke quietly to the policeman that appeared on the spot, and said : "My God, tell me what I have done". A few moments later, he added: "It's something dreadful, isn't it; it's Peter, isn't it ?" (Peter was his son's name.) When he was brought before a second policeman for questioning, he said : "I have done something dreadful to Peter", and when he was told what had happened, he mumbled to himself: "Why did I do it?" When he was asked to relate what had happened to him, he replied: "We were in the back room... I remember hitting Peter, but I don't know why I did it. I will tell you what I remember."

In his direction to the jury, Barry J. says inter alia:

> "Therefore, in considering this third charge you have to ask yourselves whether the accused knowingly struck his son, or whether he was acting as an automaton without any knowledge or control over his acts. If you think that he was in a condition similar to that of a person in an epileptic fit, who does not know what he is doing at all then the elements of malice and unlawfulness would not have been established. If you are left in doubt about the matter, and you think that he may well have been acting as an automaton without any real knowledge of what he was doing, then the proper verdict would be 'not guilty', even on the third and least serious of these alternative charges" (p. 862).

In this instance, too, the learned judge employs the language of the M'Naghten Rules and investigates the accused's mind or consciousness, ignoring the element of will entirely.

As for the possibility that the accused was also suffering, like the rest of his family, from the cerebral tumour, the judge gives his opinion to the jury in these words:

> "If a man or woman is suffering from a cerebral tumour, says the doctor, he or she is liable to an outburst of impulsive violence, quite motiveless, and over which the patient has no control at all. The doctor does not state positively that this is the inference to be drawn from these

> events, but he says that it may be; and if a tumour does in fact exist, then the conduct of the accused would be wholly consistent with that of someone suffering from such a disease" (p. 864).

After completing those observations, the judge goes back and restates the importance of the intellectual element - as distinct from the volitional element - in the investigation of this question.

11. So we see that, notwithstanding that the distinction between the intellectual element and the volitional element in a man's acts is well known in England also, an English court refrained, in a case where the facts were consistent with the facts in the present case, from applying the principle underlying section 11, but instead applied the principle that finds its expression in our law in section 14 of the Ordinance.

It is not merely by suggestion alone that the judges in England have decided that the decisive factor is the intellectual state of the accused and not the volitional element in his actions. They have done so in clear and express language.

In the case of *Charles Aughet* (26), Lawrence J. states, at p. 106:

> "Under Article 71 of the Penal Code (the reference is to the Belgian Penal Code, the accused being a Belgian soldier) it was open to him to set up as a defence that he was compelled to commit the acts... by a force which he was unable to resist. He did set up this defence, *which is not one known to English* law, and the Court held it to be proved and acquitted him."

In the case of *Kopsch* (17), Hewart L.C.J. speaks about:

> "the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive. It is not yet part of the criminal law, and it is to be hoped that the time is far distant when it will be made so" (ibid.,at pp. 51-52).

And in the case of *Thomas* (27), Darling J. states categorically:

> "Impulsive insanity is the last refuge of a hopeless defense" (ibid., at p. 37).

12. Turning now to Silberg J's judgment, which differs from the findings of fact made by the court below, and, in this way, enabling the learned judge to fit the present case into the framework of section 14, I see great difficulties in his path and with all regret I cannot adopt his conclusion.

It has been proved that the appellant is suffering from the disease of paranoia. It has also been proved that a person suffering from the disease of paranoia is capable at the same time of understanding perfectly well the nature of his acts, and to know that a certain act falls within the class of prohibited acts. Those facts do not bring the accused within the defence afforded him by section 14. The burden of proof in all that concerns the accused's being of unsound mind continues, therefore, to be on the shoulders of the appellant and in order to succeed in his defence, the proof of paranoia alone will not suffice. The experts that gave evidence in the court below were unanimous in their opinion that the accused was suffering at the time of the act not only from paranoia, but also from a trance. It seems to me that it cannot be inferred from their evidence that every person suffering from paranoia must of necessity also suffer from trances. At all events, it follows that, in the opinion of the doctors, the present appellant was suffering from a trance at the time of the act. It is clear that it is the duty of a judge who hears the evidence, to weigh it up and on the evidence to decide whether or not there existed a trance at the time of the act, and if the judges found that the opinions of the expert witnesses on this point were of a theoretical nature and no more, and that the evidence did not enable them to reach a definite finding, then the judges of the court below were at liberty to decide what they did, and I do not see that we can differ on this point, from the decision at which the learned judges in the court below arrived.

This question is in England left to the determination of the jury, because it is a question of fact. We, too, are obliged to leave the decision on this point in the hands of the judges who heard the evidence of the witnesses. I would only add that, from the evidence

presented to the judges below (aside from the evidence of the experts), it is hard to see that the appellant was in a state of trance, and if the judges of the District Court reached the conclusion that they did, I do not see how I can overrule their decision and hold that that finding of theirs is erroneous. Accordingy, and with all due respect to my learned colleague, Silberg J., I see no reason for allowing the present appeal. It is true that it is the act of a paranoiac that caused the death of the victim. But it is equally true that not every act of a paranoiac is considered by our legislator to be the act of a person of unsound mind. On that ground and in accordance with the law as it exists in the State at the moment (as distinct from the law that may appear to be desirable), the accused is guilty of causing the death of the victim.

13. Although I cannot absolve the appellant from liability for his deed, either by reliance on section 11 of the Criminal Code Ordinance, as my colleague, Agranat J., suggests, or by reliance on the provisions of section 14 of the same Ordinance, as my colleague, Silberg J. suggests, I think that the final result at which I arrive will not in practice be different from the result at which my two colleagues have arrived. I do not see how it is possible to apply to the present case the provisions of the Treatment of Mentally Sick Persons Law, 1955; but it seems to me that it is possible to ensure the appellant's committal to a suitable hospital and his reception there on the basis of the Prison Ordinance, 1946. I assume that when it becomes apparent to the prison authorities that a certain prisoner has turned insane, the Minister of Police will not be deterred from using the power given him according to section 62 of that Ordinance to order the transfer of such a prisoner to an institution where he will obtain the treatment he needs and which he ought to receive.

14. Now for the cross-appeal on behalf of the Attorney-General, which relates to that part of the judgment of the court below in which it was held that the prosecution had not proved in this case the existence of the element of which section 216(c) of the Criminal Code Ordinance speaks. The final section of the District Court's judgment is devoted to this question, and the conclusions of the court are:

> "We are of the opinion that the prosecution has not proved that the killing was premeditated, and therefore the accused is not guilty of premeditated murder, but of manslaughter."

It follows from the judgment of the court below that, if A takes up a revolver in order to shoot and kill B, and in fact kills him, then the element mentioned in section 216(c) of the Ordinance is proved. On the other hand, if that same A fires his revolver at B but against his will hits C, A cannot be convicted of murder but only of manslaughter. *Prima facie,* that result is exceedingly strange. But the words employed by the legislator are perfectly plain, and although his intention may have differed from the one to be gathered from the language of the section, we are bound to examine his intention in the light of the wording that the legislator has employed in the section itself. The use of the word "such" four times in one subsection of the Code leads me to conclude that the construction placed upon that subsection by the District Court is indeed the correct one. This is the language of section 216 (c):

> "For the purpose of section 214 of this Code a person is deemed to have killed with premeditation when: -
>
> > (c) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed."

It will be noted that if Reuven intended to kill Mustapha or some other member of Mustapha's family, then Reuven will be convicted of murder if he caused the death of Mustapha or another member of his family. The same applies if Reuven intends to kill Mustapha or any other Moslem, and no distinction will be drawn if in fact Mustapha or any other Moslem is killed. In both cases alike, Reuven will be convicted of murder. If, on the other hand, Reuven intended to kill Mustapha but in fact hit Anastas, who is of the Christian faith and who at the time of the act was standing near to Mustapha, the condition required by section 216(c) will not have been satisfied, and Reuven will be convicted of manslaughter only. As stated above, that is because of the absence of the element of preparation in Reuven's act, as required according to section 216(c). I would only add that it is quite impossible to have regard to section 216(c), while at the same time ignoring section 216(a). Section 216(a) as is known, speaks of the killer's resolve "to kill such a person". It follows,

therefore, that "such person" mentioned in section 216(c) is identical with "such person" mentioned in section 216(a).

I gather from the language of the section and from reading the section as a whole, that if Reuven intended to kill Mustapha, but hit Anastas instead, Reuven will not be convicted of murder, but only of manslaughter, in accordance with sections 212 and 213 of the Criminal Code Ordinance.

Considerable importance was attached to that distinction in the past, when a murderer was liable to the penalty of death by hanging, and to that penalty alone, whereas a person convicted of manslaughter was liable to the maximum penalty of life imprisonment. Today, those distinctions have to a great extent been blurred as the result of the abolition of capital punishment for murder, and its replacement by imprisonment for life.

My opinion is, therefore, that the interpretation given to section 216(c) by the court below was the right one, and I think that the Attorney-General's appeal should be dismissed.

In accordance with what has been set out above, it is decided by a majority to allow the appeal of the appellant, and it is unanimously decided to dismiss the cross-appeal of the respondent. The result will be as set out in the last paragraph of the judgment of Agranat J.

Appeal allowed.

Cross-appeal dismissed

Judgment given on February 24, 1956