Trinity Term
[2015] UKPC 34
Privy Council Appeal No 0038 of 2013

JUDGMENT

Robinson (Appellant) *v* The State (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lady Hale
Lord Kerr
Lord Clarke
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

20 July 2015

Heard on 16 June 2015

Appellant	*Respondent*
Paul Bowen QC Stephen Broach Amanda Clift-Matthews (Instructed by Simons Muirhead and Burton Solicitors)	Peter Knox QC Tom Poole (Instructed by Charles Russell Speechlys LLP)

LORD HUGHES:

1. On this appeal from the Court of Appeal in Trinidad and Tobago against conviction for murder, the issue concerns the manner in which the partial defence of diminished responsibility was dealt with in the court of trial.

2. The law of diminished responsibility in Trinidad and Tobago is, so far as material to this case, in the same form that it had in England and Wales from the introduction of the concept in 1957 until alteration by the Coroners and Justice Act 2009. Section 4A(1) of the Offences Against the Person Act 1925, chapter 11.08 provides:

> "4A. (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

By section 4A(2) the onus of establishing diminished responsibility is placed upon the defendant; as in the case of any other burden of legal proof which is laid upon a defendant, this is to be discharged by proof on the balance of probabilities. By section 4A(3) diminished responsibility, if established, reduces the offence from murder to manslaughter.

3. The present defendant was born in September 1962. On 16 January 2002, in an incident in a pharmacist's shop in Tacarigua, he killed Mr John, a security guard. In due course he was tried for murder. His defence advanced the issues of self-defence, provocation, and diminished responsibility. The Board is concerned only with the last.

4. The defendant was 39 years old at the time of the offence. He had a history of schizophrenia, which had resulted in his admission to a mental hospital on some five or so occasions, beginning in 1985 at the age of 23. In January 2002, despite having a High School and Labour College education, he was wandering the streets as a destitute in an unkempt, dishevelled and unhygienic condition, and appears to have been living in an abandoned house. It was his habit sometimes to visit the pharmacist's shop to beg for snacks or soft drinks. The proprietor had known him for some dozen or so years, by the names 'Tony' or 'Psycho'. On 16 January the defendant returned to the shop for a second time that day at around 5.00 pm. His clothes were ragged and he was barefoot. He was carrying a metal bar about three and a half feet long and about half to one inch

thick. He stood tapping the bar on the floor. The proprietor told him that he was not supposed to be there, having already been in that morning. Although he was asked on something like seven occasions to leave, the defendant did not. He eventually went to the door, opened it, flapped it to and fro, and invited the proprietor to put him out. The latter asked his security guard to deal with the defendant. When the guard went up to him, the defendant first laughed at him and said he could not put him out if the proprietor could not, and then swung the metal bar at the guard in a way which brushed him lightly about three times. At that, the guard took out his sidearm, placing his other hand on the defendant's neck or upper chest. He said to the defendant "See what I have here; I am a firearm security officer; kindly leave". At that, the defendant swung the bar, this time forcefully from behind his back, and struck the guard on the back of the head. Within a second or two, the guard's gun was fired, whether in reflex or by deliberate action was unclear. Both men fell to the floor. The guard had sustained fatal injuries. The defendant had been shot under the left arm. He ran from the shop, but was seen to return to stand on the opposite side of the road watching for two to three minutes, before walking away. He was found shortly afterwards sitting on the kerb two streets away, barebacked, trembling and rocking back and forth in an agitated manner. When approached by two uniformed policemen, he repeated "You is Carl; you is Carl" (not the name of either officer) and then told the sergeant "I want a smoke to take out a bullet and a pain from my chest". He was co-operative and was arrested. He was himself taken to hospital where his wound was treated. He made no further comment about the events which had occurred. Nor did he give evidence at the trial.

5. The defendant was not tried until seven years after the killing. The reasons for the delay were part of his medical history. This history was not placed chronologically before the jury and was not properly deployed in support of the assertion of diminished responsibility, as it ought to have been, although it emerged, almost incidentally, in the evidence of the two forensic psychiatrists called for the defence, Dr Othello and Dr Ghany. Some of it emerged in chief and other snippets in cross examination. Putting it into order, the picture was this. Prior to the killing, there had been some five previous admissions to hospital beginning in 1985; the consistent diagnosis had been schizophrenia. After that there had been some outpatient treatment, but the last had been in December 2000. That was a little more than a year before the offence. There was no record of his having had, during that year, any drug treatment (essential so often in cases of schizophrenia and frequently very effective whilst maintained). The offence was then in January 2002. Some three or four months after the killing he had been admitted to hospital on 30 April 2002 with florid symptoms of schizophrenia. At that stage, Dr Ghany noted that he was experiencing delusions and hallucinations, he was exhibiting grandiose ideas and religious incoherence and he was generally functioning at a low level. He was agitated, irrational and incoherent. He claimed to have had 91 wives and a career as an inventor of lasers, computers and generators. At one stage he said that the man he had been charged with killing had in fact himself murdered the shopkeeper. At a later stage during this hospital admission he gave an account of events at the shop which was not far from accurate save that he said that he had been shot by the guard and had then stood bleeding for some three minutes before responding by striking the

guard with the metal bar. In May 2006 he was admitted to hospital for assessment of fitness to plead; where exactly he had been between June 2002 and then was not in evidence. He was seen by, no doubt amongst others, Dr Othello. He was assessed to be unfit to plead and in February 2007 was found by the court to be so; an order was made for his detention in hospital during the court's pleasure. Under treatment, he recovered considerably and became fit to plead. Reports detailing his recovery were not before the jury, but in fact showed that by February 2008 he was well groomed and coherent and lacked most of the previous psychotic symptoms, save that he was still asserting that the security guard was still alive. Counsel for the State did elicit that this last assertion was made, and also that it had disappeared within a matter of days, or at most weeks, of one of the reports, at a time when the defendant may have believed that recovery might lead to his release, rather than to his trial. In June of 2008 he was discharged from hospital to prison, by now fit for trial. His trial followed in February 2009.

6. At that trial the initial stance of the State was that it would accept a plea of guilty to manslaughter on the basis of diminished responsibility (if it were tendered). The Deputy Director of Public Prosecutions had herself authorised this position. Whether such a plea was actually tendered or not is not clear, but it may not have been, since self-defence (as well as provocation) was being relied upon, and seems to have been defence counsel's primary case throughout, including in his closing speech. At all events, counsel for the State formed the view, clearly conscientiously, that he ought not to accept diminished responsibility and should challenge the evidence of it. The Board will return to this conclusion later.

7. The defence was proposing to rely, on the issue of diminished responsibility, only upon the evidence of Dr Othello. She had not seen the defendant until May 2006, after his admission that year to hospital, thus four years and more after the offence. She had examined him on three occasions, but all had been brief owing to his irritable and illogical responses. She had written a very short one and a half page report. It described his condition at that time, which was floridly schizophrenic. It referred in a sentence or two to the fact that he had had several previous admissions to hospital and had been diagnosed as schizophrenic. It referred to Dr Ghany's report of summer 2002, to its description of his then florid schizophrenia, and to its stated conclusion that he had been suffering from an abnormality of mind at the time of the offence, and it endorsed that last conclusion.

8. After the cross examination of Dr Othello had put diminished responsibility in issue, and had elicited the period between the offence and her contact with the defendant, the defence also called Dr Ghany, relying not on any recent assessment or indeed any recent report, but simply on what he had said in June 2002. That report does not have the appearance of being prepared for use at a murder trial on the issue of diminished responsibility. It was of similar length to Dr Othello's report. It was however able to record the history of previous admissions from 1985 onwards and the diagnosis of schizophrenia then made, it set out his condition at the time of his 2002 admission

(summarised in para 5 above) and it stated the conclusion in a single sentence that at the time of the offence his condition amounted to an abnormality of mind which seriously affected his mental responsibility.

9. In the event, both Dr Othello and Dr Ghany gave evidence to the jury that in their expert view the defendant had been affected at the time of the offence by an abnormality of mind, namely schizophrenia. Both, when asked, expressed the view that that abnormality of mind substantially impaired his mental responsibility for his acts. It has to be said that the manner in which their evidence in chief was elicited did not make it easy for the jury to follow. The history was not elicited in a way which showed the recurrent appearance of symptoms either side of the offence. Whilst the apparent absence of drug treatment for a year was elicited together with a general proposition that such might lead to relapse, the significance of the destitute lifestyle was not clearly elicited nor was there any direct focus on the likely medical condition of the defendant on the day of the killing. The doctors were not asked about the significance of the defendant's arguably strange behaviour at the time of, and immediately after, the offence.

10. Counsel for the prosecution adduced no medical or other evidence to contradict those conclusions, but challenged them through cross examination on a number of grounds. There is nothing necessarily wrong with taking this course, if there is a proper basis for it. It is more difficult if cross examining counsel has no psychiatric report of his own from which to derive possible flaws in, or valid criticisms of, the evidence adduced for the defendant, but even then it is not impossible nor is it wrong. Some little care is, however, required from counsel lest the jury be left with the impression that an exploratory or speculative line of questioning has a valid basis, in psychiatry or otherwise, when it has not. And if this process is adopted, it imposes a particular duty on the judge to avert any risk of such impression if it would be unfounded and to make sure that the jury grasps the real issue(s) which it has to determine.

11. In the present case, the cross examination of the experts included the following topics.

> (a) Both were cross examined with a view to showing that there was nothing in the behaviour of the defendant at the time of the killing to suggest frank delusions or hallucinations at that time. Whilst Dr Ghany had spoken of delusions existing at the time of his May 2002 examination (for example the 91 wives and the career as an inventor), and appeared at one stage to suggest that the defendant would not have understood the consequences of hitting the guard with the metal bar, Dr Othello said frankly that she could not say whether the defendant was delusional at the time or not. Both agreed that there was no outward manifestation of delusion at the time. This was plainly so, and in that respect the case differed from some instances of offences where schizophrenics

kill under hallucinatory or delusional beliefs about the victim which have no basis whatever. It was perfectly legitimate for counsel to establish that this was so. But delusions are only one form of schizophrenic symptom. Severely disordered thinking, the inability to make sound judgments about what is going on around one and loss of care for oneself are among others. The true issue in the present case was whether the defendant's mental responsibility for the killing was substantially impaired by these effects of schizophrenia at the time of the events. Dr Othello did refer to this form of schizophrenic disability, but it needed to be made clear to the jury that the exclusion of frank delusions did not bring the issue of diminished responsibility to a close.

(b) This investigation of delusions was linked in cross examination to the proposition that a schizophrenic may at different times be symptom-free or, as was put to the experts, enjoy a "lucid interval". The doctors both agreed that this may occur, as plainly it may. They both expressed the firm opinion that it was not likely to have applied to the defendant at the time of the offence, but the cross examination was likely to leave the jury with the impression that the absence of delusion meant a "lucid interval", in the sense of freedom from illness. Indeed, once Dr Othello had agreed with the proposition that lucid intervals were possible, the next question reminded her that the defendant was now fit to plead, as if that were the same as being free from his illness; in any event by the time of the trial he is likely to have been on medication. The significance of the "lucid interval" evidence needed to be made clear to the jury.

(c) It was suggested to both doctors in cross examination that because they had no first-hand information about exactly what the defendant had done in the pharmacist's shop, their conclusions were vulnerable because they depended on what he himself had said. There are certainly cases where this is a legitimate concern. In some cases the medical opinion as to diminished responsibility depends heavily on what happened and the defendant may be the only person present who survives to advance an account. Other cases may depend on what he knew or thought at the time. Indeed, yet others may depend on the reliability of what he has said about past symptoms. In all these cases, the medical opinion may depend heavily on the accuracy of what he says, and his reliability accordingly needs careful investigation. *R v Terry* [1961] 2 QB 314, *R v Ahmed Din* [1962] 1 WLR 680 and *R v Bradshaw* (1985) 82 Cr App R 79 are just three of many examples of one or other of these types of case. But each case requires consideration according to the issue raised. This was not one of any of these cases. The defendant had given no account whatsoever of the killing to Dr Othello. He had given two inconsistent accounts to Dr Ghany. One was transparently fanciful. The other, with its suggestion of standing still for three minutes after being shot, was inconsistent with the uncontradicted evidence of the shopkeeper which the jury had heard. But, critically, neither formed any part of the reasoning of either doctor, except to the extent that the subsequent giving of fanciful or inaccurate accounts of events was capable of being consistent with

schizophrenia. The jury needed to understand that this was not a case in which the experts' conclusions depended to any extent at all on the truth of what the defendant had said about the killing.

(d) It was similarly suggested to the doctors that the information which they had had from social workers about the events in the shop was second-hand hearsay. So it was, and if there had been any dispute about what the events of the killing had been, or if the conclusions of the doctors depended on what they had learned from social workers, this might have been relevant, but neither applied. The shopkeeper's evidence was uncontradicted. The jury needed to understand that these questions were simply irrelevant.

(e) Both doctors were cross examined upon the basis that they had wrongly omitted to identify the "aetiology" of the schizophrenia. This line of questioning was based on the language of the statute, which does of course state that the abnormality of mind in question may be the product of arrested/retarded development of mind, inherent cause or disease. This cross examination was entirely misconceived. First, the purpose of the statute in naming these three possible sources of abnormality of mind is to extend rather than to restrict the scope of the expression. More fundamentally, schizophrenia is a plain abnormality of mind. It may derive at least in part from inherent causes, but if it does not it is properly described as a disease of the mind; indeed it may be that it can be both. Where, as here, an underlying condition of chronic schizophrenia is common ground, there is no point whatever in spending time on discussing which of those two is its technical classification, and no psychiatrist can properly be criticised for not adverting to the question. The cross examination left in the air the suggestion that the doctors did not know their business sufficiently well and that this omission demonstrated the fact. That was simply wrong.

(f) Both doctors were asked whether they had performed psychological tests upon the defendant. Specific tests were identified by questions in cross examination, such as the Minnesota multiphasic personality inventory test (MMPI), the ink blot test, the Benda Gestalt test, and an IQ test. Dr Othello simply said that she had not administered them. Dr Ghany said more than once that they were not necessary. He was invited by counsel simply to answer the question whether the tests had been done. That was unfair. He was not re-examined to explain that they would have been wholly inappropriate in a case where personality disorder or learning disability were not in issue, and where there was the plainest possible history of chronic schizophrenia, which such tests would not address. It was not put to either doctor what use such tests might have served in a case of schizophrenia, and there was in fact no basis for the unspoken suggestion that they would have had any purpose. The questions left in the air the suggestion that there was some lack of professionalism in not conducting

such tests, or at least that the experts' conclusions were in some way weakened by their absence.

12. In all these respects the jury stood in plain need of guidance from the judge. That was the more so because counsel for the prosecution made explicit in his closing speech the assertion that the experts' conclusions were vitiated by lack of sufficient expertise, or at least by stubborn refusal to budge from them. The jury was invited to ask whether Dr Othello had been "evasive". It was told that Dr Ghany had been "very deficient" in the matter of psychological tests. It is likely that the description "bent" which appears in the transcript of counsel's speech is either a mistranscription or carries a meaning other than "dishonest" in the place and context in which it was used, but certain it is that the jury was invited to conclude that the doctors' professional pride inhibited them from recognising the possibility that they were wrong.

13. For Robinson, Mr Bowen QC also submitted to the Board that similarly inappropriate was cross examination as to possible deliberate tailoring by the defendant of his responses to doctors. That additional criticism is not made out. The rather sudden jettisoning of the fanciful assertion that the victim was still alive, at a time when the defendant may have thought, however wrongly, that he might be released once recovered from his florid condition, merited exploration. Likewise, there was nothing wrong with demonstrating in cross examination that Dr Othello's contact with the defendant in May 2006 had been brief interviews cut short by his irritability and irrationality. But neither of these matters in the end could have carried great weight on the issue which mattered, namely whether it was more likely than not that at the time of the killing the defendant's mental responsibility was substantially impaired by the consequences of his schizophrenia, as then present. It could not seriously be suggested that he had been counterfeiting schizophrenia since 1985, so that the underlying condition was really undeniable and what mattered was its state in January 2002. His responses in 2008 to possible discharge from hospital were of tangential relevance to this and the reasons for the brevity of Dr Othello's interviews with him in 2006 were if anything more consistent with symptoms then being present than with their being absent.

14. It should be recorded also that the adducing of the psychiatric evidence was not without some deficiencies. The reports were perfunctory, whether because they had not been prepared with a view to a contested murder trial or for some other reason. The evidence was not elicited sequentially so as to explain the asserted likelihood that schizophrenic symptoms contributed to the killing given (i) the long history of chronic schizophrenia, (ii) the probable absence of medication for a year before the event, (iii) the destitute lifestyle and total lack of care for himself despite the defendant's plain education and intelligence, (iv) the strange features of his behaviour both in the shop and, more, in the aftermath of the killing, and (v) the florid state of his symptoms not very long afterwards when seen in hospital in May. There was also the rather unsatisfactory feature that Dr Ghany appeared at one stage in his evidence to have

difficulty distinguishing insanity from diminished responsibility, whilst Dr Othello was led in chief, probably through misunderstanding of the question, to say that the abnormality of mind which she attributed to the defendant was something different from his schizophrenia (an answer which was never followed up).

15. Thus in several ways, the manner in which the evidence of the doctors was adduced did not give either the judge or the jury the help they were entitled to expect. It is nevertheless plain that the matters set out in para 11 above all called for careful treatment by the trial judge if the jury was not to make the mistake of treating counsel's questions as of more significance than the witnesses' answers and was to focus on the correct issue. This presented the judge with a difficult task, the more so because the jury was going to have to be directed also about self-defence and provocation, and in circumstances in which it had been self-defence, which was objectively the less viable defence, which had been given much the greatest attention by counsel for the defence.

16. In summing up on the issue of diminished responsibility, the judge had to deal with evidence given on one side only, since the prosecutor had adduced none on the topic. He elected to adopt a structure under which he first narrated the evidence of the two doctors and then reviewed the arguments which counsel for the state had advanced in cross examination and in his closing speech. He gave the jury an entirely conventional and proper direction as to the nature of expert evidence, which included explaining that the trial was by jury and not by expert, so that the jurors were not obliged to accept the evidence of the experts, even if it was not contradicted by other evidence or challenged. He correctly summarised the law. His summary of the evidence of the two doctors was careful and accurate. His recital of the criticisms which counsel for the prosecution had made of the experts was correctly preceded by a reminder of the importance of distinguishing between evidence and argument. But the structure meant that that was then followed by a simple enumeration of those criticisms without any assistance to the jury beyond the faithful listing of them. In the circumstances set out above, this deprived the jury of the analysis, and in some cases correction, which several of those criticisms demanded. Moreover it left the last word on the expert evidence comprised of a litany of criticism of it.

17. It is convenient to take seriatim the matters set out at para 11.

> (a) & (b) The judge did not explain that the absence of delusions was not, on the evidence of the doctors, conclusive against diminished responsibility. It is possible to find in the earlier summary of the evidence of Dr Othello the reminder that she had said that delusions were two of the symptoms of schizophrenia, "but not the only two", and in the summary of the evidence of Dr Ghany that he had said that there were various symptoms, but this needed to be juxtaposed with the criticism in cross examination if the jury was to focus on the

right issue. The same applies to the recital of the questions and answers relating to "lucid intervals".

(c) & (d) The judge's summary of the criticisms of the doctors included the complaint that their evidence had been dependent on hearsay, but did not explain that in fact it had not. He did at a later stage direct the jury that whatever the defendant had told Dr Ghany about events in the shop could not be used as evidence against him, and was only significant because used by the doctor as support for his diagnosis, but he did not relate this to the earlier summary of the criticism of reliance on hearsay. The combination of these directions, separated by a little distance in the summing up and not in any way cross-referenced, was likely to confuse.

(e) The judge recorded the criticism that the aetiology of the schizophrenia was absent from the evidence of the doctors, but said nothing at all about the significance of this, or lack of it. On the contrary, in directing the jury as to the law of diminished responsibility he twice included the proposition that one element of that condition was its attribution to one of the three sources mentioned in the statute. All this would inevitably lead to the jury being misled as to the significance of counsel's criticism. In the context of this case and the way it had been conducted, the judge simply had to tell the jury that attribution of the schizophrenia to a cause was a non-issue and that the issue was not its source but its effect on the day of the killing.

(f) The judge recorded the fact that the suggested battery of psychological tests had not been carried out. He did not explain to the jury that this was a false point, not least because counsel had been unable to suggest to the doctors any purpose which would have been served by such tests. The jury could not be expected, unassisted, to appreciate that in the absence of any suggested reason why Dr Ghany was wrong to say that the tests were unnecessary, his answer to that effect ought to be accepted. This treatment of the point was almost bound to leave the jury thinking that the doctors were insufficiently expert.

18. It is necessary to refer also to two other observations in the summing up.

(i) When addressing the evidence of the doctors as to inability to make good judgments and sound decisions about socially acceptable behaviour as a common symptom of schizophrenia, the judge added that such characteristics could be found in normal people. He no doubt meant the jury to bring this into account if it concluded that the defendant was probably affected by schizophrenia at the time of the killing, and to do so on the subsequent question of whether his mental responsibility for the killing was substantially impaired. But he did not say so

and the location of the observation amongst his recital of the criticisms of the doctors advanced by the prosecution was likely to lead the jury to think that impairment was irrelevant, even if attributable to schizophrenia, if someone not mentally ill might behave similarly. That was a misdirection. Simple poor judgment or socially unacceptable behaviour owing, for example, to lack of morality, or to absence of consideration for others, or to lack of sound upbringing, is not capable of giving rise to diminished responsibility. But poor judgment and socially unacceptable behaviour arising from thought disorder attributable to an identified mental illness such as schizophrenia may indeed do so, depending on its extent.

(ii) At the later stage of summarising the closing speech of counsel for the state, the judge paraphrased it as having attributed to the doctors "an element of professional crime" in the form of unwillingness to modify their conclusions. There had been no proper basis for such a suggestion, as distinct from inviting the jury to say that it was not satisfied that whatever the defendant's condition it did not substantially impair his mental responsibility for the killing, and it was incumbent on the judge, perhaps after raising the point with counsel to give an opportunity for it to be justified, to say so.

19. This approach to the case of diminished responsibility was not the one advanced to the Court of Appeal, where complaint about the summing up was expressly disclaimed. In those circumstances it is not surprising that that court confined itself to saying that the question of substantial impairment of mental responsibility was a jury matter and that it was not for the court to usurp the jury's function in determining it.

20. On the analysis which the case has now received, the Board is satisfied that, taken overall, the combination of the cross examination of the doctors, the prosecution's closing speech and the manner in which the issue of diminished responsibility was left to the jury in summing up render this conviction for murder unsafe. Between them, they deprived the jury of the help it needed in focusing on the real issue and putting aside irrelevant considerations.

21. That being so, it is unnecessary to address the more far-reaching submission advanced in the Grounds of Appeal that this was a case in which the medical evidence was so clear that the jury was not entitled to reject it. Nor is it necessary to investigate the circumstances (if any) in which, so it is contended, a trial judge is justified in withdrawing murder from the jury where there is psychiatric evidence going to diminished responsibility on one side only. Beyond underlining that the issue of substantial impairment is a jury question, and that there can be circumstances in which the evidence of it is so overwhelming that it justifies a strong direction to the jury, the Board says nothing about either proposition.

22. Similarly, it is unnecessary to consider the application to adduce as fresh evidence a new psychiatric report made in 2013 by Dr Marc Lyall. That application came extremely late and no good reason has been advanced for failure to adduce a full report at the time of the trial. The Board does observe that Dr Lyall's report, leaving to one side the appeal-related comments on what occurred at the trial, is in the form which such a report ought to have when diminished responsibility is in issue at trial. It sets out a proper and consecutive medical history. It makes clear the sources of its information. It not only presents a diagnosis of the defendant's underlying condition but it specifically addresses the point which matters most, that is its likely effect upon him at the time of the killing.

23. The consequence is that the conviction for murder must be quashed. The State very properly does not seek a re-trial. It follows that a verdict of manslaughter on the grounds of diminished responsibility must be substituted.

24. It also follows that the appeal against the sentence of death falls away. The Board is aware that, if that appeal had survived, it would have been heard together with other cases in which the constitutionality of a mandatory sentence of death in the case of persons with mental disorder or disability of some kind will be considered. There can, however, be no question of this case being part of that combined hearing. Although the Board was invited to consider deferring its decision upon the appeal against conviction in order to allow this case to remain with the others for a combined hearing of appeals against sentence, that is an impossible course to take. The Board could not consider sentence until it had disposed one way or another of the appeal against conviction. If the conviction is quashed, there is no sentence of death left to consider. Moreover it would be very unfair to the defendant to withhold from him the decision that his conviction for murder must be quashed.

25. The correct sentence for manslaughter on the basis of diminished responsibility ought properly to be considered in Trinidad and Tobago, according to local sentencing rules and practice. The case must be remitted to the Court of Appeal for consideration of sentence. Whether any question of medical disposal now arises must be a matter for that court, which can direct the preparation of up to date forensic psychiatric reports on the defendant's current condition, on the prognosis, on the need for any medication or other control, and on risk to others if it considers it necessary.

Accepting a plea of guilty to manslaughter by diminished responsibility

26. The Board does not think that it should leave this appeal without addressing the view formed by counsel for the prosecution that it was improper for him to accept a plea of guilty to manslaughter on the basis of diminished responsibility, had it been tendered.

27. Counsel very clearly reached this conclusion conscientiously, and at a late stage when the trial was about to begin. He appears to have done so on the basis of (i) some of the older English cases dating from the time soon after the introduction of diminished responsibility by the Homicide Act 1957, and (ii) the terms of the Offences Against the Person Act, chapter 11.08.

28. There is no doubt that in the early days of the partial defence in England and Wales, whilst the courts were adjusting to its arrival in 1957, the view was taken that an assertion of diminished responsibility ought to be subjected to particularly careful scrutiny. In *R v Matheson* [1958] 1 WLR 474 the Court of Criminal Appeal concluded that the evidence of the psychiatrists was so clear that the verdict of guilty of murder was not safe, but it recorded the then resolution of the judges of that court generally that a plea of guilty ought not to be accepted, but rather that the issue ought to be determined by a jury. That was a judge-made rule of practice, and was so described by Lord Goddard CJ in *Matheson*. By 1962 the judges of the Court of Criminal Appeal generally had resolved that it was a practice which ought no longer to be followed: see the historical review by Lawton LJ in *R v Vinagre* (1979) 69 Cr App R 104, itself a case in which the acceptance of a plea was understandably thought to have been inappropriate on the facts. Lawton LJ explained in *Vinagre* that the practice had been changed because of judicial experience of distressing trials in which uncontroversial evidence of acts committed when the defendant was plainly mentally imbalanced was unnecessarily rehearsed at length.

29. Since 1962 it has been the plainly accepted practice in England and Wales to accept pleas of guilty to manslaughter by reason of diminished responsibility where, on careful analysis, it is plain to the Crown that that is the right outcome. When in 2004 the Law Commission reviewed the law of diminished responsibility, research undertaken for it by Professor Mackay demonstrated that in a four-year sample period something like 90% of diminished responsibility outcomes were the result of acceptance of a plea, with no jury trial: *Partial defences to murder* Law Com No 290, Appendix B. It remains of great importance that pleas are accepted only in cases where it is proper to do so. Generally that means cases where there is no significant material dispute either of underlying fact or of medical analysis, and moreover it is clear that the defendant's mental responsibility for the killing can properly be described as *substantially* impaired. There may still be the very occasional case which is of such public profile or concern that it has to be the subject of full trial. In England and Wales these decisions are facilitated by the usually ready availability of full medical reports from experienced forensic psychiatrists. It is an important contribution to this process that every person charged with murder is routinely assessed by such a psychiatrist instructed by the prosecution, and early after arrest, either in prison or, in the relatively few cases in which s/he is on bail, as a condition of bail. So long as this careful consideration is given to each case, it is plainly of public benefit for pleas of guilty of manslaughter to be accepted. This avoids trials on non-issues which will be both expensive to the public and distressing to many of those involved, whether as witnesses, or relatives of the deceased, or as defendants and their families.

30. The Board can see no reason why those considerations should not apply equally in Trinidad and Tobago, providing that equivalent safeguards are maintained. From the enquiries which counsel for the state has undertaken at the request of the Board, it would appear that the practice in Trinidad and Tobago is indeed to permit the acceptance of a plea of guilty to manslaughter on the basis of diminished responsibility. Such a course had been adopted, for example, in the recent case of *Maharaj v Attorney General of Trinidad and Tobago* (Civil Appeal No 118 of 2010), and it attracted no comment when the case was considered by the Court of Appeal on 25 March 2015.

31. There is nothing in the Offences Against the Person Act to prevent this sensible practice. Counsel for the State in the present case was concerned that section 4A(6) might have that effect, but the Board is satisfied that his concerns were unfounded. Set out in full, section 4A provides as follows:

> "4A(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
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> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder is liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.
>
> (5) Where on a trial for murder the accused contends -
>
> (a) that at the time of the alleged offence he was insane so as not to be responsible according to law for his actions; or
>
> (b) that at that time he was suffering from such abnormality of mind as is specified in subsection (1), the court shall allow the

prosecution to adduce or elicit evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence.

(6) Where on a trial for murder -

(a) evidence is given that the accused was at the time of the alleged offence suffering from such abnormality of mind as is specified in subsection (1); and

(b) the accused is convicted of manslaughter,

the court shall require the jury to declare whether the accused was so convicted by them on the ground of such abnormality of mind and, if the jury declare that the conviction was on that ground, the court may, instead of passing such sentence as is provided by law for that offence, direct the finding of the jury to be recorded, and thereupon the court may order such person to be detained in safe custody, in such place and manner as the court thinks fit until the President's pleasure is known.

(7) The court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary."

32. Section 4A(6) is not the subsection which makes the correct outcome in a case of diminished responsibility a conviction for manslaughter. That is effected by section 4A(3). The purpose of subsection (6) is to interpret the jury's verdict where a trial for murder takes place and the verdict is "not guilty of murder but guilty of manslaughter". In that event, if the court is to have the power to order detention in a place of safety, instead of passing sentence, it is necessary to know whether the basis of the verdict was diminished responsibility or something else (such as provocation, or lack of intent). It does not follow that subsection (6) means that there has to be a jury trial even if the evidence of diminished responsibility is so clear that the prosecution, on careful consideration, is satisfied that manslaughter on that basis is the correct outcome of the proceedings, and the Board holds that this is not the implication of the subsection. It is not akin, as may have been thought at the trial in the present case, to the English rule in relation to verdicts of guilty by reason of insanity. In that, different, case, the effect of the Trial of Lunatics Act 1883, section 2, is indeed to require a jury verdict, but that is in a case where the statute also requires jury determination whether the defendant did

the act or made the omission charged. There is no parallel with this long-standing provision to be found in section 4A(6).

33. For completeness, two further features of section 4A(6) should be recorded. First, in order to meet the requirements of the Constitution in relation to the separation of powers, the reference to the President must now be understood as a reference to the court itself. The first instance judge made a declaration to that effect in *Maharaj* (supra) and there was no appeal by the Attorney General against that part of his decision. It must follow that subsection (7) no longer has any application. Second, the form of possible disposal provided for by subsection (6) is discretionary and not mandatory. The court before which a defendant is convicted of manslaughter on the grounds of diminished responsibility, whether by a jury or on acceptance by the prosecution of his plea of guilty on that basis, also has available the normal range of sentencing powers up to the maximum of life imprisonment which is applied to any offence of manslaughter by section 6 of the Offences Against the Person Act.

Conclusion

34. The conviction for murder must be quashed and conviction for manslaughter on the grounds of diminished responsibility substituted: see para 23 above. The sentence of death must also be quashed. The case must be remitted to the Court of Appeal in Trinidad and Tobago for consideration of sentence or disposal: see para 25 above. For the avoidance of doubt, those orders by the Board do not by themselves occasion any change in whatever may be the present regime under which the defendant is held except to the extent that he is no longer under sentence of death; what course is now taken in relation to him is a matter for the local courts.