

other issue, nevertheless, the Court finds that there is not sufficient to contradict the usual presumption of [sic] the usual inference of sanity.

"There is no testimony concerning the mental state of the defendant as of July 13, 1951, and therefore the usual presumption of sanity governs.

"While if there was some testimony as to his mental state as of that date to the effect that he was incompetent on that date, the burden of proof would be on the Government to overcome it. There has been no such testimony, and the usual presumption of sanity prevails.

* * * * *

"Mr. Ahern, I think you have done very well by your client and defended him very ably, but I think under the circumstances there is nothing that anybody could have done." [Emphasis supplied.]

We think this reflects error requiring reversal.

In *Tatum v. United States* we said, "When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of

mankind and presumes that all people, including those accused of crime, are sane."⁶ So long as this presumption prevails, the prosecution is not required to prove the defendant's sanity. But "as soon as 'some evidence of mental disorder is introduced, * * * sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt.'"⁷ Here it appears that the trial judge recognized this rule but failed to find "some evidence." We hold that the court erred and that the requirement of "some evidence" was satisfied.⁸

In *Tatum* we held that requirement satisfied by considerably less than is present here. *Tatum* claimed lack of memory concerning the critical events and three lay witnesses testified that he appeared to be in "more or less of a trance," or "abnormal," but two psychiatrists testified that he was of "sound mind" both at the time of examination and at the time of the crime. Here, the psychiatric testimony was unequivocal that Durham was of unsound mind at the time of the crime. Dr. Gilbert, the only expert witness heard,⁹ so stated at least four times. This crucial testimony is set out in the margin.¹⁰ Intensive questioning by the court failed to pro-

6. 1951, 88 U.S.App.D.C. 386, 389, 190 F.2d 612, 615.

7. 88 U.S.App.D.C. at page 389, 190 F.2d at page 615, quoting Glueck, *Mental Disorder and the Criminal Law* 41-42 (1925).

8. In its brief, the prosecution confounds the "some evidence" test with the "evidence sufficient to create a reasonable doubt" test, despite our explanation in *Tatum* that the "evidence sufficient to create a reasonable doubt" test applies only after the issue has been raised by "some evidence" and the burden is already upon the Government to prove the defendant's sanity beyond a reasonable doubt. 88 U.S.App.D.C. at page 390, 190 F.2d at page 616.

9. Dr. Amino Perretti, who also examined Durham in connection with those proceedings and furnished an affidavit that Durham was of unsound mind, was unable to testify due to illness.

10. (1) "Q. [Mr. Ahern]. As a result of those examinations did you reach a conclusion as to the sanity or insanity of the defendant? A. Yes, I did arrive at an opinion as to his mental condition.

"Q. And what is that opinion? A. That he at that time was of unsound mind.

"Q. Can you tell us what disorder he was suffering from, Doctor? A. The report of his case at the time, as of October 9, 1951, I used the diagnosis of undifferentiated psychosis, but according to the record the diagnosis was at the time of commitment psychosis with psychopathic personality.

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"Q. At that time were you able to make a determination as to how long this condition had existed? A. According to the record I felt at the time that he had been in that attitude or mental disorder for a period of some few to several months."

(2) "Q. [Mr. Ahern]. Directing your