



[2026] UKPC 22
Privy Council Appeal No 0022 of 2025

JUDGMENT

Uriah Woods (Appellant) v The State (Respondent)
No 2 (Trinidad and Tobago)

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

before

Lord Reed
Lord Lloyd-Jones
Lord Leggatt
Lord Doherty
Sir Anthony Smellie

JUDGMENT GIVEN ON
22 May 2026

Heard on 28 and 29 January 2026

Appellant

Edward Fitzgerald KC
Graeme Hall
(Instructed by Simons Muirhead Burton LLP)
All appearing pro bono

Respondent

Rowan Pennington-Benton
Daniel Goldblatt
(Instructed by Charles Russell Speechlys LLP)

LORD LLOYD-JONES AND SIR ANTHONY SMELLIE:

Introduction

1. On 9 July 2015, following a trial before Jack J and a jury, the appellant was convicted of the murder of his former partner, Sandra Miller, and was sentenced to death by hanging.

2. At trial, the prosecution case was that the appellant had committed the premeditated murder of Ms Miller on 14 July 2005. The appellant and Ms Miller had been in a relationship for about 15 years and together they had three children. The prosecution suggested that the relationship had been marred by years of domestic abuse including threats by the appellant to kill her if she ever left him. In February 2005 Ms Miller left the appellant following an incident where it is alleged that the appellant beat his son, Ryan, with a cable. Ms Miller then moved to another property known as Leeward Croft. She entered into a relationship with Lawrence Stewart and on 3 July 2005 they became engaged. During the morning of 14 July 2005 the appellant saw Mr Stewart in the street, told him to leave Ms Miller and threw bottles at him. Later that day, in the evening, the appellant went to Leeward Croft where he found Ms Miller and Mr Stewart in bed together. Ryan and Darion, both sons of the appellant and Ms Miller, were also in the room. The appellant struck Ms Miller 22 times with a cutlass and she died from her injuries. The appellant also severed Darion's foot with the cutlass. The appellant left the premises before he could be arrested. The prosecution case was that the appellant went to the property armed with a cutlass intending to use it. This, with other evidence, was said to negate any suggestion of a sudden and temporary loss of self-control. On 16 July 2005 police officers discovered the appellant's location. They attempted to apprehend him but he escaped. The appellant was shot during this incident. On 27 July 2005 the appellant was found by the officers in an unfinished house, suffering from infected gunshot wounds. He was discharged from hospital on 3 August 2005 and was taken to the police station and charged with murder.

3. At trial, the appellant gave evidence in his defence. There were no other defence witnesses. He accepted that he had killed Ms Miller but put forward a defence of provocation, which, if made out, would reduce the offence from murder to manslaughter. He maintained that at the time of the killing he and Ms Miller were in a relationship. He denied any prior violence or threats. He maintained that Ms Miller had moved out only for security reasons. Although he and Ms Miller lived separately, he would often visit Leeward Croft and stay the night. He stated that on the night of 14 July 2005 he went to visit his wife and children. When he arrived he was shocked to find the deceased in bed with Mr Stewart and he "tripped" or "lost it". He stated that, after the moment when he saw them lying in bed, he remembered nothing until he awoke in hospital. The appellant maintained at his trial that he found the cutlass in the apartment at Leeward Croft. He

stated that he had no recollection of inflicting any injuries with a cutlass on Ms Miller or Darion. At trial, no issues were raised relating to the appellant's mental health.

4. Following his conviction and sentence, the appellant appealed to the Court of Appeal of Trinidad and Tobago (Yorke-Soo Hon, Narine and Mohammed JJA). In a judgment dated 14 December 2017 all of the grounds of appeal against conviction and sentence were dismissed (*Uriah Woods v The State*, Cr App No T31 of 2015).

5. One of the grounds of appeal was that the trial judge had "misdirected the jury on the law with respect to provocation in that he directed them to examine the reasonableness of the appellant's reaction and to consider the powers of self-control of an ordinary person". Narine JA, delivering the judgment of the court, considered that the clear wording of section 4B of the Offences Against the Person Act expressly leaves for the jury's determination "the question whether the provocation was enough to make a reasonable man do as he did". The actions of the appellant were to be considered in the context of whether a reasonable man would have reacted as the appellant did (para 16). The jury was required to decide this question according to the effect the provocative acts and/or words would have had on the reasonable man (para 18). The law adopts the reasonable man test to introduce a standard of self-control that is acceptable by contemporary society. To do otherwise would be to provide justification for wholly unwarranted acts of aggression regardless of the circumstances and the gravity of the provocation (para 19).

6. On 10 June 2022 the appellant applied for permission to appeal to the Judicial Committee of the Privy Council on the ground that fresh medical evidence, from a psychiatrist Dr Richard Latham, demonstrated that he was not guilty of murder but was guilty of manslaughter on grounds of diminished responsibility. On 8 December 2022, a Panel of the Board (Lord Briggs, Lord Sales and Lord Hamblen), refused the appellant's application for leave to appeal (JCPC 2022/0056) in the following terms:

"(1) permission to appeal be REFUSED as the evidence of Dr Latham does not justify the grant of permission in circumstances where it recognises the need for a psychological assessment to be carried out and recommends a further psychiatric assessment. If such evidence becomes available and supports an appeal the Board would be prepared to reconsider the matter without prejudice to the other arguments raised by both the Appellant and the Respondent."

Subsequently, the appellant secured further clinical assessments and reports.

7. Some five and a half years after the decision of the Court of Appeal in the present proceedings, on 26 June 2023, the Court of Appeal of Trinidad and Tobago (Yorke-Soo Hon, Moosai and Mohammed JJA) delivered its judgment in *Marcelline v The State*, Crim App No S015 of 2014, in which it considered the decision of the Hong Kong Court of Final Appeal (“HKCFA”) in *HKSAR v Liang Yaoqiang* (No 2) [2017] HKCU 289; [2017] 2 HKC 123; 20 HKCAR 1 (“*Liang*”) which had not been cited before the Court of Appeal in the present proceedings. In *Marcelline* the Court of Appeal noted that the law of Hong Kong included a statutory provision identical to section 4B of the Offences Against the Person Act of Trinidad and Tobago and (at para 102) it concurred with the reasoning of the HKCFA in *Liang*. With the benefit of the decision in *Liang*, the court in *Marcelline* considered (at para 109) that in *Uriah Woods*, by focussing the jury on whether an ordinary person would have reacted in precisely the same manner as the appellant did, attention would have been diverted from the true issue which was whether the provocation was sufficiently grave to cause a person with ordinary powers of self-control to form the intent to kill or to cause grievous bodily harm and to act on that intent by whatever means. On that basis the Court of Appeal considered that its earlier decision in *Uriah Woods* as it related to this particular issue should no longer be followed.

8. On 27 March 2025 the appellant submitted a second application for permission to appeal to the Privy Council. On 30 July 2025 a Panel of the Board (Lord Reed P, Lord Richards and Lady Simler), granted the appellant permission to appeal on two grounds:

(1) The fresh clinical evidence demonstrated that the Appellant was not guilty of murder but was guilty of manslaughter on the grounds of diminished responsibility.

(2) The trial judge had materially misdirected the jury as to the elements of provocation.

The Panel refused the appellant permission to appeal on a further proposed ground that the fresh evidence demonstrated that he was not fit to plead or stand trial.

9. It is convenient to address the issue of provocation first.

Provocation

10. Mr Graeme Hall on behalf of the appellant advances two grounds of appeal in relation to the partial defence of provocation which, if successful, would reduce the offence from murder to manslaughter.

(1) First, he submits that the trial judge misdirected the jury in relation to the objective element of the test of provocation by directing them to consider whether the reasonable person “would have been provoked to lose his control and do exactly as Uriah Woods did”. It is submitted that the judge should have directed the jury that they should consider whether in the light of the gravity of the provocation on a person in the position of the appellant but with the ordinary powers of self-control to be expected in society today, that person might have formed the intention to kill or cause grievous bodily harm to the victim and have acted on that intention.

(2) With regard to the subjective element of the test of provocation, the appellant submits that in the light of the fresh psychiatric evidence as to the appellant’s mental health which he seeks to adduce, the trial judge’s direction as to whether the appellant was provoked has been rendered incomplete and inadequate, or requires material modification.

The Board will address these issues in turn.

The objective element: misdirection

11. Section 4B of the Offences Against the Person Act, Chap 11:08 (Trinidad and Tobago) provides:

“4B. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man”

This provision is identical to section 3 of the Homicide Act 1957 which applied in England and Wales until the defence of provocation was replaced by the defence of loss of control under sections 54 to 56 of the Coroners and Justice Act 2009.

12. In *Attorney General for Jersey v Holley* [2005] UKPC 23; [2005] 2 AC 580—an appeal from Jersey where article 4 of the Homicide (Jersey) Law 1986 corresponded to section 4B of the Offences Against the Person Act with which we are concerned—Lord Nicholls, delivering the opinion of the majority of an enlarged Board of the Judicial

Committee of the Privy Council, described the provocation defence in the following terms (at paras 5–7):

“Thus, in line with the common law, section 3 envisages that the defence of provocation has two ingredients. The first ingredient, known as the subjective or factual ingredient, is that the defendant was provoked into losing his self-control. This concept is not without its own difficulties, but it is not necessary to pursue them on this occasion. Suffice to say, in deciding whether this ingredient exists in a particular case all evidence which is probative is admissible. This includes evidence of any mental or other abnormality making it more or less likely that the defendant lost his self-control.

The second ingredient, often called the objective or evaluative ingredient, raises, in the language of the statute, ‘the question whether the provocation was enough to make a reasonable man do as he did ... [taking] into account everything both done and said according to the effect ... it would have on a reasonable man’. Broken down, this objective ingredient has two elements. The first element calls for an assessment of the gravity of the provocation. The second element calls for application of an external standard of self-control: ‘whether the provocation was enough to make a reasonable man do as he did.’

The statutory reference to a ‘reasonable man’ in this context is, by common accord, not the best choice of words. It is difficult to conceive of circumstances where it would be ‘reasonable’ for a person to respond to a taunt by killing his tormentor. Rather, the phrase is intended to refer to an ordinary person, that is, a person of ordinary self-control.”

13. Similarly, in *Daniel v State of Trinidad and Tobago* [2014] UKPC 3; [2014] AC 1290 Lord Hughes stated (at para 11):

“It is trite law that at common law provocation has for decades involved a two-stage inquiry. First, may the accused have killed when he had lost control of himself as a result of provocative behaviour by someone else? That is an inquiry about this accused on this occasion; it is sometimes described as a subjective inquiry. Second, if yes, might a reasonable person possessed of the ordinary powers of self-control to be expected

of someone of his age and sex have reacted to the provocation as the accused did? This is an objective test for the jury and is the means by which the partial defence is limited to those for whose actions there is a limited, but reasonable, excuse. In the past difficult questions have arisen over the qualities to be attributed to the hypothetical reasonable person; those do not arise in this case and are in any event largely answered by the decision of the Board in *Attorney General for Jersey v Holley* ... In some parts of the common law world, codification of the criminal law has significantly modified one or other of the two core elements of provocation, which fact may need to be remembered when one is considering decisions from other jurisdictions, but for the present the conventional two-stage inquiry is the one with which the Board is concerned.”

14. In the present case the judge directed the jury in the following terms:

“First, you must ask yourself whether the accused was so provoked, whether he was provoked in the legal sense. A person is provoked if he is caused by things that have been said and/or done by the deceased or by any other person to suddenly and temporarily lose his self-control. I repeat the definition of provocation, this is the definition of provocation.

A person is provoked if he is caused by things that have been said and/or done by the deceased, or by another person, to suddenly and temporarily lose his self-control. If you are sure the accused was not provoked in that sense, that it was not caused by something or things said or done by the deceased, Sandra Miller, and her fiancé (sic) Lawrence Stewart, or by any other person, then the defence of provocation does not arise and Uriah Woods is guilty of murder.

But if you conclude so that you are sure that Uriah Woods was, or might have been provoked in the sense that I have explained, and that as a result of provoking words and/or conduct he suddenly lost his self-control, you must then weigh how serious the provocation was for this accused.

Now, the final part of your consideration would be, is there anything you have heard or anything you have been told about the accused which may have made what was said or done affect

him more than it might any other man? Having regard to the actual provocation, and to your view as to how serious that provocation was for the accused, you must ask yourselves whether a person with the powers of self-control which are to be expected of an ordinary, sober, reasonable or normal person of the accused's age and sex, would have been provoked to lose his control and do exactly as Uriah Woods did on the night of the 14th July.

...Therefore, the ordinary, sober, reasonable or normal person in this context is a person who is not exceptionally excitable or eager or quick to argue or quarrel or fight. The ordinary sober, reasonable or normal person is possessed of such powers of self-control as everyone is expected to have from their fellow citizens. The powers of self-control each of you is expected to have is what we are dealing with.

If you are sure that such a person, as I have described to you, would not have done as Uriah Woods did in the given circumstances, then the Prosecution would have disproved or negatived provocation, and the accused is guilty of murder.

If, however, you conclude that an ordinary, sober, reasonable or normal person of the accused's age and sex would or might have been provoked to lose his self-control in similar circumstances, and that such a person would or might have gone on to do exactly as the accused did, then in such a case your verdict would be one of not guilty of murder, but guilty of manslaughter by reason of provocation. ...

Were the actions of the accused of chopping Sandra Miller 22 times, and chopping off the foot of his son, were these actions what are to be expected of a reasonable man placed in those circumstances? That is the question you must ask yourself. ...

Now, this is what the accused has placed before you for consideration, that he suffered a sudden and temporary loss of self-control. He has asked you to accept the evidence he has given and find him not guilty of murder, but guilty of manslaughter. You must consider whether a person with the normal powers of self-control which are to be expected of the

ordinary person, sober, reasonable or normal person of the accused's age and sex would have done exactly as he did?"

15. On behalf of the appellant it is submitted that the essential question on this limb of the appeal is whether the words "do as he did" in section 4 mean, as the respondent contends and the trial judge directed, to effect the killing in the manner the appellant did or, as the appellant contends, simply to kill. It is submitted that the distinction is important because if to "do as he did" means simply to kill, then the jury's reasonable man assessment is limited to asking whether an ordinary person of the appellant's age and sex might have been provoked into killing the victim. However, if those words mean to kill in the manner the appellant in fact killed, the jury's reasonable man assessment is broader, including weighing in the balance the fact that the appellant launched a sustained and vicious attack on the victim inflicting many wounds. The former meaning does not require the jury to consider whether there was a reasonable proportionality or relationship between the provocation received and the appellant's response to it but the latter meaning does.

The English and Welsh and Privy Council authorities

16. Prior to the commencement of section 3 of the Homicide Act 1957 the defence of provocation was governed in England and Wales entirely by the common law. The early evolution of the defence is described by Lord Diplock, with whose speech Lord Fraser of Tullybelton and Lord Scarman agreed, in *Director of Public Prosecutions v Camplin* [1978] AC 705 at p 713ff. He explains (at p 714) that the reasonable man made a comparatively late appearance in the law of provocation but that at least from as early as 1914 (*R v Lesbini* [1914] 3 KB 1116) the test of provocation was a double one: "the conduct of the deceased to the accused must be such as (1) might cause in any reasonable or ordinary person and (2) actually causes in the accused a sudden and temporary loss of self-control as the result of which he commits the unlawful act that kills the deceased". However, at common law the conduct had to be of a kind which was capable in law of constituting provocation and this was a question of law for the judge, not for the jury. Lord Diplock explains (at pp 714H–715A) that this was the effect of the decision of the House of Lords in *Mancini v Director of Public Prosecutions* [1942] AC 1.

17. At common law, subject to two limited exceptions, the defence of provocation required actual violence offered by the deceased to the accused. Insulting words or gestures unaccompanied by physical attack did not in law amount to provocation. In *Holmes v Director of Public Prosecutions* [1946] AC 588 the House of Lords confirmed that words alone, save perhaps in circumstances of a most extreme and exceptional nature, were incapable in law of constituting provocation. (*Camplin* per Lord Diplock at pp 714B, 715A-C)

18. An important change in the law was effected by the House of Lords in *Mancini* and in *Holmes* by introducing a requirement of a reasonable relationship between the provocation and the response. In assessing the reasonableness of the response it was necessary to take account not merely of the fact of killing but also of the mode in which the killing was effected (Glanville Williams, *Textbook of Criminal Law*, 2nd ed (1983), para 24.5; *Camplin* per Lord Diplock at pp 714H-715A). In *Mancini* Viscount Simon LC, with whom the other members of the appellate committee agreed, explained that in order to reduce the crime of murder to manslaughter, provocation must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death. He cited Stephen's *Digest of the Criminal Law*, art 317:

“In deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.”

Viscount Simon continued:

“The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v Lesbini*, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.”

19. Viscount Simon accordingly considered (at p 10) that if the only knife used in the struggle was the appellant's dagger and this followed the victim coming at the appellant and aiming a blow with his hand or fist, such action would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like a dagger and there would be no adequate material to raise the issue of provocation. (See also *Holmes v Director of Public Prosecutions* [1946] AC 588 per Viscount Simon at p

598: “*Mancini v Director of Public Prosecutions* points out the importance of considering the nature of the weapon used in retort ...”.)

20. This approach was reflected in the summing up of Devlin J in *R v Duffy* [1949] 1 All ER 932, 933 described on appeal by Lord Goddard CJ as impeccable.

“... in considering whether provocation has or has not been made out, you must consider the retaliation in provocation – that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation.”

21. Similarly, in *R v McCarthy* [1954] 2 QB 105, 109–110 Lord Goddard CJ considered that it was undoubted law that the violence used must have some reasonable relation to the provocation.

“While this provocation would no doubt have excused (when we say ‘excused’ we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one, it could not have justified the infliction of such injuries as to cause three or four fractures of the skull and the beating of the man’s head on a stony road.”

22. Section 3 of the Homicide Act 1957 (which, as noted above, is identical to section 4B of the Offences Against the Person Act (Trinidad and Tobago)) amended the common law of provocation in England and Wales in two important respects. These were explained in *Camplin* by Lord Diplock (at p 716B-E) as follows. First, it abolished all previous rules of law as to what could constitute provocation. In particular, it abolished the rule of law that, subject to certain exceptional cases, words unaccompanied by violence could not constitute provocation.

“Secondly it makes it clear that if there was any evidence that the accused himself at the time of the act which caused the death in fact lost his self-control in consequence of some provocation however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not of law: whether a reasonable man might have reacted to that provocation as the accused did.”

23. As a result, provided there was an evidential basis on which it could be concluded that the defendant lost his self-control, judges were no longer to follow the practice which had developed of withholding the issue of provocation from a jury on the basis that the accused's conduct was not capable in law of constituting provocation. It does not appear, however, that the statutory provision altered the requirement of a reasonable relationship between provocation and response (including the mode of response) within the objective element of the test. It was simply that that relationship was no longer a matter of law for the judge but a matter of fact or opinion for the jury. (See Glanville Williams, para 24.5, note 5. The observation of Lord Diplock in *Camplin* (at p 718D-E) that *Mancini* and *Holmes* ought no longer to be treated as an authority on the law of provocation may be taken to refer, so far as this issue is concerned, to the fact that the relationship was no longer a rule of law but a matter of fact or opinion for the jury.)

24. Thereafter, the words "do as he did" in section 4 of the Homicide Act and in comparable provisions, have been interpreted in England and Wales and by the Judicial Committee of the Privy Council as referring not to killing in the abstract but to include consideration of a reasonable relationship between provocation and response which extended to the mode of killing.

25. *Phillips v The Queen* [1969] 2 AC 130 was an appeal to the Judicial Committee of the Privy Council from Jamaica. Section 3C of the Offences Against the Person (Amendment) Law (Jamaica) No 43 of 1958 was identical to section 4B of the Offences Against the Person Act (Trinidad and Tobago) and to section 3 of the Homicide Act 1957 in England and Wales. The appellant had killed his mistress who had ended their relationship a week earlier. During a quarrel between the victim and the appellant's mother each spat at the other. The appellant's reaction was to seize a machete from his mother's bag and kill the victim with six blows. The defence at trial was automatism but the judge also directed the jury as to provocation. He directed them that they should ask whether a reasonable person provoked in the way the defendant was provoked would retaliate in the way the defendant retaliated and that if not the defence of provocation was not made out. The Court of Appeal considered that this direction was a misdirection but applied the proviso.

26. On a further appeal to the Privy Council the Board dismissed the appeal and held that the direction on provocation was impeccable. Referring to *Mancini*, Lord Diplock stated (at pp 136H–137A) that it was beyond question that at common law, by which the matter was regulated both in Jamaica and in England prior to amendment by legislation, the relationship between the degree of retaliation and the nature of the provocation was a relevant factor in determining whether the offence proved was manslaughter and not murder. In Lord Diplock's view, the statement of Viscount Simon in *Mancini* that the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter, was "an elliptical way of saying that the reaction of the defendant to the provocation must not exceed what would have been the reaction of a reasonable man".

27. The Board considered (at p 137C-D) that the only changes to the common law effected by the legislation were to abolish the common law rule that words unaccompanied by acts could not amount to provocation and to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did. The legislation, in referring to the question to be left to the jury as “whether the provocation was enough to make a reasonable man do as he [ie; the person charged] did” explicitly recognised that what the jury had to consider, once they had reached the conclusion that the person charged was in fact provoked to lose his self-control, “was not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control he would have retaliated in the same way as the person charged in fact did” (at p 137F-G). Lord Diplock added (at p 138C-D) that since the passing of the legislation it may be prudent to avoid the use of the precise words of Viscount Simon in *Mancini* (“the mode of resentment must bear a reasonable relationship to the provocation”) unless they are used in a context which makes it clear to the jury that this is not a rule of law which they are bound to follow, but merely a consideration which may or may not commend itself to them.

28. In *R v Brown (Egbert Nathaniel)* [1972] 2 QB 229 the appellant had been convicted of murder of his wife by cutting her throat with a razor. There was evidence that he believed she was carrying on an illicit association with another man. The defendant’s evidence was that in an argument his wife came towards him with a knife the point of which scratched his neck. He then hit her on the head twice with a poker before his mind blacked out. He knew there had been a fight but did not remember what had happened. The judge had directed the jury on provocation telling them that they must look for some proportion between the acts which provoked and the reaction which resulted from the provocation. The Criminal Division of the Court of Appeal (Lord Widgery CJ, Phillimore LJ and Talbot J), dismissing the appeal, observed that Parliament, when using simple and straightforward language in section 3 was endeavouring to lay down a precise test which the jury should apply. They said that:

“... when considering whether the provocation was enough to make a reasonable man do as the accused did it is relevant for a jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act committed by the accused. It may be for instance that a jury might find that the accused’s act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think therefore that a jury should be instructed to consider the relationship of the accused’s acts to the provocation when asking themselves the question ‘Was it enough to make a reasonable man do as he did?’” (at p 234B-D)

29. Similarly in *Camplin* Lord Diplock observed (at p 717A-B):

“A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day.”

In the same way, the model direction to the jury proposed by Lord Diplock (at p 718F) included the following:

“... the question is not merely whether such a person [the reasonable man] would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.”

30. Glanville Williams (at para 24.5) observes in relation to this model direction:

“This does not rub the point in, and the jury might not fully understand its significance (they might, conceivably, interpret the words ‘react as the accused did’ to refer merely to the fact of killing). But that is only a matter of expression: a judge who spelt out the modal rule for the jury in clearer language would evidently be upheld.”

31. In *Logan v The Queen* [1996] AC 871, an appeal to the Judicial Committee of the Privy Council from the Court of Appeal of Belize (where section 118 of the Belize Criminal Code was identical to Section 4B of the Offences Against the Person Act (Trinidad and Tobago)), Lord Steyn referred to the previous common law rule or supposed rule that “disproportionate retaliation may bar the defence, or, as it was later put, that the retaliation must bear a reasonable relationship to the provocation received”. In his view the rule plainly reflected “common sense criteria which are highly relevant to the defence of provocation. And it has never been doubted that these matters, where relevant, ought to be placed before the jury” (at p 887).

32. In *R v Acott* [1997] 1 WLR 306 the defendant was convicted of the murder of his mother. Provocation was not raised as a defence at his trial but on appeal he contended that the judge should have left the issue of provocation to the jury because of suggestions by the prosecution put to him during cross examination that he was mistreated by his mother. The House of Lords held that there was an insufficient evidential basis to require the judge to leave provocation to the jury. The present relevance of the decision lies in the observations of Lord Steyn, with whom the other members of the House of Lords

concurrent, in relation to the objective condition. He stated (at pp 310H–311D) in relation to section 3 of the Homicide Act 1957:

“Thirdly, the section provides that the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury. This part of the section provides for an external or objective standard. This provision is explained by the concluding provision that in determining the objective question the jury shall take into account everything done and said according to the effect which, in their opinion, it would have on a reasonable man. The purpose of this part of the section is well settled. After the adoption of the reasonable man test in the second half of the last century, judges withdrew cases where the defendant wished to rely on provocation on the basis of rules or supposed rules which were judicially developed. By converting common sense criteria into fixed rules of law judges empowered themselves to invoke those rules to withdraw cases from the jury. Thus the rule was laid down that disproportionate retaliation may bar the defence, or as it was later put, that the retaliation must bear a reasonable relationship to the provocation received: [*Mancini*]; [*Duffy*]; see also generally [*Logan*]. Plainly proportionality was a highly relevant matter to a defence of provocation. But the perceived mischief was that judges withdrew cases from the jury on the ground of fixed rules of law. In [*Camplin*] the House of Lords held that section 3 abolished all previous rules linked with the objective requirement as to what can or cannot amount to provocation: ... At the same time section 3 abolished the power of the judge to withdraw provocation as an issue on the ground that there was no evidence on which the jury could find that a reasonable man would have been provoked as the defendant was: [*Camplin*]. Henceforth the objective requirement was to be regarded as an issue of fact, or more realistically, as a matter of opinion, within the sole province of the jury.”

Lord Steyn went on to explain, however, that it remained the duty of the judge to decide whether there was sufficient material for a jury to find that it was a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control. If there was not, there was no issue of provocation to be considered by the jury. At a later point in his speech (at pp 312H–313A) he observed:

“... although there is no longer a rule of proportionality as between provocation and retaliation, the concept of

proportionality is nevertheless still an important factual element in the objective inquiry. It necessarily requires of the jury an assessment of the seriousness of the provocation.”

33. The final case in this line of authority is *Rampharry v The State* (Privy Council Appeal No 8 of 1998) (unreported) 20 January 1999 which was an appeal to the Judicial Committee of the Privy Council from Trinidad and Tobago. The defendant was convicted of the murder of his estranged wife during a quarrel. She sustained ten superficial stab wounds to the face and upper body in addition to a fatal stabbing through the heart. The trial judge rather grudgingly left provocation to the jury. He directed the jury that provocation consisted of three elements, the third of which was that the retaliation of the accused must be proportionate to the provocative acts. He continued:

“This is similar to self-defence. There must be some proportion between the retaliation by the accused and the actual provocative acts. And again I could use the same example I used with self-defence. If someone slaps you that may be a provocative act, but that wouldn’t cause a reasonable man to take a knife and stab the other person in return.”

34. On appeal to the Judicial Committee of the Privy Council it was objected that this was a misdirection. Sir Andrew Leggatt, delivering the opinion of the Board, referred to the observation of Lord Diplock in *Camplin* that the relationship between the gravity of provocation and the way in which the accused retaliated was a crucial factor in the defence of provocation. He also referred to the observation of Lord Steyn in *Acott* that the effect of section 3 of the Homicide Act 1957 was to convert the rule, capable of being withdrawn from the jury, that disproportionate retaliation may bar the defence, into a matter of opinion within the sole province of the jury. He concluded that the judge’s direction about the need for retaliation to be proportionate, even if it would have been exceptionable had it stood alone, was cured by the ensuing passage from which it must have been plain to the jury that his direction was to be considered in the context of the reaction to be expected of the ordinary person, judged by the standards applicable in Trinidad and Tobago.

“... even if the jury believed the appellant’s account of what happened, they must have regarded his ‘pounding’ of his wife with a knife, when she was defenceless and had not touched him with it, as constituting too disproportionate a reaction to such provocation as he said she had offered him for the jury to attribute it to the reasonable man. That provocation was wholly insufficient to make a reasonable man do as the appellant did.”

The appeal was therefore dismissed. In this Board's view, the approach followed in *Rampharry* is, so far as the current issue is concerned, entirely consistent with that in earlier cases such as *Phillips*, *Camplin* and *Acott*.

35. Pausing at this point, the picture which emerges from these authorities is as follows.

(1) There developed at common law a supposed rule of law that the mode of resentment must bear a reasonable relationship to the provocation if the offence of murder was to be reduced to manslaughter.

(2) Section 3 of the Homicide Act 1957 (and by the same token section 4B of the Offences Against the Person Act (Trinidad and Tobago)) amended the common law of provocation in that (a) it abolished all previous supposed rules of law as to what could constitute provocation; and (b) if there was any evidence that the defendant at the time of the act which caused death in fact lost his self-control in consequence of some provocation, the judge was bound to leave the question to the jury.

(3) Thereafter, the proportionality of the response to the provocation was not a rule of law but remained a relevant matter for consideration by the jury when deciding whether murder was reduced to manslaughter on grounds of provocation.

(4) These authorities provide no support for the view that in considering the objective test the jury should confine its attention to the abstract question whether a reasonable person might react to the provocation by forming an intention to kill or inflict grievous bodily harm and act on it, without consideration of what the defendant actually did. On the contrary, the nature of the response has been considered a part of the circumstances which the jury may take into account in deciding whether the objective test is satisfied.

Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980)

36. The principal recommendation of the Criminal Law Revision Committee in its Fourteenth Report, Offences Against the Person (1980) (Cmnd 7844) was that the law of provocation should be reformulated: in place of the reasonable man test the test should be that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with a murderous intent. The Committee considered that this formulation had some advantage over the then current law

in that it avoided reference to the entirely notional “reasonable man”, directing the jury’s attention instead to what they themselves considered reasonable, which in the Committee’s view had always been the real question (at para 81).

37. With regard to the specific issue under consideration in the present case, the Committee concluded (at para 86):

“We are also of opinion that the defence of provocation should not depend upon the particular mode by which the victim was injured or killed. To this extent the ‘reasonable relationship’ test will go. The question for the jury will be whether the provocation presented to the defendant was a sufficient ground for such loss of self-control as resulted in his killing the deceased.”

38. No steps were taken to implement these recommendations by legislation.

Coroners and Justice Act 2009

39. Sections 54 and 55 of the Coroners and Justice Act 2009 replaced in England and Wales the common law defence of provocation with a statutory defence of loss of control with effect from 4 October 2010. In *R v Clinton* [2012] EWCA Crim 2; [2013] QB 1 Lord Judge CJ emphasised (at para 2) that the new statutory defence is self-contained and its common law heritage is irrelevant to its interpretation. It is, however, relevant for present purposes to note that the new statutory defence retains an objective test which it expresses in the following terms:

“a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.”

(See also the Law Commission Report on *Partial Defences to Murder*, (Law Com No 290) 2004, para 9.168.)

Australia

40. In Australia the objective element of the provocation defence has developed in a different way. In *Johnson v The Queen* (1976) 136 CLR 619; 11 ALR 23 the High Court

of Australia considered section 23 of the Crimes Act 1900 (NSW) which provided a defence of provocation in New South Wales. The proviso to section 23(2) provided:

“Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find:

(a) That such provocation was not intentionally caused by any word or act on the part of the accused;

(b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and

(c) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life.”

41. The High Court of Australia held first that before provocation could become a relevant consideration, the jury must be satisfied beyond a reasonable doubt that the elements of murder were present. The words “without intent to take life” in paragraph (c) of the proviso meant without an intention arising independently of the provocation (at p 33). Secondly, it held that the accused bore the burden of proving on the balance of probabilities the matters in the proviso (at p 33). Thirdly, it held that section 23 was exhaustive of what must be established to reduce murder to manslaughter by reason of provocation. There was no separate requirement, either at common law or under section 23, that the retaliation must be proportionate to the provocation. The proportion of the fatal act to the provocation is part of the material relative to whether the provocation was reasonably calculated to deprive an ordinary person of the power of self-control (at p 35).

42. Barwick CJ observed (at pp 35–36):

“Having considered the reported cases and the writings on this matter I have come to the conclusion that the proportion of the fatal act to the provocation is part of the material on which the jury should consider whether the provocation offered the accused was such as would have caused an ordinary man, placed in all the circumstances in which the accused stood, to have lost his self-control to the point of doing an act of the kind and degree of that by which the accused killed the deceased. That proportion is not, in my opinion, a separate matter to be considered after it has been decided that an ordinary man would

have lost self-control in the circumstances by reason of the provocation. The relationship of the fatal act to the provocation is perhaps best expressed by saying that the provocation must be such as would lead an ordinary man in the accused's circumstances to so lose his self-control as to do an act of the kind and degree as the act by which the accused killed the deceased.”

43. Barwick CJ went on (at pp 36–37) to approve the following statement of Taylor and Owen JJ in their joint judgment in an earlier Australian case, *Parker v The Queen* (1963) 111 CLR 610 at 641.

“It has been said that the proviso is silent upon the question whether there must be some reasonable relationship between the provocation and the act or acts causing death. This is so in the sense that no express mention is made of this factor. But, surely, when the proviso requires that the provocation must be such that it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, it is speaking of loss of the power of self-control in relation to the act or acts causing death. In other words, the question is not whether there was some loss of the power of self-control, but whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. And, of course, the provocation must have been of such a character as was calculated to deprive an ordinary person of the power of self-control to that extent”

Barwick CJ expressed his agreement with these concepts. He observed that they seemed to treat the proportion of the retaliation as part of the application of the objective test of loss of self-control and that they also appeared to subscribe to the view that loss of self-control is a relative state.

44. Making allowance for the different context of the New South Wales legislation, it seems to the Board that the reasoning of Barwick CJ set out above is entirely consistent with that in the decisions from England and Wales following the Homicide Act 1957 and the Privy Council decisions following similar legislation considered above.

45. Barwick CJ did, however, go on to make some further observations (at p 38) which were to prove influential.

“To take into account the mode and extent of retaliation when determining whether an ordinary man, subjected to the like acts of provocation in all the circumstances in which the accused then stood, would have lost self-control to the point of doing something akin to what the accused has done is one thing. To require that it be established positively and, as a separate issue or element, whether the act of the accused was in fact proportionate to the provocation, is quite another; or to require the Crown as a specific matter to negative that proportion is quite another. This is particularly so if it be assumed that it has already been concluded that the accused had relevantly lost self-control. In considering whether an ordinary man would have lost self-control so as to form an intent to kill and to kill in the manner in which the accused did so, the jury may think the provocation was such that an ordinary man might react in the way in which the accused reacted. After all, it is the induced intent to kill rather than the induced fatal act which is the critical consideration. As I have stressed, the provocation is irrelevant unless there was an intent to kill or to do grievous bodily harm: and the provocation to be operative, must have caused that intent. No doubt the question is difficult, namely: would the actual provocation, which has caused the accused so far to have lost self-control as to have formed an intent to kill, have caused an ordinary man to have lost his self-control and to have formed that intent? To express the objective test as whether the provocation would have caused an ordinary man to have so far lost self-control as to have done an act of the kind or degree done by the accused, tends somewhat to obscure the necessity of there being an intent to kill or do grievous bodily harm. Emphasis on the essential causation of the requisite intent may, on the one hand, make provocation more difficult to establish and, on the other hand, lessen perhaps the importance in the mind of a tribunal of the particular way in which the intent to kill or to do grievous bodily harm was effectuated.”

46. The Chief Justice’s observation that it is the induced intent to kill rather than the induced fatal act which is the critical consideration was approved by a majority of the High Court of Australia (Brennan, Deane, Dawson and Gaudron JJ) in *Masciantonio v The Queen* (1995) 183 CLR 58; 129 ALR 575. Having observed that it is now well established that the question of proportionality is absorbed in the application of the test of the effect of the provocation upon the ordinary person, the majority continued (at p 581):

“... as Barwick CJ pointed out in *Johnson v The Queen* in considering whether an ordinary person could have reacted in

the way in which the accused did, it is the formation of an intent to kill or do grievous bodily harm which is the important consideration rather than the precise form of physical reaction.”

The majority continued (at p 583):

“The question is not whether an ordinary person, having lost his self-control, *would* have regained his composure sooner than the accused nor is it whether he would have inflicted a lesser number of wounds. It is whether an ordinary person *could* have lost self-control to the extent that the accused did. That is to say, the question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it. The associated question whether, in the sequence of events, an accused, having lost his self-control, had regained it so that the continued infliction of injury was in fact no longer provoked, is not a question to be answered by reference to the ordinary person. It is to be answered by reference to the conduct of the accused himself and to common experience of human affairs. It is the nature and extent—the kind and degree—of the reaction which could be caused in an ordinary person by the provocation which is significant, rather than the duration of the reaction or the precise physical form which that reaction might take. And in considering that matter, the question whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention.” (Original emphasis.)

Despite the different legislative context, the decision provides some support for the appellant’s case on the present appeal.

New Zealand

47. The Australian case law has been influential in New Zealand. In *R v Rongonui* [2000] 2 NZLR 385 (Court of Appeal) Elias CJ (with whom Thomas J agreed) referred, in a passage which was strictly obiter, to the conceptual difficulties presented by the notion of proportionality.

“If the accused has in fact lost self-control as a result of the provocation, consideration of whether the nature and extent of the attack is ‘proportionate’ may invoke a rationality already lost. In such a case the ferocity of an attack may be itself evidence of the fact of loss of self-control. On the other hand, in some cases a wholly disproportionate response may be compelling evidence that the homicide was not in fact induced by the provocation.” (at para 136)

Elias CJ explained that proportionality is not required as a matter of law and continued:

“It would be wrong for the Judge therefore to suggest that there is any requirement of reasonably proportionate retaliation. Lack of proportionality may however, as a matter of common sense, be evidence which in the particular case may help the jury to determine whether or not the accused committed the homicide under provocation. If the Judge does not suggest that the jury must consider the question of proportionality, it will not usually cause a miscarriage of justice if the jury is reminded that it can look at whether the retaliation bore any relation to the provocation in deciding whether in fact the accused was provoked into the attack. But it will usually be unnecessary to make any specific reference.” (at para 137)

48. Elias CJ referred (at para 139) to the rejection in *Phillips* of the contention that loss of self-control is absolute. She noted, however, that that conclusion was based on section 3 of the Homicide Act 1957 in which the objective test was whether the provocation was sufficient to make the reasonable man do as he did. In New Zealand the subjective limb of section 169(2) of the Crimes Act 1961 required the accused to have been induced to commit the act of homicide while in fact deprived of his self-control by provocation but the objective limb was concerned only with the sufficiency of the provocation to deprive the accused of self-control. Some care was necessary in the application of *Phillips* given the different statutory provisions (at paras 139–141). She concluded that in that case the direction would have suggested to the jury that the disproportionality of the actual response was something it must take into account. The judge’s statement that consideration of proportionality was not a requirement of law was not plain enough to dispel the impression that it was a necessary and significant element of the defence of provocation. In addition, while it was open to the jury on the facts to treat any disproportion as negating a causal connection between provocation and response, disproportion in the extent of the response was equally capable of pointing to loss of control. The judge’s reference to one possibility without mentioning the other was an error.

“That error was compounded by applying the standard of the ordinary person beyond loss of self-control to the extent of the accused’s reaction. In the result the jury may well have been deflected from the question of loss of self-control.” (at para 142)

In the result, the appellant’s defence of provocation had not been properly left to the jury.

49. In *R v Timoti* [2005] NZSC 37 [1896] Tipping J, delivering the judgment of the Supreme Court of New Zealand (Elias CJ, Gault, Keith, Blanchard and Tipping JJ), distinguished between first, the question whether the provocation caused the accused to lose his power of self-control and, as a result, to commit the act of homicide, a question of fact, and secondly, the question whether the provocation relied on was sufficient to deprive an ordinary person with the accused’s characteristics, if relevant, of the power of self-control, an evaluative question, albeit also one of fact. On the first question the relationship between the level of provocation and response was apt to be equivocal. An extreme response to relatively slight provocation could show a loss of control or that the accused was using the occasion for another purpose and self-control had been retained. On this question an abstract direction was unlikely to be helpful to the jury; a case specific direction inviting them to consider whether the accused did lose self-control would be of assistance. If the second question arose, it was necessary to consider whether proportionality is capable of assisting a jury in its evaluation of whether the provocation was sufficient to deprive the statutory hypothetical person of the power of self-control. He continued (at paras 35–36):

“It is important to note that on this question the actual mode of response of the accused to the provocation is irrelevant. This is the key point.

The question now being addressed is not whether the accused did lose the power of self-control; rather it is whether the provocation was sufficient to cause the hypothetical person to do so. The accused’s actual response is no more than a distraction on this issue. The question concerns the response of the hypothetical person to the provocation actually found to have been given. Hence a direction which invites a comparison between the level of provocation and the accused’s response to it is inappropriate and apt to cause confusion on this second (evaluative) question.”

50. Tipping J accepted that “the question whether the provocation was sufficient to cause the hypothetical person to lose the power of self-control to the point of committing

the act of homicide carries within it a value judgment to which proportionality considerations are relevant.” However, the concept of sufficiency adequately incorporated this without any need for a confusing proportionality gloss. This approach was supported by *Masciantonio* where, even against a “do as he did” criterion, the majority in the High Court of Australia aptly said that it was well established that the question of proportionality was absorbed into the application of the test involved in the evaluative question. Tipping J concluded:

“In summary, therefore, questions of proportionality may be of some assistance to a properly directed jury on the factual question but are likely to be more confusing than helpful to them on the evaluative question. On that question a direction couched in terms of proportionality between the provocation and the accused’s response should not be given.” (para 38)

51. Two points concerning *Timoti* should be noted at this stage. First, the New Zealand statute, unlike those of Trinidad and Tobago, England and Wales, or Australia, does not apply a “do as he did” criterion. Secondly, the reference by Tipping J to “the question whether the provocation was sufficient to cause the hypothetical person to lose the power of self-control to the point of committing the act of homicide” demonstrates that on this approach the objective question addressed was limited to whether the hypothetical person would have formed the mens rea for murder and acted on it. Whether the hypothetical person would have lost control to the extent the accused actually did is excluded from consideration.

Hong Kong

52. In *Liang* the HKCFA subjected the present issue to very close analysis. Mr Justice Fok PJ, delivering the judgment of the court, considered that section 4 of the Homicide Ordinance (Cap 339), which was in identical terms to section 4B of the Offences Against the Person Act (Trinidad and Tobago) and section 3 of the Homicide Act 1957, was ambiguous. In the court’s view the words “do as he did” could convey a range of meanings, namely that the provocation was sufficiently grave to cause a person with ordinary powers of self-control:

- (1) To lose self-control (“the loss of self-control meaning”);
- (2) To kill the victim (ie to form the intent to kill or cause grievous bodily harm and act on that intent) by whatever means (“the killing simpliciter meaning”);

(3) To kill the victim using the means that the defendant did, eg by stabbing or shooting or strangulation (“the means of killing meaning”);

(4) To kill the victim in exactly the manner the defendant did, eg by 6 shots of the gun or 213 chops of the knife (“the precise method of killing meaning”).

53. Having surveyed the authorities in England and Wales, the Judicial Committee of the Privy Council, Australia and New Zealand the HKCFA addressed the policy underlying the defence.

“108. However, in respect of the objective question, the notion that the retaliation must bear a particular relationship to the provocation is one beset with conceptual difficulties. Where the person with ordinary powers of self-control has been provoked to the degree necessary to cause him to lose that self-control, there is an inherent contradiction in then going on to ask whether his actions in that state of loss of self-control bear some proportionate relationship to the provocation offered by the victim. As Elias CJ put it in *Rongonui*, this may seek to 'invoke a rationality already lost'. If a person has been provoked to such an extent that the ordinary person could equally have lost his self-control to the point of forming the intent to kill the provocateur and acting on that intent, it is difficult to see why the extent of the defendant's reaction should deprive him of the defence. To ask of the hypothetical 'reasonable man' in section 4 whether the provocation might have been sufficient to make him lose his self-control to the extent of making a choice as to weapon (gun, knife or chapati pan) or to the extent of stabbing, say, once or twice in carrying out his intention to kill the victim rather than, say, 10 or 20 or even 200 times seems artificial and, more importantly, conceptually extremely difficult for a jury. The precise mode of retaliation may also be fortuitously dependent on the lethal instrument near at hand.

109. As a matter of underlying policy, where the jury have already reached the conclusion that the homicidal act was carried out intentionally by the defendant when he had lost his self-control, the real focus of the evaluative, objective, question is whether a person with the ordinary powers of self-control might have reacted to the retaliation by forming the intent to kill or cause really serious bodily harm to the victim and acting on that intent. To the extent that an extreme homicidal response negates a finding of a subjective loss of self-control, the

defence will not apply. But save in that circumstance, there is no compelling reason of logic or policy to require the jury to consider whether the homicidal actions (which have already been established were in fact brought about by a loss of self-control) bear a reasonable relationship to the provocation. On the contrary, the difficulties inherent in such a question strongly suggest a conclusion that no such question is necessary.”

54. Fok PJ considered (at para 112) that the English and Privy Council cases showed that it was debatable whether the reasonable relationship rule still applied under the statutory defence of provocation. In his view, the cases certainly supported the proposition that there was no rule of law to that effect. He considered that the idea that the mode of resentment must be proportionate in type to the provocation given was, at the very least, at odds with the abolition of the common law rule that words themselves could not amount to provocation. Once it was accepted that words themselves could provoke the loss of self-control with an intention to kill, the reasonable relationship rule must (if it survives in any form) at least require some reformulation in order to operate in a case of provocative words. He concluded:

“113. That being the case, it is difficult to see a proper basis for concluding that meaning (4) (the precise method of killing meaning) can be the correct construction of 'do as he did'. The conceptual difficulties in seeking to find a relationship between provocation that brings about a loss of self-control triggering a homicidal reaction with the reasonableness of the choice of weapon or mode of carrying out a murderous intent weighs against the conclusion that meaning (3) (the mode of killing meaning) is the proper construction of those words.

114. In the light of the context and purpose of section 4 and the underlying policy of the law to mitigate the penal consequences of a killing carried out in the frenzy of a loss of self-control, meaning (2) (the killing simpliciter meaning) provides the most logical and readily understandable meaning of the words 'do as he did'. This requires the jury to consider whether, in the light of the gravity of the provocation on a person in the position of the defendant but with the ordinary powers of self-control to be expected in society today, that person might have formed the intention to kill or cause grievous bodily harm to the victim and have acted on that intention. This is a simpler test in which the magnitude of the response is absorbed into the evaluation of whether the provocation was sufficient to cause a person with ordinary powers of self-control to lose that self-control to the point of forming the intent to kill or cause grievous bodily harm

and acting on that intent. It avoids the need for illogical and extremely difficult mental gymnastics on the part of the jury in trying to grade degrees of provocation and degrees of reasonable retaliation to such provocation. The defence of provocation is neither intended to be, nor capable of being, a matter of scientific measurement. Rather, it is intended that juries apply their common sense to the evidence to determine the result in any given case.”

55. In the light of its conclusion as to the correct construction of the words “do as he did” the HKFCA identified (at para 115) a risk that without proper direction a jury may embark on a line of reasoning which would, on that construction, be impermissible, namely that (a) notwithstanding that he was in fact provoked to lose his self-control; (b) the scale of the retaliation was out of proportion to the provocation offered; so that (c) the objective question should necessarily be answered against him.

“The jury should not be led into thinking that killing by inflicting 213 wounds would deprive the accused of the provocation defence, whereas killing by some lesser number of wounds would not.”

56. While observing that these issues do not arise in every case involving provocation, the HKCFA considered (at para 124) that in cases where a real risk of the impermissible line of reasoning exists, a suitable direction which counteracts that risk should be given to the jury. It proposed a direction along the following lines:

“In addressing the issue whether [those words/that conduct] was or may have been such as to cause an ordinary person to do as the defendant did, it is not a question of whether that ordinary person might have reacted in exactly the same way as the defendant did. It is sufficient were you to find that the provocation which was presented would or might cause an ordinary person, placed in the same situation as the defendant, to lose self-control and cause [the victim’s] death with the intention of doing so or at least with an intention to cause really serious bodily harm. If that is what you find, then you must find the defendant not guilty of murder but guilty of manslaughter and the possibility that the ordinary man would not have [stabbed 200 times but only say ten times] / [used the chopper but might have used some other implement] is irrelevant.”

Trinidad and Tobago

57. Reference has been made above to the judgment of the Court of Appeal of Trinidad and Tobago (Yorke-Soo Hon, Moosai and Mohammed JJA) in *Marcelline v The State* Crim App No S015 of 2014 where both *Liang* and the decision of the Court of Appeal in the present proceedings were considered. The Court of Appeal adopted the reasoning of the HKCFA in *Liang* and concluded (at para 109) that its decision in the present case should no longer be followed.

“No flaw had been identified in *Uriah Woods*. With the benefit of the decision in *Liang Yaoqiang*, it is now evident that by focussing the jury on whether an ordinary person would have reacted in *precisely* the same manner as the appellant did, the attention would have been diverted from the true issue which arose for their consideration. That issue did not require the jury to consider whether the provocation was sufficiently grave to cause a person with ordinary powers of self-control to kill the victim in *exactly* the manner as the appellant had. Rather, it required the jury to focus on the question of whether the provocation was sufficiently grave to cause a person with ordinary powers of self-control to kill the victim, that is, to form the intent to kill or to cause grievous bodily harm and to act on that intent by whatever means. On this basis, we are of the very respectful view that, as it relates to this particular issue, *Uriah Woods* should no longer be followed.” (Original emphasis.)

58. The Board notes that *Rampharry* was not cited in *Marcelline*.

Discussion

59. There is no rule of law which requires a jury to be satisfied when considering the objective test that the mode of killing (for example the method or weapon used or the ferocity of the attack) was a proportionate response to the provocation. The question for consideration is whether the proportionality of the mode of killing to the provocation is a relevant consideration which the jury may take into account in its evaluation of whether the objective test (ie whether a reasonable person might have been caused to do as the defendant did) is satisfied.

60. On this appeal Mr Graeme Hall (who addressed the Board on the issue of provocation) on behalf of the appellant submits that the objective test should be satisfied if the provocation might induce a reasonable person to form an intent to kill or inflict grievous bodily harm and to act on it. Accordingly, he submits that it is irrelevant to

consider the mode or method of killing or the ferocity of the attack. In particular, he submits that the weapon used or the number of blows inflicted are not relevant considerations. He relies here on the Australian and New Zealand authorities considered above, on the decision of the HKCFA in *Liang* and on the decision of the Court of Appeal of Trinidad and Tobago in *Marcelline*.

61. In terms of legal logic this is an attractive submission. In order to convict of murder it is necessary to prove an intention to kill or to inflict grievous bodily harm. The partial defence does not negate that mens rea (*Lee Chun-Chuen v The Queen* [1963] AC 220 per Lord Devlin at p 227) but it does relate to the circumstances in which that intention was formed. The question is whether the defendant's responsibility for causing death with the mens rea of murder should be mitigated. Once it is established that that intention was formed as a result of a loss of control and that a reasonable person might have formed that intention and acted on it, it might be thought that the mode in which the killing was carried out becomes irrelevant to guilt although it remains relevant to sentence. In principle, the mode of response, the weapon used or the intensity of the response do not relate to the formation of that intention.

62. In the Board's view, however, this is too narrow a focus. First, to confine the operation of section 4B of the Offences Against the Person Act to the formation of the mens rea is an unduly limited reading of the statute. The words "do as he did" refer to what the accused did and it is artificial to limit them to the formation of the mens rea of murder and acting on it in an abstract sense. Secondly, as a matter of principle, in applying the objective test the jury should be entitled to consider whether the defendant's actual response is proportionate to the provocation. Having assessed the gravity of the provocation, the jury must decide whether the provocation was enough to make a person of ordinary self-control act in the way in which the defendant acted (*Holley* per Lord Nicholls at para 6). It is not appropriate for the jury to put aside what actually occurred and limit its consideration to an abstract question. What the defendant actually did is relevant as part of the circumstances of the killing and the jury should be entitled to take it into account in making its evaluation. In the Board's view, in light of the wording of the statute, the proportionality of the mode of killing to the provocation is a relevant factor which the jury may take into account when considering whether the objective test of provocation is satisfied.

63. The nature of the partial defence of provocation is that it invites the jury to make a broad moral judgement about the degree of culpability of the accused in failing to control his actions. As a matter of social morality, which the jury is best placed to assess, the degree of culpability depends not only on what effect the circumstances might be expected to have on the state of mind of the accused but also on how the accused acts in response to them. It is, therefore, neither realistic nor appropriate to seek to remove the details of what the accused actually did (including the mode of killing and the ferocity of the violence used) from the jury's consideration.

64. It has been objected that to accept the mode of response as relevant to the objective test assumes that the reasonable man, even after he has lost his self-control, will continue to behave reasonably. (See, for example, Ashworth “The Doctrine of Provocation” [1976] CLJ 292, 303; *Liang* at para 108.) Hence the observation of Elias CJ in *Rongonui* (at para 136) that this may seek to “invoke a rationality already lost”. In a sense, however, this proves too much. The whole exercise of asking what a reasonable man might have done invokes a rationality already lost. The objective question only arises if the defendant has been found to have lost his self-control. In answering the objective question, the defendant is judged by the standard of a reasonable man, whatever reading is given to the words “do as he did” in the statute. In a situation where this hypothetical reasonable man might have been provoked to lose his self-control, there is no inherent contradiction in asking whether he might have reacted to the provocation in the way the defendant did, or whether the defendant’s reaction exceeded, in the means or extent of the violence used, the reaction to be expected of the reasonable man.

65. As the Law Commission of England and Wales observed in its 2004 *Report on Partial Defences to Murder*, it is a problem inherent in the objective test that persons of ordinary temperament would not normally be expected to kill in the face of provocation. The Commission noted the observation of Lord Bingham CJ in *R v Campbell* [1997] 1 Cr App R 199 that “it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation”. Nevertheless, as the Law Commission pointed out, juries have recognised that there may be circumstances in which an ordinary person may be driven to use fatal violence in response to provocation. But clearly the partial defence of provocation must require some objective assessment of the response and its causes. Otherwise, the law would favour a person with a propensity to fly into a murderous rage at the least provocation. (See Law Com No290, *Report on Partial Defences to Murder*, 2004, paras 3.113, 3.114.)

66. In *Liang* the HKFCA observed (at para 114) that its favoured approach to the objective test avoided the need for illogical and extremely difficult mental gymnastics on the part of the jury in trying to grade degrees of provocation and degrees of reasonable retaliation to such provocation. In the Board’s view, however, loss of self-control may be a matter of degree so that the proportionality of the response does not necessarily cease to be relevant once it is established that a person of normal self-control would have lost self-control. A similar argument was advanced in *Phillips* where the objection was answered by Lord Diplock (at p 138A-B) as follows:

“... counsel for the appellant contended, not as a matter of construction but as one of logic, that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did. This argument is based on the premise that loss of self-control is not a matter of

degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon. It is not insignificant that the appellant himself described his own instantaneous reaction to the victim's provocation in spitting on his mother as 'I spin around quickly was to punch her with my hand.'"

The response of a person of ordinary self-control to provocation can fairly be expected to vary according to the severity of the provocation. To adopt the language of Taylor and Owen JJ in *Parker v The Queen* (above, para 43) the question is whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. While the Board would accept that the defence of provocation is not capable of being a matter of scientific measurement, the proportionality of the mode of response to the provocation is a matter which a jury should be entitled to take into account when applying the objective test.

67. The Board notes that "the impermissible line of reasoning" identified by the HKFCA in *Liang* rests on the premise that its interpretation of the words "do as he did" is correct. (See *Liang* paras 85 and 115.) For the reasons set out above, the Board does not accept that premise. Nevertheless, there will be cases (for example where the jury has been introduced to the notion of proportionality) in which it will be appropriate or necessary for the judge to direct the jury that there is no rule that the response must be proportionate to the provocation and that this is simply one factor which the jury may take into account in considering whether the objective test is satisfied. A lack of proportionality does not necessarily mean that the objective test is not satisfied. The Board endorses the observation of Barwick CJ in *Johnson v The Queen* (at pp 35–36, cited above at para 42): the proportion of the fatal act to the provocation is part of the material on which the jury should consider whether the provocation offered the accused was such as would have caused an ordinary man, placed in all the circumstances in which the accused stood, to have lost his self-control to the point of doing an act like that by which the accused killed the deceased. (See also the observation of Lord Steyn in *Acott* at pp 312H–313A, cited at para 32 above.).

68. Moreover, as the Board explained in *Holley* (at paras 9 and 12), the objective test is the only standard external to the accused by which the jury can assess the sufficiency of the provocation relied upon. The rationale is that although a reasonable man would, by definition, be unlikely to be provoked to kill, the test based on such an individual is explicable in terms of its function: to introduce as a matter of policy a standard of self-control which must be met if provocation is to be established as a defence. The objective,

evaluative, condition is the ethical foundation of the defence: the defendant is to be partially excused because he satisfies both the element of loss of self-control and the element of moral justification, which is that an ordinary person might have done the same.

69. For the reasons set out above, the Board considers that the decision of the Court of Appeal of Trinidad and Tobago in *Marcelline* should no longer be followed on this point.

70. It does not follow, however, that it must be established under the objective test that a person of ordinary self-control would have acted in precisely the way in which the defendant acted. The words “do as he did” do not require an exact correspondence between the defendant’s conduct and that of a reasonable person. What is required is that a reasonable person might have acted in the same or in a similar way. The real issue is whether it was reasonable to lose self-control to the degree that the defendant did, not whether the ordinary person would have responded with the same kind of acts as the defendant did. (See Ashworth, [2005] Crim LR 966 at 974.) Here we consider that the jury question formulated by Lord Diplock in *Phillips* (at p 137F-G) (“not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control he would have retaliated in the same way as the person charged in fact did”) is unduly strict. We have noted above the language of the Coroners and Justice Act 2009 section 54(1)(c) which sets out an objective test for the partial statutory defence of loss of control by asking whether “a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.” (Emphasis added.) In the Board’s view the words emphasised articulate what was the best interpretation of the previous wording.

71. In this regard the summing up in the present case was clearly defective. The judge repeatedly directed the jury to consider whether a reasonable person would have done exactly as Uriah Woods did on the night of 14 July:

“... you must ask yourselves whether a person with the powers of self-control which are to be expected of an ordinary, sober, reasonable or normal person of the accused’s age and sex, would have been provoked to lose his control and do exactly as Uriah Woods did on the night of the 14 July.”

“If you are sure that such a person, ..., would not have done as Uriah Woods did in the given circumstances, then the Prosecution would have disproved or negatived provocation, and the accused is guilty of murder.

If, however, you conclude that an ordinary, sober, reasonable or normal person of the accused's age and sex would or might have been provoked to lose his self-control in similar circumstances, and that such a person would or might have gone on to do exactly as the accused did, then in such a case your verdict would be one of not guilty of murder, but guilty of manslaughter by reason of provocation”

The judge then went on to define the objective question to be decided by the jury in terms which included a graphic description of the gruesome attack:

“Were the actions of the accused of chopping Sandra Miller 22 times, and chopping off the foot of his son, were these actions that are to be expected of a reasonable man placed in those circumstances?”

The Board is in no doubt that this was a misdirection. The jury would have understood that unless a reasonable person would have acted in exactly the way in which the appellant did, the partial defence of provocation was not available.

The proviso

72. Section 44(1) of the Supreme Court of Judicature Act provides

“44(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.”

73. Notwithstanding the misdirection, the Board has come to the clear view that this is a case for the application of the proviso so far as the provocation defence is concerned. The following matters demonstrate that the killing was not carried out as a result of a loss

of control but was premeditated, and that, therefore, a defence of provocation could not succeed at a retrial.

(1) The incident at Leeward Croft at 10.30 pm on 14 July 2005 did not involve a sudden discovery by the appellant of infidelity on the part of Sandra Miller or a surprise encounter. Although the appellant maintained that he and Ms Miller were still together, she had left the appellant in February 2005, some five months before the killing, and was, to the knowledge of the appellant, living with Lawrence Stewart and the children at Leeward Croft.

(2) When the appellant entered the apartment Ms Miller and Mr Stewart were lying on a bed in their underclothes. They were not engaging in sexual activity. Two of her children were sleeping in the room.

(3) On the morning of 14 July 2005, the appellant saw Mr Stewart in the street. He told him to leave Ms Miller and threw bottles at him. This is inconsistent with a surprise encounter at Leeward Croft and with a continuing relationship between the appellant and Ms Miller.

(4) Mr Stewart made a contemporaneous complaint to the police on 14 July 2005 that the appellant had threatened to kill him and Ms Miller.

(5) Although the appellant maintained at his trial that he found the cutlass in the apartment at Leeward Croft, he has now said that the adjoining apartment at Leeward Croft contained some of his fishing equipment including the cutlass and that this is where he got the weapon he used. (2024 interview with Dr Attard, para 67)

(6) It was the evidence of Ricky Guy at trial that later that night the appellant told him that “he ain’t done yet, he coming back to finish the job”.

74. For these reasons, the Board is satisfied that no reasonable jury could accept the plea of provocation and that, accordingly, no substantial miscarriage of justice has occurred so far as the provocation defence is concerned.

Fresh evidence: relevance to the subjective inquiry

75. In a further ground of appeal, the appellant submits that the clinical evidence he seeks to adduce as fresh evidence, if admitted, would advance his case on the subjective

inquiry as to whether he was in fact provoked. He submits that evidence of any mental or other abnormality which makes it more or less likely that he lost his self-control is relevant and admissible. (See *R v Smith (Morgan)* [2001] 1 AC 146 per Lord Hobhouse at p 185G-H). He further submits that, in the light of the fresh evidence as to his mental health, if admitted, the trial judge's direction as to whether he was provoked has been rendered incomplete and inadequate or requires material modification.

76. Entirely correctly, the appellant does not contend that the fresh evidence would advance his case in relation to the objective test. Within that test, as explained above, while the gravity of the provocation to the defendant is to be assessed having regard to the defendant's personal characteristics, the standard of self-control by which his conduct is to be evaluated is the external standard of a person having and exercising ordinary powers of self-control (*Holley* per Lord Nicholls at paras 18, 22, 23). As a result, the Board considers that the appellant would not be assisted in relation to the objective test in a further appeal by the clinical evidence he now seeks to adduce.

77. *Holley* also decided that the defence of provocation is not intended to include alcoholism or other subjective disabilities. Those may be considered within a defence of diminished responsibility which, in contrast, does not require an element of moral justification which is what the objective test of provocation invokes.

78. While the psychiatric evidence might, in principle, be relevant to the subjective test of provocation in any retrial (see in this regard *Holley* at para 25), the Board has, for the reasons stated above in relation to the proviso, come to the clear view that a defence of provocation would have no prospect of success. In these circumstances no purpose would be served by admitting the evidence for the purposes of a possible defence of provocation. This ground of appeal is accordingly dismissed.

Diminished responsibility

79. Mr Edward Fitzgerald KC on behalf of the appellant also seeks to raise, for the first time now on appeal to the Board, a plea of diminished responsibility. He relies on the aforementioned fresh evidence in the form of clinical reports from examinations of him conducted, respectively in March 2020, January 2024 and February 2024, by two psychiatrists and a neuropsychologist.

80. He invokes section 4A(1) of Trinidad and Tobago's Offences Against the Person Act which provides that:

“4A(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he is 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.”

81. There are two distinct operative aspects of this provision: (a) whether the accused was suffering from an abnormality of mind at the time of the killing and (b) whether that abnormality substantially impaired the accused’s mental responsibility for the killing.

82. The onus of proof is upon the accused, as explained in *Robinson v State of Trinidad and Tobago* [2015] UKPC 34, per Lord Hughes (at para 2):

“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.”

83. On behalf of the appellant, it is submitted, citing *Campbell* [1997] 1 Cr App R 199, (per Lord Bingham CJ) that the fresh evidence, to be examined below, makes out a sufficient case that “had it been available at trial, the defence of diminished responsibility might well have succeeded”.

84. While that dictum encapsulates the ultimate consideration for the Board in deciding this application, it does not address the necessarily prior considerations which arise on an appeal for the admission of fresh evidence. The proper starting point is section 47 of the Judicature Act of Trinidad and Tobago which gives the court jurisdiction, on an appeal, to receive fresh evidence “if it thinks it necessary or expedient in the interests of justice”.

85. *Pitman v State of Trinidad and Tobago* [2008] UKPC 16 was a case also in which the admission of fresh evidence of diminished responsibility was raised for the first time on appeal before the Board. At para 31, the Board explained, citing with approval the dictum of de la Bastide CJ in *Solomon v State of Trinidad and Tobago* (1999) 57 WIR 432, that the breadth and generality of the section 47 power did not remove the long accepted requirements of the common law that fresh evidence should appear to be capable of belief and that a reasonable explanation be furnished for the failure to adduce it at trial, even while these factors may not be conclusive of the issue, as an appellate court has the overriding statutory power to admit the evidence if it is in the interests of justice to do so.

86. Some five years later, in *Lundy v The Queen (New Zealand)* [2013] UKPC 28, the Board refined and articulated a sequential series of tests for the admission of fresh evidence, in the following terms, at para 120:

“The Board considers that the proper basis on which admission of evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admissible unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.”

87. The rationale of the sequential series of tests becomes particularly clear in a case like the present where the appellant seeks, for the first time, to adduce evidence of diminished responsibility at the time of the commission of the offence, some 20 years after its commission and 10 years after his trial.

88. In these circumstances there will be obvious concerns such as have indeed been raised by the respondent here, whether the evidence might be based upon a narrative which did not form the basis of a defence at trial and may arguably be seen as inconsistent with that defence, and so may recently have been concocted by the appellant to support a diagnosis of abnormality of mind at the time of the offence.

89. The safeguard against this type of abuse is that, ordinarily, if the evidence could, with reasonable diligence, have been called at trial, it will not qualify as sufficiently fresh to be admitted. This criterion is more fully explained at para 117 of *Lundy* (approving a dictum formulated by the New Zealand Court of Appeal in an earlier case); it is because:

“Ordinarily, if the evidence could, with reasonable diligence, have been called at trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation. If that were

not so, new trials could routinely be obtained on the basis that further evidence was now available. On the other hand the Court cannot overlook the fact that sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled".

90. The principles have been expressed in different ways by the courts but to the same over-arching effect in the interests of justice. The following cases starkly bring into focus the competing imperatives of finality in the trial process and that of ensuring that a defendant is able to raise an operative abnormality of mind which may be relevant to his defence.

91. In *Campbell* [1997] 1 Cr App R 199, the appellant had been convicted of murder in 1985. It was later contended on appeal that by virtue of psychiatric evidence given at the trial, the judge should have directed the jury not only as to provocation but also as to diminished responsibility. That appeal was dismissed on 31 October 1986 but subsequently, the Home Secretary referred the case to the Court of Appeal under section 17(1)(a) of the Criminal Appeal Act 1968. This course was indicated because at the time of the trial and of the first appeal, there was clear evidence that the appellant had, at the relevant time, suffered from an abnormality of mind in the form of epilepsy. The psychiatrist called by the defence had, however, been unable to suggest that this abnormality had been such as to have substantially impaired the appellant's mental responsibility for his acts and omissions in committing the killing. Accordingly, the nature and extent of this abnormality were not explored in any depth and the court was now asked to receive the evidence of two psychiatrists with special expertise in epilepsy. It was held, allowing the appeal, that (1) defendants must advance their full defence before the jury and call any necessary evidence at trial. It is not permissible to advance one defence before the jury and, when that has failed, to devise a new defence and then seek to raise that defence on appeal; (2) the failure of the defence to advance diminished responsibility at that trial was not however, a matter of tactical decision but of practical necessity since the expert witness on whom the defence relied found it impossible to support a defence of diminished responsibility. Based on the evidence now available, the defence of diminished responsibility might well have succeeded. Accordingly, a re-trial would be ordered.

92. In *Brown (Nigel) v State of Trinidad and Tobago* [2012] UKPC 2; [2012] 1 WLR 1577 the appellant appealed against his conviction for murder to the Board in reliance, inter alia, upon section 47 of the Supreme Court of Judicature Act, seeking to adduce fresh evidence as showing that there were serious doubts about his mental capacity to sufficiently prepare for his trial. In allowing the appeal and remitting the case to the Court

of Appeal to determine the safety of the conviction in light of the fresh evidence and any rebutting evidence the Court of Appeal might decide to admit, the Board declared, at p 1578, that:

“although it should not be assumed that even highly persuasive evidence produced for the first time at the final appeal stage would be admitted, where a doubt remained about the correctness of the verdict which led to a penalty of death, any court would be bound to ensure that such doubt should either be removed or, if it could not, that it should prevail against the carrying out of that sentence; and that, accordingly, since fresh evidence as to the defendant’s fitness to plead raised a substantial issue about the fairness of his trial and the safety of his conviction it would be admitted and the case remitted to the Court of Appeal...”

93. The cases also show that in applying the principles, the Court will be astute to recognise that the circumstances of the applicant may have impacted his ability to adduce the evidence at trial, even had it then been available.

94. In *Williams (Cardinal) v The Queen* (1998) 53 WIR 162, on an appeal from St Vincent and the Grenadines, the appellant had been charged with the murder of his partner committed in a brutally violent rampage which resulted also in the death of their two young children. He was examined by a psychiatrist but with a view only to determine fitness to plead, not to assess possible diminished responsibility at the time of the commission of the offence. At no time had the psychiatrist been asked to address the questions whether the appellant was suffering from an “abnormality of mind”, whether its aetiology was one of those mentioned in section 160(1) of the Criminal Code (the equivalent to section 4A(1) of the Trinidad and Tobago Offences Against the Person Act (above)), or whether it would have substantially impaired the appellant’s mental responsibility for his acts. Later, while on appeal to the Board, he was examined by a distinguished forensic psychiatrist to form an opinion as to his mental condition at the time of the killings and whose report, if accepted, would be material on which a jury could reach a finding of diminished responsibility. It was held, advising that the appeal be allowed and the case remitted to the Court of Appeal, that the new psychiatric evidence clearly satisfied the criterion of likelihood of credibility (as expressed also in section 45A of the Eastern Caribbean Supreme Court Act) and the further criterion that there be a reasonable explanation for the failure to adduce it was satisfied by the realities of the position of a relatively indigent accused on a capital charge in St Vincent and the Grenadines.

95. Finally in this regard, in *Chandler v State of Trinidad and Tobago* [2018] UKPC 5, the Board had to deal with an application to admit fresh medical evidence which, it was

contended, could have provided the basis of a defence of diminished responsibility while, at trial, the defendant had run an inconsistent defence that the victim had been stabbed and killed by someone else. Noting (at para 11) that the principles relating to the admission of new evidence on appeal are well-established, the Board went on to discuss the problems created by the late admission of such evidence citing from its earlier judgment in *Pitman v State of Trinidad and Tobago* [2017] UKPC 6; [2018] AC 35 per Lord Hughes, who at para 48 of that earlier judgment, stated as follows:

“...the Board sees considerable force in the observations of both Archie CJ in *Pitman* and Narine JA in *Hernandez* that it is unsatisfactory that the mental condition of defendants should be raised for the first time only on appeal, and often many years after the trial. Very similar concerns were expressed by Lord Judge CJ in the English context in *R v Erskine* [2010] 1 WLR 183. The admission of fresh evidence on appeal is a matter of discretion. Not only must the evidence appear credible but the explanation for its absence at the trial is very relevant to the exercise of discretion. The best prevention of such late appearance of medical evidence lies in the regular expert examinations, at an early stage, of all defendants facing murder charges. It must be for the individual jurisdictions to devise such means of seeking to achieve this as are practical in local conditions. It may nevertheless occasionally happen that fresh, and late, evidence is compelling, and that justice requires its admission.”

96. It will be seen that a consistent theme of the cases, is that while the defendant must explain the failure to have adduced the proposed evidence at the time of trial—ie to satisfy the second criterion of the *Lundy* test—personal circumstances will often have prevented that from happening and the State or those responsible for his representation, should have intervened to ensure that his state of mind at the time of the offence was properly assessed. Each jurisdiction has an obligation to ensure that a defendant, whose state of mind is manifestly in need of assessment but who may lack the wherewithal to bring this about, is given that assessment.

97. The Board is of the view that this is such a case, as may have been thought was apparent from the sheer brutality and irrationality of the appellant’s assault upon his victims and his subsequent behaviour, including during his confrontations with the police. Seen purely from a logical point of view, while, as discussed above, there was a proper basis for the jury’s conclusion that the appellant’s behaviour was premeditated, that does not preclude him having suffered an abnormality of mind, within the meaning of section 4A(1), at the time of the offence.

98. The reason why an assessment of his state of mind was not conducted remains unclear. The Board is informed that the lawyer who represented the appellant before the Court of Appeal, Mr Daniel Khan, had made enquiries of his trial lawyer, a Mr Wright, about what consideration was given, in preparation for trial, to the appellant's mental health at the time of the offence. No response was forthcoming from Mr Wright. Further enquiries of Mr Wright by way of letters sent on 19 February 2019 and 10 January 2020 from Simons, Muirhead and Burton, solicitors then acting for the appellant, were also unanswered.

99. We note however, that the appellant had himself written to Mr Khan in anticipation of his appeal before the Court of Appeal "to remind you to please file as part of my legal arguments—the fact of diminished responsibility or temporal insanity". But Mr Khan did not seek to have him examined, being, rather precipitately one might think, of the view that an argument for diminished responsibility could not succeed.

100. Given the circumstances as they stand, one must now proceed on the basis that the second criterion of the *Lundy* test—whether the evidence could, with due diligence have been available at trial—is now uncontroversial. This must indeed be so when it is borne in mind that the appellant was an indigent prisoner of "retarded" intellectual ability (as his psychological assessment opines) and who found himself in a penal system which appears to have offered no assistance for the recognition and evaluation of any state of delusional derangement he might in fact have been in, the state of mind that the experts have also now opined to have been operative at the time of his offence.

101. It is these reports which we must now consider by way of the proposed fresh evidence. In light of our conclusion that their admissibility and effect if admitted will ultimately be matters for the Court of Appeal, we will conduct only a brief examination. The question is whether the evidence meets the remaining criteria of the *Lundy* test; ie: credibility and whether its absence would affect the safety of the conviction.

102. The three experts are all reputable professionals. Dr Richard Latham is a UK-based consultant forensic psychiatrist who first assessed the appellant on 28 March 2020 in Frederick Street Prison, Port of Spain, Trinidad.

103. In his report of 28 March 2020 Dr Latham concludes that:

"46. In summary, Mr Woods has held and continues to hold beliefs about the deceased. These beliefs seem likely to have arisen before the offences. These beliefs relate to a perception of her infidelity as well as believing that she wanted and had tried to kill him by poisoning. These beliefs are likely to be relevant in understanding why he killed her although he does

not seek to justify his actions on the basis of these beliefs. The difficulty however is twofold: i) Were they fixed and false beliefs (delusions) and ii) In the absence of any clear recollection from Mr Woods about his state of mind at the time, any opinion on the association between his beliefs and his actions at the time is difficult. However, it seems likely that if these beliefs are delusions, the diagnosis of delusional disorder is appropriate. This would then provide the foundation for the partial defence of diminished responsibility” (Emphases added)

“49. ...There are however some clinical factors that suggest he may be delusional even if there was a real event that served as a trigger. Delusionally jealous people often interpret small pieces of evidence in a way that is highly distorted. They may also seek these small pieces of evidence in a very determined way. Mr Woods was adamant that he could smell other people on his wife and that he could tell she was having sex with other men from her underwear. He was unshakeable in his beliefs about this. This kind of assertion is commonly seen in people who are delusionally jealous.” (Emphasis added.)

and in his conclusions Dr Latham stated that:

“59. In summary, Mr Woods has beliefs which, in my opinion, are likely to be delusional. These beliefs have been present for many years and if they are delusions lead to the medical diagnosis of delusional disorder. The case is unusual however in that I cannot categorically say that I know his beliefs are false. It may be, as is often the case with delusional disorder, that his delusions arose out of real events so that in his mind reality and delusion have become one. If my diagnosis is correct then these delusions were likely to have been relevant at every stage of his trial. I have recommend (sic) that there is a psychological assessment of Mr Woods’ intellectual function and personality traits. It may also be of assistance for there to be a second psychiatric assessment considering the issue of delusional disorder.” (Emphasis added.)

104. Following Dr Latham’s recommendations, the appellant was assessed by Mrs Patricia Lee-Wah Cooper, a locally based clinical psychologist. She was instructed to conduct an intellectual assessment to assess his overall intellectual functioning. She concluded inter alia that:

“Mr. Wood's general cognitive ability is within the "Extremely Low" range of intellectual functioning, scoring a Full Scale IQ (FSIQ) of 53. His overall thinking and reasoning abilities exceed those of only approximately 0.1% of individuals his age...

Mr. Woods' FSIQ fell within the extremely low range indicating an Intellectual Development Disorder. An Intellectual Development Disorder is a neuro-developmental disorder that causes problems with intellectual tasks. Due to this, Mr. Woods may have difficulties in various areas such as learning, communicating, thinking rationally, understanding social cue ands, making judgements reading or expressing himself. He may also have disordered logic, challenges with problem-solving and planning.

Mr. Woods' Overall Executive Functioning is below average. This executive dysfunction indicates underdevelopment in the skills needed for the mental processes that enable him to focus attention, remember instructions, juggle multiple tasks successfully, regulate his emotions, and resist the urge to behave hastily due to frustration.

Although Mr. Woods' Intellectual functioning and conceptual skills may be classified as severe, his social and practical domain are slightly better developed. Therefore, his overall results indicate that Mr. Woods meet criteria for Intellectual Disability: Moderate.”

105. Also following Dr Latham's recommendations, the appellant was further assessed by Dr Stephen Attard, a consultant forensic psychiatrist and a member of the Royal College of Physicians of the United Kingdom. Dr Attard opined that in light of Mrs Lee-Wah Cooper's report, the appellant meets the criteria for mild intellectual disability and that his IQ score:

“suggests that out of 1000 individuals his age, 999 would have thinking and reasoning abilities which exceed his. This score is at the more impaired end of the mild intellectual disability range, which is considered to be from 50-70”.

Dr Attard further concludes that:

(1) The applicant likely meets the criteria for delusional disorder.

(2) That, on the evidence:

“Mr Woods’ belief regarding the victim of the index offence wishing to kill him and poisoning him in February 2005 to be a fixed false belief based on an inaccurate interpretation of an external reality, despite evidence to the contrary, which he has maintained for almost twenty years”.

(3) As a person with an intellectual disability, the Appellant was more vulnerable to developing a delusional disorder.

(4) There is no significant evidence of malingering or exaggeration.

(5) “It is likely that both his intellectual disability and likely delusional disorder had a significant Impact on Mr Woods’ mental state and functional ability at the time of the index offence. The Appellant’s “mental disorders impaired his ability to form rationale (sic) judgement and impaired his behaviour and consideration of consequences at that time.”

106. The experts were asked to provide a joint expert statement, dated 2 October 2024, in which they concluded that the appellant has “a mild to moderate learning (intellectual) disability” and a delusional disorder “mixed-jealous and persecutory-type”. Further, they concluded that both abnormalities of mind were likely present at the time of the offence.

107. By way of further context, it must be noted that there was a history, at least from the appellant’s point of view, of belief about and accusations of infidelity on the part of Ms Miller and there was in fact an episode of poisoning which resulted in his hospitalisation.

108. Just how these beliefs or factually based perceptions were to be factored into the diagnosis of delusional disorder which, it seems, proceeds primarily upon an assumption of delusion divorced from reality, was the subject of understandable scrutiny by Mr Pennington-Benton on behalf of the respondent. In his argument, Mr Pennington-Benton pointed to the case of *R v Ahmed Din* [1962] 1 WLR 680, in which the English Court of Appeal held that the jury upon a murder trial were entitled to reject a defence of diminished responsibility presented as based upon a diagnosis of paranoia or delusional disorder, which was in turn based upon an assumption that the defendant had had no solid grounds for suspecting his wife of having committed adultery with the man whom he

killed. The evidence revealed however, that there may have been a factual basis for the belief and so contrary to the diagnosis that the defendant suffered under a delusion, the trial judge was held to have been right in directing the jury that it was open to them to reject the defence of diminished responsibility, which they did, returning a verdict of guilty of murder. Given the factual basis for the defendant's belief in his wife's infidelity, there was no basis for finding him to have been suffering from the delusional disorder of paranoia and so he had not discharged the burden of proof required for the partial defence of diminished responsibility.

109. Relating that case to the present, Mr Pennington-Benton questions the premise of the experts' assessments, given the presence in this case of some factual bases for the appellant's beliefs. Here there was in fact an incident of poisoning (albeit by whom was never proven) and Ms Miller had in fact left the appellant to live with another man, Mr Lawrence Stewart. Mr Pennington-Benton submits that there is therefore a lack of factual basis for the diagnosis of a delusional disorder as Dr Latham, in his original report, had accepted that:

“If Mr Woods is correct that his partner had multiple relationships for many years and that she was indeed trying to kill him by poisoning and possibly other means then he is not delusional and there is no diagnosis.”

110. It will be apparent that the circumstances of the case are, however, rather less cut and dried than Mr Pennington-Benton's argument suggests. At the time of the offence, Ms Miller had left the appellant and had been living with Mr Lawrence Stewart. That state of affairs, however, was not the beginning but the culmination of a history of recrimination and accusations of infidelity by the appellant. This longstanding and ongoing belief in Ms Miller's infidelity he is reported to have continued to hold up to the time of interview by the experts, but whether there was a factual basis for its inception is unknown. So too whether there was a factual basis for his fears about being poisoned, which despite Ms Miller having left to live with Mr Stewart, he was found by the examinations to have continued to harbour. It is, as we understand the experts' evidence, because of that ongoing state of paranoia, impacting his low intellectual ability to cope with what would have been for him an overwhelming emotional situation, that the appellant, at the time of the offence, is thought to have probably suffered from an abnormality of mind in the nature of a delusional disorder. That, we think, can be gleaned from Dr Latham's report in paragraphs 46, 49 and 59 as extracted above. In a subsequent letter, in response to the respondent's criticisms of his report, Dr Latham elaborated in terms which would confirm this view. However, this letter has become controversial because the respondent has objected to its admissibility and no conclusive ruling was given by the Board. For that reason we do not rely upon it now. Whether reliance should be placed upon Dr Latham's explanatory letter by the Court of Appeal will be a matter for them. For present purposes, it will suffice to state that the Board is unable to conclude,

on the basis of our examination as explained above, that the expert evidence is, in terms of the *Lundy* criteria, not capable of belief.

111. The foregoing is of course, only the Board's provisional view of the expert evidence. It will be a matter for the Court of Appeal what they make of it, after having had regard to any other expert evidence which may be before them.

112. The remaining issue arising from *Lundy*, for present purposes, is whether the absence of the expert evidence could result in there having been a miscarriage of justice. That is also, of course, directly relevant to the statutory mandate of section 4A(1) of the Offences Against the Person Act, as set out at paras 80 and 81 above. The conviction for murder shall be reduced to manslaughter if the accused was suffering from such abnormality of mind as "substantially impaired" his mental responsibility for his actions at the time of the offence.

113. Whether the abnormality of mind substantially impaired the appellant's mental responsibility for the killing will also be a matter for the Court of Appeal, as it would have been a matter of fact for the jury. In *R v Lloyd* [1967] 1 QB 175 at 177, it was said that the impairment had to be "more than trivial". More recently, in *R v Golds* [2016] UKSC 61; [2016] 1 WLR 5231, at paras 27 and 28, the Supreme Court explained that trial judges need not give detailed instructions on the meaning of "substantial impairment" unless the jury specifically asks for clarification. The Court advised, in terms which the Board is content to adopt, that where clarification is sought, the jury should be told that the expression does not mean more than merely trivial, but a condition representing an important or weighty (or significant) degree of impairment in the defendant's ability to understand, judge, or exercise self-control.

114. Applying this standard, we are of the view *de bene esse*, for present purposes, that the fresh evidence makes out a sufficient case such that had it been available at trial the defence of diminished responsibility might well have succeeded. See *Campbell* [1997] 1 Cr App R 199.

115. We therefore remit the case to the Court of Appeal for its consideration.

116. In keeping with the advice from established case law discussed above (see for instance *Chandler* and *Pitman and Hernandez* (both above)), we also invite the Court of Appeal to provide what are now long overdue guidelines for the routine assessment of the state of mind of defendants in cases which might appear to require such assessment in the future.