IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL NO. 021 of 2017
IND#0020 of 2011
SC#0357 of 2011

BETWEEN:

DEVON JERMAINE ANGLIN

Applicant

and

HIS MAJESTY THE KING

Respondent

BEFORE:

The Rt Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

Appearances: Mr Ben Tonner KC instructed by Mr Greg Burke of McGrath Tonner for the Appellant
Mr Simon Davis, Director of Public Prosecutions, for the Respondent

Date of Hearing: 8 December 2022

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Delivered: 7 March 2023

JUDGMENT

APPEAL AGAINST SENTENCE

The Rt Hon Sir John Goldring, President

Introduction

1. On 20 January 2011 the Applicant was convicted by Chief Justice Smellie, sitting alone, of the murder by shooting of Carlo Webster and the attempted murder of Christopher Solomon. On 9

February 2018 the Chief Justice, following the introduction of the Conditional Release Act 2014, specified 30 years as the minimum period of incarceration. The Applicant now seeks leave to appeal that sentence. He seeks the Court's leave to admit as fresh evidence the opinion of Dr Marc Lockhart, a psychiatrist from Behavioural Health Associates Cayman and that of Dr Liezel Anguelova, a psychologist, that at the time the he shot the deceased on 10th September 2009, he was suffering from Post-Traumatic Stress Disorder ("PTSD") and/or the effects of brain damage as a result of a machete attack he suffered in about November 2005, in consequence of which, as Dr Lockhart expressed it in his first of four reports, he "*lost control of his ability to restrain himself*." Finally, he seeks to rely upon the "Neurology Expert Review" of Assistant Clinical Professor Kaplan of NY Neurology Associates, although the assistance it provides the Applicant is a matter of debate. It is submitted by the Applicant that his PTSD was such as to take the case into the exceptional category and justify a reduction in the minimum term. It is further submitted that the provocation to which he was subjected prior to the shooting also amounted to such a circumstance and similarly justified such a reduction.

2. We permitted the Applicant to adduce the fresh evidence '*de bene esse*.' Dr Lockhart and Dr Anguelova gave evidence. The Crown in response relied upon Professor Myers, the Professor and Chief of the Division of Forensic Psychiatry at the Warren Alpert Medical School of Brown University in the United States.

3. The Applicant was represented by Mr Tonner QC, the Respondent by Mr Davis, the Director of Public Prosecutions.

The legal provisions

4. Section 14 of the *Conditional Release Act*, 2014, states:

> *"14 (1) Notwithstanding any other Law to the contrary, when sentencing a prisoner to a term of imprisonment for life, the court shall specify the period of incarceration the prisoner shall serve before the prisoner is eligible to be considered for conditional release on licence, the period being such as the court considers appropriate to satisfy requirements of retribution, deterrence and rehabilitation, but for murder, the period shall be thirty years before the prisoner is eligible for conditional release unless there are –*

(a) *extenuating circumstances, exceptional in nature, in which case the court may impose a lower period of incarceration; or*

(b) *aggravating circumstances, exceptional in nature, in which case the court may impose a longer period of incarceration*

(2) In making a decision under subsection (1)(a) or (b), the court shall state the extenuating circumstances or the aggravating circumstances, as the case may be.

(3) The Board may…order conditional release on licence of a prisoner sentenced to a terms of imprisonment for life after the prisoner has served the period of imprisonment specified by the court under subsection (1)."

5. Section 21 provides for the making of regulations to give effect to the law. Regulation 14 of the *Conditional Release of Prisoners Regulations*, 2016, which was made pursuant to section 21, provides that:

> *"For the purposes of determining the earliest possible conditional release date in relation to a prisoner on a term of imprisonment for life, the circumstances set out in Schedule 12 shall be considered.*

6. Schedule 12 ("*sentencing guidelines*") provides:

> "***Introduction***
>
> *1. (1) Where a mandatory life sentence for murder is prescribed by any Law, for the purposes of section 14 of the Act the aggravating and extenuating circumstances are outlined in this schedule.*
>
> *(2) For offences other than murder, for the purposes of section 14 of the Law, the aggravating and extenuating circumstances may include all the relevant circumstances of the offence and or the offender.*
>
> *(3) For murder, the period shall be thirty years before the prisoner is eligible for conditional release unless there are extenuating or aggravating*

circumstances, exceptional in nature, in which case the court may impose a shorter or longer period of incarceration respectively;

Aggravating circumstances and extenuating circumstances

2. (1) Detailed consideration of aggravating or mitigating circumstances may result in a minimum term of any length.

(2) Aggravating circumstances that may be relevant to the offence of murder include -

(a) a significant degree of planning or premeditation;

(b) the fact that the victim was particularly vulnerable because of age or disability;

(c) mental or physical suffering inflicted on the victim before death,

(d) the abuse of a position of trust;

(e) the use of duress or threats against another person to facilitate the commission of the offence;

(f) the fact that the victim was providing a public service or performing a public duty

(g) concealment, destruction or dismemberment of the body

(h) previous convictions

(i) abduction and sexual or sadistic conduct; and

(j) any other circumstances which may be considered relevant.

(3) Extenuating circumstances that may be relevant to the offence of murder include -

(a) an intention to cause serious bodily harm rather than to kill;

(b) lack of premeditation;

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 185(1) of the Penal Code (2013 Revision)), lowered the offender's degree of culpability.

(d) the fact that the offender was provoked (for example, by prolonged stress);

(e) the fact that the offender acted to any extent in self-defence or in fear of violence;

(f) a belief by the offender that the murder was an act of mercy;

(g) the age of the offender; and

(h) any other circumstances which may be considered relevant…

*…**Duty to give reasons***

5 (1) Any court making an order pursuant to section 14 must state in open court, in ordinary language, its reasons for deciding on the order made."

'Exceptional in nature'

7. The meaning of those words was considered by this Court in *R v Ramoon and Douglas,* CICA 7.12.18, and, more recently, in *Ricketts and Others* CICA 09/2018, where, at paragraph 17, it was said:

"*(i) It cannot have been the Legislative Assembly's intention that the words have anything to do with how infrequent or uncommon the circumstances of the murder in question were in Cayman –*

'… the words relate not to the frequency of the conduct, but its seriousness. The issue is whether the circumstances of the murder in question were so serious as to mark out the nature of the case as exceptional, and to justify a longer period of imprisonment' (para 105).

(ii) As to extenuating circumstances, what is important is not how often such circumstances may occur but whether their weight is so exceptional as to justify the imposition of a lower period (para 106).

(iii) With regard to the use of firearms to commit a murder, Schedule 12 para 2(2) is not exhaustive, nor can it have been the Legislative Assembly's intention to exclude the use of a firearm as a possible aggravating circumstance (para 108).

(i) Whether or not this is the case will depend on all the circumstances of the case, but

'…it does seem to us that in most cases the pre-possession and use of firearms is likely to amount to an aggravating feature' (para 109).

(ii) The sentencing exercise

'…is pre-eminently an area for the application of judicial judgment and discretion. Each case will depend on its own facts. The Judge will stand back and make an overall assessment of the circumstances as he finds them to be. He will, no doubt, take into account, among other things, the prevalence of particular sorts of murder in the Cayman Islands, the protection of the public and such aggravating or mitigating circumstances as he finds in the particular case.' …

(iii) 'We accept … that it is important not to water-down the meaning of the phrase 'exceptional in nature'…

18. In short…in interpreting Schedule 12, paras 2(2) and (3) (aggravating and extenuating circumstances) and the words 'exceptional in nature', the factor in question must be of sufficient weight and seriousness so as to take the case into the exceptional category and move the minimum term either upwards of downwards from the starting point of 30 years' imprisonment."

8. In paragraph 19 of *Ricketts*, in dealing with some submissions which had not been advanced in oral argument, it was said that:

"*Once the court is sure that one or more of the circumstances set out…is made out, it has the discretion to increase or reduce the minimum term*."

9. As we indicated in argument, that observation in one respect went too far and requires correction. The provision requires the factor leading to the increase or reduction in question to be "*of sufficient weight and seriousness so as to take the case into the exceptional category*." It would accord with general principle that the judge would need to be sure of the aggravating circumstances upon which reliance is placed, but that a lesser degree of proof could be sufficient when considering extenuating circumstances upon which a defendant seeks to rely, as the Chief Justice indicated in the present case (at §31).

The facts

10. Although the facts are summarised in the Court's judgment in an earlier application seeking to reopen the appeal against conviction, given the opinions expressed by Dr Lockhart and Dr Anguelova, it is necessary to set out the facts as agreed by the Defence and recounted by the Chief Justice in his sentencing remarks (§38 and following):

> "*38. The defendant shot Carlo Webster at near point blank range to the head and twice to the body after he had fallen, killing him instantly. Christopher Solomon was shot with the bullet entering the side of his torso during the same incident. Webster was the intended victim of the shooting and the Crown relied on the doctrine of transferred malice…*
>
> *…40. The issue was identity…The Crown relied in particular on the evidence of two anonymous witnesses, witness E and witness B…*
>
> *…43. The defendant did not give evidence.*
>
> *…44…The witness [B]…saw a fight between Devon Anglin, Carlo Webster and Chadwick Bodden. The witness said that Devon Anglin punched Chadwick Bodden and kicked him as he fell to the ground. The security guards took Chadwick Bodden out of the club. Chadwick Bodden appeared to be inebriated. Then Carlo Webster punched Devon Anglin in the face. Anglin walked to the male restroom. Webster then also moved towards the male restroom and was intercepted by Ophia (identified during the trial as Devon Anglin's girlfriend). Chelsea Watler, a friend of Ophia's testified to an incident shortly before during which Chadwick Bodden, without any apparent*

cause, twice spat drink from his cup at Ophia and that this happened in the presence of Devon Anglin. As to the terrifying event of the shooting the witness said that while Carlo Webster and Ophia Smith were talking in the hallway leading to the restroom "Devon Anglin walked out of the restroom and took the gun out of his waist, pointed it at Mr. Webster and started shooting"…The witness said this happened about two minutes after Devon Anglin had gone to the restroom. When Anglin pulled the gun from his waist there was about five feet between him and Carlo Webster. As the witness heard the first shot, Carlo Webster appeared to grab at his side as he was falling to the ground. Then Anglin fired a second shot. Then, as Webster was on the ground, Witness B said Anglin 'walked up to him, point the gun at him and shot him'… After that "everyone started running" and Devon Anglin walked towards the exit door. The witness said the firearm was either a 9 millimetre or .22 millimetre. The CCTV footage showed the defendant spent more than 5 minutes inside the restroom immediately before the shooting and Carlo Webster was either inside the restroom as well or at the threshold of the doorway to the restroom.

45. *[The] Court noted that from the examination in chief and cross examination a picture of Witness B emerged, having been present during incidents leading up to the shooting and during the shooting itself and describing a clear view of the fatal shooting of Carlo Webster by the defendant, "inferentially in a cold-blooded act of retribution for the earlier hostile exchange between them, which the witness also described"…*

…47 …Witness E…saw two altercations, the witness saw the man in the orange coloured shirt (who turned out to be Carlo Webster) punch the man in the striped shirt (who turned out to be Devon Anglin) in the face and he punched back. The first altercation was separated by the security guards and five to eight minutes later another fight broke out in the same area with different persons. After the second fight the witness saw the man with the orange coloured shirt near the male restroom. "The guy with the striped shirt who was involved in the first fight was in front of him, about 20 centimetres' away", said Witness E. The witness turned and about three seconds later

heard a shot. There were up to four shots. People were running. Witness E turned around to face the bathroom and saw the guy with the striped shirt walking out of the club. He had a gun in his hand. He put it in his pants waist and walked out the club. The witness extended his/her hand as if to shield friends from the gun man as he walked by on his way out of the club. The witness saw the guy in the orange shirt on the floor by the bathroom area with blood around him…"

11. In short, following the altercation described by the Chief Justice, the Applicant walked into the male restroom, coming out from it shortly afterwards with a loaded gun, intending to shoot and kill the deceased. Having done so, he walked out of the night club and disposed of the gun. The assessment of the Chief Justice, who heard the evidence during the trial, was of a cold-blooded act of retribution. The Applicant only admitted he was the gunman years after the event and after an unsuccessful appeal to this Court and a refusal of leave by the Judicial Committee of the Privy Council. By the time he appeared before the Chief Justice for sentence in 2018 he had changed tack. As will become apparent, he is now seeking to advance a fresh account of the shooting which is not only inconsistent with what he has previously said, but is also wholly inconsistent with the evidence.

The psychiatric evidence before the Chief Justice

12. There was a report from Professor Myers. He had seen the Applicant on the 12th of December 2017. He did not accept the Applicant was suffering from PTSD at the time of the shooting. Among other things, he observed that such a diagnosis substantially depended on self-reporting. The Professor rejected that diagnosis with "*reasonable medical certainty*". It was his view that the primary diagnosis was of an Anti-social Personality Disorder.

13. There was also a short psychological report from Ms. Nina Welsh, a forensic psychologist. On the basis of answers the Applicant himself had given in response to a series of questions (the "*checklist*"), Ms. Welsh said, "*It is possible that his behaviour during the index offence of murder was influenced by such factors [of which he complains]."*

The Chief Justice's sentencing remarks

14. The Chief Justice set out those circumstances relied upon by the Defence as exceptional and extenuating in nature. The first of those was what was submitted to be the provocative

circumstances preceding the shooting. The Chief Justice summarised those submissions in the following way (§87):

> "*It is submitted that taken by themselves these would be provocative circumstances and although not rising to the level of the defence of provocation at law, when considered as they would be expected to have affected the offender Anglin, his emotional and psychological condition should be taken into account. It is submitted that whilst Devon Anglin's response was evidently grotesquely disproportionate, the conduct of Chadwick Bodden and Carlo Webster was provocative within the meaning of Schedule 12 section 2 (3)(b) of the Regulations which lists provocation as a potentially extenuating circumstance available to offenders convicted of murder*."

15. Reliance was also placed on the Applicant's "*emotional and psychological condition*" and the effect of the machete attack in November 2005 following, as the Chief Justice observed, an altercation inside a night club. It was also submitted that the medical evidence confirmed that the Applicant was suffering from PTSD, that that amounted to an exceptional circumstance justifying a reduction in sentence.

16. The Chief Justice concluded (§116 and following):

> "*116. In the present case, the cold and calculated manner of his killing of Carlo Webster was not the consequence of Mr Anglin's loss of self-control. It was, as found at trial, 'a cold-blooded act of retribution for the earlier hostile exchange' between Devon Anglin and Carlo Webster. Webster had been removed from the restroom and restrained from any further attempt at approaching Anglin even while Anglin was seen washing his face in the restroom. Some 29 seconds later, armed by this time if not before with a gun, Anglin then calmly and deliberately walked out of the restroom directly to where Webster was standing and shot him at near point-blank range. Mr Anglin then concealed the gun in the waist of his pants, calmly made his way through the crowd and exited the nightclub before running away from the scene. Consistent with that deliberate attitude, he steadfastly denied being the*

gunman, a further troubling consequence of which is that the gun was never recovered…

…118. This was not a shooting in the heat of rage, but retribution by way of a 'gangland style' execution, aimed not only at Webster but also at intimidation of his associates and reckless as to whether or not anyone else was hurt…

…120. Mr. Anglin's self-reported symptoms of PSTD from his earlier traumatic experiences or from his childhood experiences, as explanation for his deadly response against Webster, have been firmly rejected by the psychiatrist. I am satisfied that I too should reject this explanation, for all the sensible reasons given in the psychiatric report.

…121. While there may well have been a degree of provocation, neither Carlo Webster nor his fellow protagonist Chadwick Bodden can be said to have clearly prevailed in their exchanges with Anglin. There is no evidence that Anglin was humiliated. Instead, the evidence is that he had clearly prevailed against Chadwick Bodden who was drunk and had retaliated blow for blow in an exchange of punches with Carlo Webster before the security officers intervened...

…123 The circumstances of the murder of Carlo Webster by the use of an unlawful gun in a crowded nightclub are, by any measure, aggravating and exceptional in nature…Viewed from the point of view of the public interest in retribution and deterrence these are circumstances which could well ordinarily justify an uplift from the 30-year statutory minimum. However, the Law calls upon the sentencing judge to have regard also to rehabilitation and it is here that I think it appropriate to take account of Mr. Anglin's personal circumstances, such as his relatively young age at the time of the offence and the fraught and provocative circumstances of hostile rivalry in which he seems to have found himself…

…127. In my judgment after the holistic review of all the circumstances, there is no compelling reason to interfere with the statutory minimum of 30 years in this

case. I therefore confirm that to be the minimum period to be served by Mr. Anglin before he is eligible for consideration for release on licence."

The medical evidence

The machete incident

17. There is no doubt that in November 2005, when he was 18, the Applicant was involved in an incident of serious violence inside, and immediately outside, a night club. The background to the violence bore a striking similarity to the events leading to the shooting in the present case. In a confrontation outside the nightclub, the Applicant was attacked by a number of men, one of whom was wielding a machete. On that occasion, the Applicant did not have, or have access to, a firearm. He resorted to the use of a knife. As to the injuries he suffered, Professor Kaplan put it in the following way:

> "*[The] altercation…resulted in multiple laceration injuries…including the largest on the right parietal scalp. Records from the emergency department state that he vomited but did not lose consciousness. CT head obtained at the time mentions right parietal skull fracture and no evidence of intercranial bleeding. He required surgical repair of the laceration but was otherwise well…*
> *…repeat CT of the head in 2007 again showed no evidence of intercranial abnormality and healing of the…fracture*."

18. An MRI review on 1 October 2021 was normal and showed no signs of remote traumatic brain injury.

19. An EEG on 14 October 2021 showed mild temporal slowing and infrequent sharp waves and was otherwise normal. Professor Kaplan was of the view that the clinical significance of the EEG findings was doubtful. He concluded that:

> "*…[the Applicant] had mild traumatic brain injury in 2005. He has no evidence of structural brain damage…Whereas frequent headaches [which the Applicant reported] are likely related to the [brain injury], it is unlikely that his psychiatric or cognitive symptoms are caused or related to [the] 2005 [injury]…if this was the sole instance of brain injury/concussion*."

The issue

20. On the one hand, Dr Lockhart, supported by Dr Anguelova, was of the opinion that following the machete incident the Applicant suffered from an underlying trauma which resulted in PTSD and affected his brain. The consequence was that following the initial confrontation in the night club in 2009 some four years later, the Applicant was unable adequately to manage his impulses. That lack of impulse control led him to shoot the deceased intending to kill him. On the other hand, Professor Myers' primary diagnosis was that at the time of the killing the Applicant had an anti-social personality disorder evidenced by a history of disregard for, and violation of the rights of, others. Professor Myers, while not excluding the possibility of PTSD was of the view that the Applicant's functioning before arrest was not indicative of someone suffering from PTSD. He emphasised that such a diagnosis relies heavily on self-reporting. As to any brain injury, Professor Myers' opinion was the evidence suggests any trauma was resolved by September 2009 and played no part in the killing.

Dr Lockhart's evidence

21. In diagnosing PTSD, Dr Lockhart relied upon a number (a "*constellation*") of factors. They included, as he suggested, significant medical and other records of those who examined the Applicant following the machete incident, examinations carried out during his imprisonment, the Applicant's complaints, the Applicant's account of the events of 10 September 2009 and examinations of the Applicant both by him and Dr Anguelova.

22. Dr Lockhart accepted that the Applicant had an anti-social personality disorder and suffered from cannabis and alcohol disorders. He accepted his school records revealed, among other things, that he pulled out a knife when he thought he would be attacked, he broke a boy's ribs and an arm when a disparaging remark was made about his father (an event not originally referred to by Dr Lockhart) and that he was seriously involved in drugs from a young age. However, importantly, as Dr Lockhart suggested, there was evidence that following the machete attack, the Applicant was prone to a greater degree of anger and violence than before. There were, as he suggested, significant references in psychiatric and psychological reports to a possible personality change following that attack. Dr Alrubaie, in four sets of notes made between October 2006 and June 2007, referred to the Applicant exhibiting symptoms of PTSD and anxiety disorder. Dr Lockhart considered that the fact the Applicant said he did not remember seeing Dr Alrubaie, someone whose views could be said to advance his case, was of significance. Dr Lockhart agreed that at no time did Dr Alrubaie express the opinion that the Applicant was suffering from PTSD.

23. Reliance was placed on the notes of Dr Bernard, a prison psychiatrist, who wrote, in May 2018 and March 2019 of a major depressive disorder and of PTSD. By then the Applicant had been in prison for a considerable time.

24. Dr Lockhart also referred to what the Applicant's mother and stepfather said regarding a change in the Applicant following the machete incident.

25. It is agreed that a diagnostic criterion for PTSD is an avoidance of places, activities and people which remind the sufferer of the traumatic event. As we have said, the allegedly traumatic event occurred in a night club in circumstances strikingly similar to those of 10 September 2009. The Applicant told Dr Lockhart that he had "*difficulty in being in public places especially in areas with large amounts of people since November 2005…[He] described constant or repeated episodes of re-experiencing memories of the traumatic event including flashbacks and dreams. He complained of constant headaches and described the use of cannabis and alcohol to medicate*." Dr Lockhart accepted this account.

26. As to the events before the shooting, the Applicant told Dr Lockhart that when in the bathroom, following the altercation outside, the Applicant "*began to feel angry…and people were holding on him and trying to restrain him*." He stated that this escalated his feelings and brought back re-experiencing of his previous traumatic event in November 2005. He described the feeling that his life was in danger and that this caused "*his blood to start running*." He described the replaying of past events in his mind as he was in the bathroom washing his face. He reported that at that point he was told that "*someone would shoot him in the face and he lost control of the ability to restrain himself*." Again, Dr Lockhart accepted this account. He did not ask for details, such as how a firearm first came into the picture, how, if the Applicant did not have it, it was obtained, who loaded it: all, it might be thought, relevant matters when seeking to understand the Applicant's conduct and his reactions.

27. Dr Lockhart carried out a psychiatric examination of the Applicant. It included a 'personality assessment inventory.' It involved the Applicant answering a series of questions. In his report of October 5th, 2020, Dr Lockhart said:

> "*With respect to negative impression management, there are indications suggesting that Mr Anglin tended to portray himself in an especially negative or pathological manner. This pattern is often associated with deliberate distortion of the clinical picture, and the critical items should be reviewed to evaluate the possibility of malingering. Alternative explanations include the possibility that the test results reflect a "Cry for Help" or an extreme or exaggerated evaluation of oneself and one's life. Regardless of the cause, THE TEST RESULTS POTENTIALLY INVOLVE CONSIDERABLE DISTORTION AND ARE UNLIKELY TO BE AN ACCURATE REFLECTION OF THE RESPONDENTS [sic] OBJECTIVE CLINICAL STATUS*."

28. Unsurprisingly, Professor Myers relied upon the Applicant's response to the personality assessment as undermining reliance upon what the Applicant said as the basis for a diagnosis. Dr Lockhart's response in evidence was, firstly, that the tests were not designed for forensic-type cases and that, secondly, it was "*clear*" that the exaggeration "*was due to his underlying trauma and post-traumatic symptomology*." It reflected a "*cry for help*."

29. Dr Lockhart placed reliance upon Professor Kaplan's report as supporting his view that the Applicant had suffered traumatic brain injury following the machete attack which went to his responsibility for his actions on the night of the shooting. He suggested that the report, in the context of the other evidence, provided "*diagnostic clarity"* regarding the impact of the brain injury on the events of 10 September 2009.

Dr Anguelova

30. Dr Anguelova, in a lengthy report, referred to the Applicant as suffering from a major depressive disorder, a delusional disorder and a generalised anxiety disorder. She expressed the view "*with a reasonable degree of psychological certainty*" that the Applicant suffered from PTSD when the murder was committed. She identified "*The primary trauma event for his PTSD…as the 2005 machete attack*." She said she relied upon the same reports, notes and evidence as did Dr Lockhart. Dr Anguelova referred in some detail to the evidence of Dr Johnson, who started therapy with the Applicant in 2019.

31. A psychometric assessment was carried out by Dr Anguelova. That involved the Applicant answering a series of questions. The results were sent off to the Pearson Institute which then

reported on the answers. As Moses JA pointed out during the course of Dr Anguelova's evidence, Pearson, when reporting, did not know the particular background and circumstances in which the answers were given.

32. Like Dr Lockhart, Dr Anguelova had to grapple with "*Validity Concerns*" in respect of the Applicant's "*over-reporting*" which the psychological functioning test ("the MMPI-3 protocol") starkly revealed. That test, as reported by Pearson, "*provided a very unusual combination of responses that is strongly associated with non-credible memory complaints. This combination of responses is uncommon even in individuals with significant emotional dysfunction who report credible symptoms. In addition, he reported a much larger than average number of somatic symptoms rarely reported by individuals with genuine medical conditions. This level and type of infrequent responding may occur in individuals with substantial medical problems who report credible symptoms, but could also reflect exaggeration. In individuals with no history or other corroborating evidence of physical health problems this likely indicates non-credible reporting of somatic symptoms*." The MMPI-3 protocol was considered "*invalid and uninterpretable due to over-reporting*."

33. Dr Anguelova, like Dr Lockhart, said that the exaggeration could be a cry for help of someone suffering from PTSD.

34. A further test ("MCMI-IV"), among other things, referred to the 'life events checklist' ("DSM-5"). Possible DSM-5 diagnoses included PTSD. However, in the Applicant's case, the possible diagnoses "*in order of their clinical significance and salience,*" were schizophrenia, alcohol use disorder and other substance abuse disorder. As to personality disorders, it stated that, "*Deeply ingrained and pervasive patterns of maladaptive functioning underlie the clinical syndromal pictures. The following personality prototypes correspond to the most probable DSM-diagnoses that characterise this patient…Borderline Personality Disorder…Paranoid Personality Disorder…and Schizotypal Personality Style*." A possible diagnosis of PTSD was not mentioned.

35. It was also said in the MCMI-IV report that the Applicant's response style "*may indicate a broad tendency to magnify the level of experienced illness or a characterological inclination to complain or be self-pitying*." Dr Anguelova maintained that it might indicate feelings of extreme vulnerability "*associated with a current episode of acute turmoil*."

36. Dr Anguelova placed considerable reliance on the Applicant's answers in the structured interview which comprised the "Clinician Administered PTSD Scale." She said more than once that her diagnosis of PTSD relied upon the Applicant's answers taken in conjunction with the evidence as a whole.

37. A further test ("The Trail Making Test") was described by Dr Anguelova as useful in determining traumatic brain injury. The Applicant's scores were slightly above average. They did not indicate brain damage.

38. The Applicant, among other things, told Dr Anguelova he had been a successful full-time drug dealer. Dr Anguelova suggested this could have been directly influenced by his brain injury. The Applicant said it was usual for people to die in nightclubs or when they were going out and that he was "*always nervous*" of going to night clubs. He referred to all his friends getting killed.

39. Finally, the Applicant advanced to Dr Anguelova a fresh, and self-exculpatory, account of the murder. It was to the following effect:

> "*...when he came out of the bathroom Mr Webster, wearing an orange shirt triggered his mind and he felt "out of it." He indicated that this meant he could not think. Mr Anglin recalls Mr Webster pulling with his left hand a gun from his pants. Mr Anglin then jumped forward and grabbed his left hand with the gun. The gun allegedly went off and shot Mr Webster in the right forearm at which point he let the gun go and Mr Anglin allegedly grabbed the gun and shot Mr Webster once in his head and once in his chest*."

40. When asked if she would weigh the change of account into the mix when assessing the Applicant's credibility, Dr Anguelova said that while "*perhaps*" she would, "*I also do think that after [PTSD]...people are inclined to repress memory. And there are different times after periods of healing or periods after the post-traumatic stress incident*."

Professor Myers

41. The Applicant told Professor Myers of his background of drug dealing, of being shot at and of seven of his friends being killed. He described putting a concrete nail in his cell door at night to prevent someone killing him.

42. In his report of 12 January 2018, Professor Myers referred to a surge of information regarding the Applicant having PTSD. He observed that while most people who experience a traumatic event do not have PTSD, the onset of the condition, normally improves and generally resolves within a few months or years. The descriptions of the Applicant's symptoms were atypical. There were, in the Professor's opinion, other indications that raised a doubt about PTSD. Someone with PTSD tends socially to isolate himself, not frequent with many others the sort of premises at which the traumatic event occurred. PTSD sufferers normally look forward to treatment. The Applicant did not attend therapy sessions for PTSD. He only took appropriate medication for a short time.

43. Psychometric testing carried out in prison suggested the Applicant was exaggerating, possibly fabricating the degree of PTSD symptoms. As to the Applicant being hypervigilant, that reflected no more than the reality of his position. He was genuinely in chronic danger of being seriously injured or killed. Genuine fear brought on by reality-based factors did not amount to PTSD.

44. It was Professor Myers' opinion, the Applicant had responded to an interpersonal conflict with deadly force, fearing that unless he did so, he might be killed in the future.

45. The Professor, while not suggesting a diagnosis of PTSD was impossible, did not change his opinion in the light of the reports of Dr Lockhart and Dr Anguelova. He stated the Applicant's account to Dr Anguelova of a "*flashback*" was inconsistent with the account given to him. The Applicant's change of account as to how the shooting occurred suggested the possibility of an attempt to lesson his culpability. There was further evidence of exaggeration. For a reliable diagnosis of PTSD, a person had to be straightforward about their symptoms and life functioning, which the Applicant was not.

46. As to a change in the Applicant's behaviour following the machete incident, the school records suggested to Professor Myers that the Applicant had problems of violence prior to the incident. He carried a weapon. He found it difficult to control his anger (as the breaking of a boy's ribs and arm in 2002 indicated). He used marijuana daily. He drank alcohol and went to night clubs. These anti-social behaviours were, in Professor Myers' view, consistent with the murder being driven by the combined effects of an anti-social personality disorder and substance abuse.

47. Dr Lockhart's reliance upon Professor Kaplan's neurological report to support brain damage as a component in the Applicant's conduct was, in Professor Myers' opinion, unjustified. The report revealed mild traumatic brain injury. There was no evidence of structural brain damage on several CT and MRI brain studies. Symptoms in the vast majority of patients improved. It was Professor Kaplan's opinion that any psychiatric or cognitive symptoms relating to the brain injury were unlikely (absent a subsequent brain injury or concussion). Moreover, the results of Dr Anguelova's psychometric testing were not consistent with someone having cognitive deficits related to a remote traumatic brain injury.

Our conclusion on the medical evidence

48. As Professor Myers emphasised, a diagnosis of PTSD substantially depends upon accurate and reliable self-reporting. The evidence that the Applicant's reporting was neither accurate nor reliable seems to us overwhelming. The psychometric test results speak for themselves. To argue, as did Dr Lockhart and Dr Anguelova, that the Applicant's 'over-reporting' may be a cry for help and a product of PTSD is essentially circular. The tests seek to ascertain whether the person taking them may suffer from PTSD. When the results are a self-evidently unreliable basis upon which to diagnose PTSD, that is explained away on the ground that the very thing which the tests have failed to ascertain, namely PTSD, is the cause of their unreliability. Neither is it an answer, as Dr Lockhart suggested, that the tests were not designed for forensic-type cases. For the evidence, as it seems to us overwhelmingly, suggests that the Applicant answered the questions untruthfully and in a way which he believed would advance his case.

49. In our view, neither Dr Lockhart nor Dr Anguelova have grappled with the implications of the Applicant's most recent account of the murder, an account which is inconsistent with the evidence and plainly untrue. It is, as it seems to us, a deliberate attempt by the Applicant to reduce his culpability for the murder and advance his case for the purposes of this appeal. Dr Anguelova's (in any event, far-fetched) view to the effect that the fresh account might reflect a memory which the Applicant had repressed for many years was palpably wrong. The events of the account purportedly being recalled did not happen and could not therefore be recalled. Moreover, the implications of the change of account are significant. Dr Lockhart's diagnosis of PTSD was advanced on the basis of the previous account. Dr Anguelova's diagnosis was advanced on the basis of a different account. Each relied to a substantial degree on the truthfulness of the account given to them in circumstances where, in our view, no reliance can be placed on any account of the murder the Applicant gives.

50. Nothing in the Applicant's general lifestyle following the machete incident suggests someone suffering from PTSD. He was a successful and full-time drug dealer. If the Applicant genuinely suffered from PTSD as a consequence of what had happened to him in a nightclub some four years before, it seems to us most unlikely, if not inconceivable, he would patronise nightclubs in the way he plainly did. We do not accept he was telling the truth when he claimed he found it difficult to be in public places. Moreover, if genuinely suffering from PTSD he would have undertaken the treatment offered to him.

51. Neither do we accept, as Dr Anguelova suggested, that his brain injury influenced his drug dealing. He was involved in drugs from a young age.

52. Professor Kaplan's report does not in our view support the opinion that traumatic brain injury following the machete attack played any part in the murder. The brain injury was mild. There was no evidence of structural damage. Any damage would be expected to improve. Nothing said by Professor Kaplan suggested brain damage played any part in these events. Psychometric testing suggested there was no brain damage.

53. Although some of those who examined the Applicant after the machete incident believed he might suffer from PTSD and, in 2018 and 2019, Dr Bernard expressed the view that he did, those views must substantially have depended upon the reliability of what the Applicant said. Reliance upon the accounts given by the Applicant's mother and stepfather seems to us misplaced. The picture they paint of the Applicant prior to the machete incident is not consistent with the school and other reports.

54. In the result, we agree with Professor Myers' opinion. We agree that the Applicant's 'anti-social behaviours,' evident from a young age, were consistent with the murder being driven by the combined effects of an anti-social personality disorder and substance abuse. We do not accept that PTSD or brain damage played a part in the murder. We are driven to conclude that the Applicant has sought to construct a spurious case in order, in the first instance, to found the basis of a second appeal against conviction and, that having failed, to seek a reduction in sentence.

Section 16 of the Court of Appeal Act (2011 Revision)

55. Detailed submissions were advanced as to whether the Court should admit the fresh medical evidence under section 16 of the Court of Appeal Act (2011 Revision): whether it was "*necessary*

or expedient in the interests of justice" for the Court to do so. Attention was drawn to the somewhat broader provisions of section 23 of the Criminal Appeal Act 1968, the applicable provision in England and Wales. That provision, among other things, states that in deciding whether to admit fresh evidence the court should have regard to whether the evidence appears to be capable of belief or to afford any ground for allowing the appeal and whether there is a reasonable explanation for the failure to adduce the evidence in the original proceedings. It was agreed that in deciding whether it was "*necessary or expedient in the interests of justice*," regard should be had to section 23 and the authorities decided under it, some of which were drawn to the Court's attention.

56. However, in the light of our decision regarding the medical evidence, we can take this shortly. The Court has rejected the evidence as affording a ground for allowing the appeal. It has concluded it lacks credibility. In those circumstances, its admission cannot be necessary or expedient in the interests of justice and we therefore do not admit it. It is unnecessary to go further than that.

The remaining grounds of appeal

57. Mr Tonner did not seek to rely as a justification for reducing the Chief Justice's sentence the Applicant's most recent account of the murder given to Dr Anguelova. He relied upon the evidence which was before the Chief Justice. He submitted that the Chief Justice failed, or failed adequately, to take into account the considerable provocation which led to the shooting. He also submitted that no account was taken of the absence of premeditation.

58. Mr Tonner submitted that the Applicant, was only 23 at the time, he had gone to the nightclub not anticipating any violence, or expecting to encounter the deceased. There was no evidence he had a gun. Chadwick Bodden was the instigator of what happened. He disparaged, threatened and spat at the Applicant's girlfriend. The Applicant only acted to assist her. Chadwick Bodden having been ejected, the deceased then took it upon himself to become involved. He was struck in the face, on one view, drawing blood. When the Applicant sought to withdraw by retreating to the restroom, he became trapped there. The deceased was banging on the door. Tempers were high. The Applicant spoke to his girlfriend. It was only moments later, submitted Mr Tonner, that the Applicant shot the deceased. All these events happened a short time after the Applicant had been humiliated in front of his peers and his girlfriend. Given those circumstances, the Chief Justice was wrong, submitted Mr Tonner, to speak of a cold-blooded attack.

59. Mr Tonner also relied upon the medical evidence which he had adduced and which we have rejected. In the circumstances, we need say no more about PTSD or brain damage. However, Mr Tonner further submitted that even in Dr Myers' opinion, there was evidence the Applicant was suffering from an anti-social personality disorder and a substance abuse disorder.

60. Reliance was placed on the young age of the Applicant at the time and his very difficult youth, about which it is not necessary to go into detail.

61. Finally, the Court's attention was drawn the case of *Trevino Bodden* (Indictment 91/2006A) in which Henderson J imposed a minimum term of 28 years in respect of a 21 year old defendant convicted of two murders. That case, decided before *Ramoon and Douglas* and *Ricketts and Others*, was not a guideline case, and has been overtaken by those subsequent decisions. It is unnecessary to say more about *Trevino Bodden*.

Our conclusion

62. We cannot rely on any account the Applicant now gives as to the events leading to the murder. The facts the Chief Justice set out were agreed between the Crown and defence. His description of a cold-blooded act of retribution first appeared at §45 of those agreed facts and during the course of his analysis of the evidence of witness B.

63. It is clear the Chief Justice had well in mind the issue of provocation. He referred to the defence submissions on the topic (see §87). He subsequently specifically considered it (see §121). As his detailed sentencing remarks reveal, he was alive to the basis upon which the defence was putting its case, including reliance upon the youth of the Applicant. It was in our judgment open to him as the trial judge to approach the facts in the way that he did. In the final analysis, whatever the extent of the previous provocation, this was the deliberate murder of someone with a firearm. While there was no premeditation in terms of planning, the Applicant, when in the restroom had, or arranged for, access to a gun which he deliberately decided to use in order to kill someone. This was, in other words, no spur of the moment offence. All these were factors the Chief Justice was entitled to take into account.

64. Moreover, in the light of what this Court has said in *Ramoon and Douglas* and *Ricketts and Others*, the Chief Justice would have been entitled to regard the Applicant's use of a firearm as so serious as to mark out the nature of the case as exceptional and justify a longer period of imprisonment.

65. There is nothing in the youth of the Applicant or the remaining medical evidence to justify a reduction in sentence.

66. In our judgment the Chief Justice was plainly entitled to conclude there was no reason to interfere with the statutory minimum of 30 years. In all the circumstances, we refuse the Applicant leave to appeal.