Hilary Term
[2016] UKPC 6
Privy Council Appeal No 0104 of 2014

JUDGMENT

Richard Brown (Appellant) *v* The Queen (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lady Hale
Lord Clarke
Lord Wilson
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

9 February 2016

Heard on 3 December 2015

Appellant	*Respondent*
James Guthrie QC Rowan Pennington-Benton (Instructed by Candey)	Tom Poole (Instructed by Charles Russell Speechlys)

LORD TOULSON:

1. On 16 January 2003 in the Home Circuit at Kingston, Jamaica, the appellant was convicted of murdering Errol Lynch on 22 September 1998. For a considerable part of the time between the murder and the appellant's trial he was detained as unfit to plead. On conviction he was sentenced by the trial judge (Pitter J) to life imprisonment with hard labour and ordered to serve a minimum period of 25 years' imprisonment before he could become eligible for parole. On 11 March 2005 his appeal against conviction and sentence was dismissed by the Court of Appeal of Jamaica (Forte P, Smith JA and McCalla JA (Ag)).

2. On 19 March 2015 the appellant was granted leave to appeal by the Board. The reason for the grant of leave was that extensive investigations carried out pro bono by Mr Timothy Wright, then a solicitor in the firm of Morgan, Lewis & Bockius, raised concerns about the appellant's mental health and whether it had been properly investigated during the trial process. In giving leave, the Appeal Panel asked that both parties use their best endeavours to provide the Board with full information as to the basis for and circumstances of the appellant's detention from September 1998 to January 2003 including the circumstances in which he was found fit to plead. The Board is appreciative of the parties' efforts, which have resulted in it now having a fuller picture than at the time when leave was granted.

3. The prosecution case was that on 22 September 1998 the appellant and two other men went to deceased's home in Swallowfield Road, Kingston, and shot him. The case depended on the eye witness evidence of Mr Artheram White, who lived opposite the deceased. Mr White died before the case came to trial, but the judge admitted in evidence a witness statement made by him on 3 October 1998 and a deposition taken from him at a preliminary examination on 17 June 1999. The witness statement was admitted under section 34 of the Justices of the Peace Jurisdiction Act and the deposition was admitted under section 31D of the Evidence (Amendment) Act. In the Court of Appeal it was accepted that it was permissible for the court to admit one or other of the witness statement and the deposition, but it was argued that it was wrong to admit both of them, because the two were consistent and to admit both served no purpose other than to provide mutual corroboration. The court rejected that argument and there is no longer any complaint about the admission of Mr White's evidence, except in one respect (connected with the appellant's mental health) which it will be necessary to explain.

4. Mr White in his witness statement described the deceased as "the weedman on the street". He said that at about 8 pm he was standing by his gate when he saw three men walking along Swallowfield Road. Under the streetlight he recognised the face of

one of the three men as the appellant, whom he had known for the past seven years. He did not recognise either of the other men. The deceased was at a neighbour's yard but soon returned to his own yard. Mr White described the events which followed:

> "I could see that there was a conversation between Romy [the appellant] and Burru [the deceased]. Within seconds of Romy and Burru talking I saw when Romy pulled a gun from his waist and fired one shot at Burru. Burru was within arm's reach of Romy. After the first shot was fired I saw when Burru held on to Romy and a struggle developed between both men. I saw when both men fell to the ground. I saw when one of the other men walked up and fired one shot at Burru's head. I could hear the explosions. I see fire coming from the gun that Romy and the other men had. After the second shot was fired I saw when Romy and the other two men ran out of the yard."

5. Mr White's deposition included some additional details but did not contradict his witness statement. Both in his witness statement and in his deposition he gave the date of the incident as 22 November 1998 and remained adamant about that in cross examination. He was plainly wrong because 22 November 1998 post-dated his witness statement by seven weeks. The only other cross examination was that counsel put it to Mr White that he had not seen the appellant with a gun or at all on that night. (It is unsurprising that the cross examination was not more extensive, because it was a preliminary hearing and it would doubtless be common for the defendant's counsel to keep his powder dry, as used to be the practice in England and Wales when committal proceedings involved oral depositions.)

6. The appellant was arrested for murder on 30 September 1998. He was interviewed under caution and signed a written statement which recorded:

> "On Tuesday the 22nd of the 9th, 1998, at about 8 pm, I was walking along Swallowfield Road, when I was met by two men who, we all went to Burruw's yard. When entering Burrow's yard we pass about five youths sitting in the yard. One of the men with me ask one of the youth for Burruw. I heard when the youth say 'See Burruw deh ah come.' Burruw entered the yard and I asked Burrow for, to buy weed. I ask Burruw to sell me a bag of weed. He replied by saying, 'Me ah go inna mi room fi it, wait.' The two youth that follow me to Burruw also ask Burrow for weed. I saw when one of the men pull a barrel gun and fire two shot at Burruw. I saw when Burruw drop near to a tree where he parked his van. I ran from the yard, the man also ran … I threw away the jacket I

had on because it had on blood. When Burruw got shot he was about three feet …"

7. The appellant gave evidence at the trial, which differed in some respects from his statement under caution but not in the core of his defence. He said that on the evening of 22 September 1998 he went to the deceased's premises to buy some weed. He was not joined by others and was on his own when he reached the yard. There were four men sitting at the front of the gate and two men standing by the gate. He called out for the deceased, who was not there, but then he saw the deceased cross the road from another house. One of the two men at the gate started to argue with the deceased and the argument turned into a struggle in which they fell to the ground behind a parked van. After they fell to the ground he heard an explosion which sounded like a gunshot. Then the other man by the gate walked up to the van and he heard another explosion. The appellant said that he did not have a gun and that he left. He told his mother about the incident and she told him to throw away his jacket in case anyone at Swallowfield Road wrongly suggested that he was responsible for the shooting. He denied giving a written statement to the police and said that they made him sign some blank sheets of paper. He also denied knowing Mr White and said that he could think of no reason why Mr White should have provided evidence against him.

8. Neither fitness to plead nor diminished responsibility was raised as an issue at the trial. Prior to sentencing, the only reference made to the appellant's health was that in cross examination he was asked whether he remembered the preliminary hearing at which Mr White came to court and replied "No, ma'am, I was a sick person them time". In re-examination he was asked whether he had received treatment. He said that he was taken to Bellevue Hospital ("BVH") when he was at the police station; that he was treated by Dr Leveridge and that he also went to University Hospital to Dr Ottey. The matter was not further pursued.

9. The medical records now available to the Board show that he had history of a schizophrenic psychotic disorder. He was born on 8 November 1967 and was first treated at the University Hospital of the West Indies ("UHWI") in 1987, but the hospital notes were destroyed in a hurricane.

10. In 1996 the appellant was convicted of robbery with wounding and sentenced to a period of probation. The probation service was concerned that he was mentally disturbed and referred him to the BVH for assessment. The BVH notes show that he was admitted on 19 August 1996. He was brought to the hospital by relatives, who gave a history that for about six years he had been disruptive, attacking them and others, setting fire to property and destroying furniture. He was said to become aggressive and violent towards others when faced with stressful situations. He was put on medication.

11. On 24 September 1997 a BVH progress note recorded that the appellant was suffering auditory hallucinations and delusions of persecution. The diagnosis was psychotic disorder modified by ganja abuse. The note referred to relapse due to non-compliance with medication. He was given an injection and put on a daily course of medications. On 18 November 1997 his condition was noted to be stable and his medication was adjusted.

12. The overall picture which emerges from the medical records is that the appellant suffered from a chronic mental disorder aggravated by drug abuse; that with proper treatment his condition would improve and would remain stable as long as he continued to receive appropriate medication; but that failure to take his medication would result in relapse and an acute psychotic condition. There is no evidence whether he was taking prescribed medication during the months leading to the commission of the offence on 22 September 1998.

13. Following his arrest, on 13 October 1998 the appellant appeared at the Gun Court on charges of murder and illegal possession of a firearm. He told the judge that he needed medical attention. He was acting strangely and the judge requested a medical assessment. On 21 October 1998 the appellant was taken to the BVH for assessment but the psychiatrist who saw him noted that he was uncooperative and suspected him of malingering.

14. On 11 January 1999 the appellant appeared before another judge, who ordered a psychiatric assessment. On 27 January 1999 a nurse's note at the BVH recorded that he said that he was hearing voices saying "Beware of dark shadows who eat people", his speech was unclear and he appeared not to understand the charge against him. He was to be referred to a forensic psychiatrist, but there is no record of a further assessment at that stage.

15. The preliminary examination began in June 1999. The appellant was represented by counsel, Mr Norman Harrison. The examination concluded in November 1999 and the case was sent to the Home Circuit for trial. At a procedural hearing in the Home Circuit a psychiatric report was ordered and the appellant was examined by a consultant psychiatrist at UHWI, Dr Franklin Ottey. On 21 June 2000 Dr Ottey reported that in his opinion the appellant was suffering from a schizophrenic psychotic disorder and was unfit to plead. He said that the appellant was unable to give a coherent account of the offence for which he had been charged; that he gave incoherent answers to most of the questions asked; that he kept muttering, seemingly in response to hallucinatory voices; and that he displayed gross thought disorder.

16. The law of Jamaica on fitness to plead was contained at the relevant time in section 25(1) of the Criminal Justice (Amendment) Act 1960, which provided:

> "If any person indicted for any offence shall be insane, and shall, upon arraignment, be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment; … it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded; and thereupon to order such person to be kept in strict custody, until the pleasure of the Governor-General shall be known; … and in all cases of insanity so found it shall be lawful for the Governor-General to give such order for the safe custody of such person so found to be insane, during his pleasure, in such place and in such manner as to the Governor-General shall seem fit."

17. This provision followed, mutatis mutandis, the language of section 2 of the Westminster Parliament's Criminal Lunatics Act 1800, which was in force at the time of enactment of the Jamaican Criminal Justice (Administration) Act 1960. (Section 2 of the 1800 Act was repealed and replaced by section 4 of the Criminal Procedure (Insanity) Act 1964, which was further amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and again by the Domestic Violence, Crime and Victims Act 2004.)

18. Section 25 of the Jamaican Criminal Justice (Administration) Act 1960 was amended by the Criminal Justice (Administration) (Amendment) Act 2006 and now expressly provides that "A verdict of unfit to stand trial shall not prevent the defendant from being tried subsequently if he becomes fit". This amendment post-dated the trial by three years.

19. In the light of Dr Ottey's report dated 21 June 2000, a jury was duly empanelled to try the issue of the appellant's fitness to plead. On 31 October 2000 he was found to be unfit and was ordered to be detained at the Governor-General's pleasure. He was detained at the Tower Street Adult Correctional Centre, Kingston, under medical supervision.

20. On 9 August 2001 the prison psychiatrist, Dr G Leveridge, reported that the appellant had made significant progress on medication and was no longer exhibiting any evidence of active psychopathology. Dr Leveridge considered that he was now competent to stand trial.

21. The case was then brought back before the Home Circuit, although there is no record of precisely how or when this happened. In his plea in mitigation after the appellant's conviction, counsel who appeared for him at the trial, Mr Delano Harrison QC, told the judge that

> "… when I first interviewed Mr Brown, I had occasion m'Lord to report to Mr Justice Karl Harrison a certain difficulty which I had which in turn led to, at my request, a third examination of Mr Brown. Drs Ottey and Leveridge had occasion to interview him again because he had a long period of two years or more at what the doctor describes as being at the Governor-General's pleasure. He was unfit for quite a long time."

22. A note in the prison medical record, dated ?/11/02 (the day is indecipherable) and initialled GL (G Leveridge), reads "Report for Att-at-law Delano Harrison prepared." The appellant was seen at UHWI on 19 November 2002 by Dr Ottey, who reported on the following day:

> "He [the appellant] said that he had been imprisoned at the General Penitentiary for the past two years and had been seen by the prison psychiatrist there, Dr G Leveridge, on several occasions. He has been receiving psychiatric treatment on a regular basis.
>
> …
>
> He is aware that he has been charged for murder but said that he had not committed the offence.
>
> … He gave a history of having had auditory hallucinations in the past but not presently. He displayed no thought disorder or evidence of delusional thinking …
>
> In my opinion the features of a Schizophrenic Psychotic Disorder which he previously displayed are presently in remission because of treatment. It is likely however that this illness would have caused substantial impairment of his mental state at the time the offence was allegedly committed.
>
> He is presently fit to plead."

23. Mr James Guthrie QC, who appeared for the appellant pro bono on the present appeal, suggested that there must have been a further report by Dr Leveridge which is now missing. The Board considers this improbable. It appears more likely that when Mr Harrison asked the court to order "a third examination", the two earlier reports which he had in mind were Dr Ottey's report dated 20 June 2000 (that the appellant was unfit

to plead) and Dr Leveridge's report dated 9 August 2001 (that he was now fit to plead). It also seems likely that the report referred to by Dr Leveridge in the prison medical record as a report prepared for Mr Harrison was Dr Ottey's report dated 20 November 2002 (following an examination of the appellant at the UHWI, at which Dr Leveridge may or may not have been present). Be that as it may, Dr Ottey's report dated 20 November 2002 confirmed Dr Leveridge's opinion that the appellant was now fit to plead, and no challenge was made to that opinion. It seems clear that the court, the prosecution and the appellant's legal team, all accepted that the appellant was now fit to plead.

24. Mr Guthrie argued that the appellant's conviction should be quashed for several reasons relating to the issue of fitness to plead. First, he argued that prior to the amendment of section 25 of the Criminal Justice (Administration) Act by the Criminal Justice (Administration) Amendment Act, which was three years after the appellant's conviction, a jury's verdict of unfitness to plead had permanent effect and a defendant who subsequently recovered his health could not lawfully be put on trial. If that argument failed, Mr Guthrie's next argument was that after a jury had found a defendant to be unfit to plead, it was necessary for a new jury to be empanelled to re-try the issue before the defendant could lawfully be put on trial. If that argument failed, Mr Guthrie argued that at least there had to be a recorded formal ruling by a court that the defendant was now fit to plead before he could be put on trial.

25. No authority was cited in support of these arguments and the Board rejects them. The first argument is a misinterpretation of the opening words of section 25 ("If any person indicted for any offence shall be insane, and shall, upon arraignment, be found so to be by a jury lawfully empanelled for that purpose, so that such a person cannot be tried upon such indictment …"). In *R v Dyson*, (1831), reported in a note to *R v Pritchard* (1836) 7 Car & P 304, Parke J empanelled a jury to decide whether the defendant was fit to plead. The report states that in directing the jury the judge, at p 306, referred to the following passage in Hale's *Pleas of the Crown*, vol I, p 34:

> "If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed."

26. Section 2 of the Criminal Lunatics Act 1800 was not intended to change the substantive law relating to fitness to plead, but dealt with the practical consequences of a finding of unfitness. It authorised the Crown to give such order for the person's safe custody, during royal pleasure, in such place and manner as it considered fit. If the defendant recovered his sanity, there was nothing in the Act to prohibit the Crown from sending the defendant back to the court with a view to his arraignment and trial. Otherwise, if the appellant's argument were correct, an innocent defendant who had

been found unfit to plead, and had then recovered his health, would have no possibility of acquittal but would remain liable to executive detention for the rest of his life.

27. As to the second and third arguments, the question of the appellant's fitness to plead was properly considered before he was tried. At his counsel's request an up to date opinion was obtained from Dr Ottey, who reached the same view as Dr Leveridge that he was now fit to stand trial. It has not been argued that he was in fact unfit at the time of the trial. The medical evidence was one way, and the transcript of the appellant's evidence contains nothing to suggest that he had any difficulty in giving his account of events or in understanding and answering questions. If, as seems clear, there was no live issue as to his fitness to plead at the time of the trial, the argument that there ought nevertheless to have been a jury trial of the matter, or a formal judicial ruling that he was fit, is a hollow procedural argument. It would have been a barren exercise, and the argument that it was necessary has no foundation in statute or at common law.

28. Mr Guthrie further submitted that the appellant's counsel ought to have objected to the admission of Mr White's deposition on the ground that the appellant was unfit properly to follow the proceedings or to instruct counsel at the preliminary examination. As previously recorded, the deposition shows that counsel who appeared on that occasion for the appellant, Mr Norman Harrison, challenged Mr White's evidence about seeing the appellant at the time of the shooting and, in particular, about the appellant having a gun. Mr Harrison must have had instructions to that effect. This fact tells against the submission that he acted for the appellant in circumstances where the appellant was unable to give him proper instructions. It is also inherently unlikely that counsel would appear for a client who was unable to follow the proceedings or to instruct him properly (except to the extent of bringing the problem to the court's attention), and it would be wrong for the Board to conclude that counsel did so without him having had an opportunity to comment on the suggestion. Moreover, even if Mr White's deposition had been excluded, there would not have been the same ground of objection to the admission of his original witness statement, which was substantially to the same effect. For those reasons the Board is not persuaded on the material before it that the admission of the deposition involved any irregularity. If, however, there was any irregularity in that regard, the Board is satisfied that it did not result in a miscarriage of justice.

29. Turning to the issue of diminished responsibility, Mr Guthrie submitted that the appellant had a viable defence of diminished responsibility which the appellant's trial counsel failed to advance, either because he was unaware of the evidence to support it or because he failed properly to consider it.

30. Section 5 of the Jamaican Offences Against the Person Act 1864, as amended, provides:

> "(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter."

The language is identical to section 2(1) to (3) of the Homicide Act 1957 for England and Wales as originally enacted.

31. It is well established that in order to establish a defence of diminished responsibility (on a balance of probability), it is necessary for the defendant to adduce medical evidence to support it. Mr Guthrie relied on the final sentence of Dr Ottey's report dated 20 November 2002 ("It is likely however that this illness would have caused substantial impairment of his mental state at the time the offence was allegedly committed"), together with the known history of the appellant's schizophrenia, none of which was before the jury.

32. Mr Poole for the prosecution did not dispute that it was open to the Board to consider fresh evidence on the hearing of the appeal. There have been numerous cases in England and Wales in which an appellant has sought to raise a defence of diminished responsibility on appeal, after unsuccessfully running a different and inconsistent defence at the trial, and the Board considers that valuable guidance is provided by the case law of the Court of Appeal of England and Wales (albeit that there are statutory provisions in England and Wales in section 23 of the Criminal Appeal Act 1968). The leading authority is *R v Erskine and Williams* [2009] EWCA Crim 1425; [2010] 1 WLR 183.

33. In *Erskine and Williams* the court held that the decision whether to admit fresh evidence on an appeal was fact specific and that the court has a wide discretion, focusing on the interests of justice. The fact that the issue was not raised at trial does not automatically preclude its reception. However, if an appellant were allowed to advance on appeal a defence which could and should have been put before the jury, the trial

process would be subverted. If a defence was not raised at trial which could have been raised, or evidence was not deployed which was available to be deployed, it is unlikely to be in the interests of justice to allow it to be raised on appeal unless a reasonable and persuasive explanation was given for the omission.

34. The court referred in *Erskine and Williams* to the forensic difficulty of raising mutually inconsistent defences which involve a) denial of responsibility for the killing and b) asserting diminished responsibility for the killing. Lord Judge, CJ said at para 82:

> "… the trial process demands that the defendant, no doubt after considering legal advice, must decide which defence to advance. In an ideal world, of course, if he were responsible for the killing, he would admit it. But even if he is responsible, he may, and often does, choose to plead not guilty. What he cannot do is to advance such a defence and then, after conviction, seek to appeal in order to advance an alternative defence, such as diminished responsibility. There is one trial, and that trial must address all relevant issues relating to guilt and innocence."

35. No rule of law prevents a defendant from advancing at the trial a primary defence and an alternative fall back defence if the primary defence fails, but there are obviously major practical difficulties in pursuing inconsistent defences at the same time. A defendant who seeks to do so, and who gives evidence, is likely to be put on the spot in cross examination as to what he is really saying. In the present case, if the appellant had raised an issue as to his mental health, it would inevitably have led to disclosure of his medical records, including evidence of his past aggressive and violent behaviour, and this would have weakened his primary case.

36. Mr Guthrie submitted that there was a reasonable explanation why the appellant did not advance diminished responsibility as a defence at his trial and that justice requires that he should have an opportunity to do so.

37. In the course of the sentencing proceedings Mr Delano Harrison referred to medical evidence about the appellant's mental health. This led to the following exchange:

> "HIS LORDSHIP: The last examination to which you referred speaks to his having an auditory history; '… auditory hallucinations in the past but not presently.' [The judge continued reading from Dr Ottey's report dated 20 November 2002.] And it goes on to say, 'The features of schizophrenic psychotic Disorder

> which he previously displayed are presently in remission because of treatment. It is likely however that this illness would have caused substantial impairment of his mental state at the time the offence was committed.' That is what the report speaks to. Certainly the evidence as is, did not suggest that at the time the offence was committed he was suffering from this mental disorder, the way the offence was committed.
>
> MR HARRISON: If I had that kind of information then there may have been a different approach to the conduct of the defence, the question of the level of responsibility."

38. Mr Guthrie submitted that this exchange shows that Mr Harrison was unaware until that moment of the contents of Dr Ottey's report dated 20 November 2002. The Board regards that as improbable. The report had been ordered by a judge at an earlier hearing at Mr Harrison's request. Dr Leveridge's note in the appellant's prison medical record referred to "Report for Att-at-law Delano Harrison prepared". It is unlikely in the circumstances that Mr Harrison did not receive it; and if he did not receive the report for which he had asked, he would have been likely to ask what had happened. Mr Harrison himself is unable to throw any light on the matter. Mr Wright has set out in an affidavit, sworn on 6 November 2014, his investigations into the case, which included asking Mr Harrison what he could remember about the matter. Mr Harrison told Mr Wright that he did not recollect anything about the appellant's mental illness and that he remembered nothing about his exchange with the judge during his mitigation.

39. It seems likely to the Board that Mr Harrison's comment "If I had that kind of information then there may have been a different approach to the conduct of the defence" was a reference to the judge's remark about the absence of evidence to suggest that at the time of committing the offence the appellant's mental responsibility for his conduct was substantially impaired by his illness.

40. However, it is unnecessary to come to a firm conclusion about the correct interpretation of that exchange. The outcome of this appeal cannot and should not turn on it. The Board accepts that the appellant should have received advice about whether it might be possible to advance a defence of diminished responsibility and, if so, about the choice which had to be made and its potential consequences. Mr Harrison cannot say whether this happened and he no longer has his file on the appellant's case. The appellant told Mr Wright that he had no discussion with Mr Harrison about his mental problems.

41. In considering what is in the interests of justice, two matters stand out. The first is the appellant's account of the circumstances and cause of the deceased's death. He

has consistently maintained that he went to the deceased's premises to buy some weed; he did not have a gun; he was present when the deceased was shot by two men whom he described; and he later threw away his jacket for fear of being wrongly accused of responsibility for the murder. He said this to the police and to the jury. Mr Wright visited him in prison in August 2014 and recorded in his affidavit:

> "The appellant said that at the time of the murder of Errol Lynch in September 1998, he was very ill and was not taking his medication. He said that he did not commit the murder, but was at the scene of the crime, trying to buy ganja from Lynch, who was his 'weed man'. He said that he now knows it was two men, known as 'Killa' and 'Shotta', who committed the crime. He described Arthur White, the eyewitness as a 'coke-head'".

42. Mr Wright also stated in his affidavit:

> "I asked the appellant if he had any conversations with Dr Ottey before the trial. He said that Dr Ottey explained that if he pleaded guilty, then medical records might allow a conviction for manslaughter, rather than murder. I asked whether the appellant considered pleading guilty. The appellant said that he did not want to plead guilty as he did not commit the crime."

43. The latest psychiatric report on the appellant, by Dr Clayton Sewell, dated 2 December 2015, states that "Mr Brown maintains that he is not guilty of murder".

44. The appellant has never said anything which might suggest that his illness had anything to do with the killing of the deceased, nor was there evidence from any other witness about the manner in which the appellant was behaving at the material time to suggest that his responsibility for his conduct was substantially impaired by his illness. Furthermore, in view of the appellant's consistent account (reinforced by what he told Mr Wright about his unwillingness to accept a conviction for manslaughter because he did not kill the deceased), there is no reason to suppose that if his conviction were quashed, and there were a retrial, he would advance a different defence from that which he has always advanced. To advance a defence of diminished responsibility would be contradictory to the case which he has elected to maintain.

45. The second matter which stands out is the absence of psychiatric evidence adequate to support a defence of diminished responsibility. Mr Guthrie properly conceded that the final sentence of Dr Ottey's report dated 20 November 2002 would have been inadequate. He had not obtained the appellant's account of events, nor had he looked at the prosecution's evidence about what happened or the account given by

the appellant to the police. Those steps would have been essential in preparing a full report, addressing not only his mental health but also the critical issue of substantial impairment of responsibility. The Board does not criticise of Dr Ottey, who had not been instructed to provide a full report on the question of diminished responsibility, but the appellant is in the position of not having any psychiatric report on which to advance a viable defence of diminished responsibility (if he wished to do so).

46. In summary, the appellant has failed to show that he had or would have a viable defence of diminished responsibility, or that it would be in the interests of justice that he should be given an opportunity now to advance a case contrary to that which he has steadfastly maintained.

47. It remains to consider the question of the appellant's sentence. The appellant was in custody from 9 September 1998 and was sentenced on 23 January 2003. He had therefore been in custody for four years and four months at the date of sentence. The judge in passing sentence said that this would be "reflected in the sort of sentence I am going to impose on you", but it is unclear what allowance he made for it. The Court of Appeal ordered that the appellant's sentence should commence on 23 April 2003. The respondent concedes that the Court of Appeal was wrong to do so, having regard to the decision of the Board in *Ali v Trinidad and Tobago* [2005] UKPC 41; [2006] 1 WLR 269, but there is an issue as to the approach taken by the judge.

48. Mr Guthrie submitted that time spent in custody should count against sentence unless there is good reason to the contrary. Mr Poole submitted that the judge acted properly within the scope of his discretion and he referred to the guidance given by the Board in *Ajay Dookee v State of Mauritius* [2012] UKPC 21. In that case the court passed a determinate sentence of five years' imprisonment. The appellant had spent 14 months in custody on remand. There was detailed information before the Board about the differences in the conditions of custody on remand and as a convicted prisoner. In those circumstances the Board considered that credit should ordinarily be given to the extent of 80 to 100% for time spent on remand, 80% being the suggested default position.

49. The present case is different in two respects. First, the period of the appellant's detention as unfit to plead did not result from a decision by him to plead not guilty (incidentally entitling him to more favourable conditions than a convicted prisoner), but from his illness. Secondly, in the case of a determinate sentence the decision about credit for time on remand fixes the release date. In the present case the minimum period set by the judge merely sets the earliest date on which the prisoner may become eligible for parole. The Board does not know what allowance the judge made in setting that date. It is hard to see why full allowance should not be given for the time spent by the appellant in custody, unless there is a particular reason for directing otherwise. The Board considers that for those reasons the proper course in the present case is to allow

the appeal against sentence and remit the matter to the Court of Appeal for further consideration. The appellant's longstanding mental health problems will be an additional factor to be taken into account by way of personal mitigation.

50. The Board will humbly advise Her Majesty that the appeal against conviction should be dismissed and the appeal against sentence allowed. In conclusion, the Board reiterates its appreciation to those who have acted in the appeal pro bono.