

6-12-07

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 10 OF 2006

Ind 53/2004

BETWEEN:

JOHN GOULDBOURNE

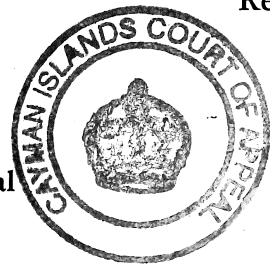
Appellant

and

HER MAJESTY THE QUEEN

Respondent

Before: The Right Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Taylor, Justice of Appeal
The Hon. Mr. Justice Mottley, Justice of Appeal



Appearances:
Daniel Janner, QC instructed by Philip McGhee of Walkers for Appellant
Cheryll Richard, Solicitor General for Respondent

Heard: 4 & 6 December 2007.

Judgment given: 6th December, 2007

Reasons released: 15th April 2008

MOTTLEY, J.A.

[1] After a trial before judge and jury, the appellant was convicted on 9 June 2006 of the murder of Moreen Marie Williams which was committed on 18 August 2004. He was sentenced to imprisonment for life. At the trial, the appellant accepted that he killed Moreen. The sole issue was whether the appellant was guilty of murder or manslaughter by reason of diminished responsibility.

[2] On 18 August 2004, about 7:00 p.m., the appellant left the home of Peaches Vasselle a friend of Moreen, with Moreen. He drove Moreen to her home at Birch Tree Hill, West Bay. Around 9:00 to 9:10 p.m., Moreen was heard shouting "Murder, murder, him gonna kill me, kick

off the door and help me!" She also shouted that "John ah kill me with a knife!" Some of her neighbours were unable to gain access to the house. The police was called to the house. On entering, Moreen was found on the ground with multiple stabs and a gun shot wound. The appellant was also found lying on the floor. His eyes were closed but "they were twitching". He was arrested by the police. Because of his condition, he was taken to the hospital.

Postmortem

[3] A postmortem examination was conducted by Dr. Nadia Williams, a consultant pathologist and senior lecturer at the University of West Indies. The pathologist found 67 wounds on the body of Moreen. These wounds included multiple stabs, punctures abrasions and defensive-type wounds. The wounds were concentrated on the face, neck, torso, both arms, hands, finger and right leg. A 0.5 cm diameter circular bullet entry wound was found 1 cm medial to the tragus of left ear. The pathologist expressed the opinion that the barrel of the gun was in contact with Moreen's face at the time it was fired. Death was said to be due to the gunshot wound to the head with associated fracture of the base of the skull with disruption of the carotid artery which supplied blood to the brain. The severe blood loss also contributed to the cause of death. The doctor expressed the view that many of the wounds appeared to be taunting-type injuries.

Psychiatric Evidence:

[4] Two psychiatrists were called by the prosecution and one by the defence. Dr. Hazel Othello first saw the appellant on 19 August 2004. At that time she was the consultant psychiatrist at the hospital. Dr. Othello graduated in medicine in 1993 from the University of West Indies. She worked as Registrar at St Ann's Psychiatric Hospital in Trinidad and Tobago. Having completed post-graduate studies, she was appointed consultant at the St Ann's

Psychiatric Hospital. She also worked as the main consultant psychiatrist in St. Lucia before coming to the Cayman Island in 2003. She was accepted by the court as an expert witness.

[5] On 19 August 2004, when seen at the medical ward of the Cayman Islands Hospital, the appellant's eyes were closed and he refused to respond to any questions from the doctor. Although she reviewed the notes of the Emergency Room nurses and doctors, she did not consider that she was in a position to form a diagnosis, at that time, as it was necessary to conduct additional evaluation of the appellant. However, the doctor made an entry in the appellant's notes of a possible histrionic reaction. By this, the doctor was referring to behaviour brought about by anxiety, excitement or anything of that nature. She did not prescribe any medication at this stage, but requested a neurological assessment be carried out on the appellant.

[6] The notes for 18 August 2004 made by the nurses in the Emergency Room indicated that the appellant refused to open his eyes or to speak. Later, while he opened his eyes occasionally and blinked them, he nonetheless did not respond to any questions which were asked. The doctor observed that this behaviour was inconsistent with symptom pattern. On 20 August, a nurse noted the appellant informed her that he was unable to move the lower half of his body. However the nurse observed that he was moving his toes. From these notes, Dr. Othello observed that it would have been possible to make one or two possible psychiatric diagnoses; either that the appellant was suffering a conversion disorder or that he was malingering. She indicated that a conversion disorder was a condition in which a patient has medical symptoms of a neurological nature which were suggestive of some disease process which affected the nervous system. The doctor explained that the disorder usually resulted from some form of anxiety rather than from medical cause and arose after a traumatic event. To

make such a diagnosis however, the doctor would have had to interview the patient and his relatives.

[7] Another factor appearing in the nurses notes which the doctor considered to be relevant is the record by the nurse that the appellant was incontinent of urine. The appellant was given a urinal and was told by the nurses to use it. He used it within two hours of receiving it. However he still refused to communicate with anyone and kept his eyes closed. Dr. Othello said that the significance of the appellant using the urinal was that it indicated that he heard the nurse's instructions and decided to follow them. The doctor indicated that this conduct assisted her in forming a possible diagnosis which was in the direction that the appellant was malingering. She explained that a patient who has a conversion related paralysis would be unable to control his urine and would be unlikely suddenly to be able to do so in response to a request or instruction.

[8] Dr. Othello described malingering as "the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives," such as evading criminal prosecution. In its simplest term, malingering is deliberately producing behaviour to give the impression of some medical condition for a specific purpose. The consultant went on to point out that malingering should be strongly suspected if certain combinations exist. These factors include inter alia medical legal, that is where the person is referred by an attorney-at-law to the psychiatrist for examination; where there is a marked discrepancy between the person's claimed distress or disability and any objective findings; a lack of co-operation during the diagnostic evaluation and in complying with the prescribed treatment regiment, the presence of anti-social personality disorder. So in the case of malingering, the symptoms are deliberately produced while in a conversion disorder the symptoms are not.

[9] The doctor placed reliance on an entry made by Dr. Fritz Hendricks, a neurologist, in which he noted that when the appellant was instructed to open his eyes, he deliberately attempted to further close them. The neurologist also noted that when the appellant's limbs were lifted and then allowed to fall, the appellant controlled their descent; in other words, he lowered his limbs in a controlled manner. Dr. Hendricks formed the impression that the appellant most likely had a conversion disorder of some kind associated with anxiety of his predicament. Dr. Othello stated that the observation by Dr. Hendricks supported her overall impression that the appellant was malingering.

[10] Dr. Othello next saw the appellant on 25 August 2004, at which time, she conducted a mental status examination on him. As a result of this examination, and other notes made, she formed the impression that the appellant was malingering and that no further psychiatric treatment was needed at that time.

[11] Dr. Othello gave additional evidence but this related to her comments on the report of Dr. Harold Bursztajn, the consultant psychiatrist, who was called to testify on behalf of the appellant. We shall return to her evidence and the evidence of Dr. Marc Lockhart who also commented on the report of Dr. Bursztajn.

[12] Dr. Bursztajn is an Associate Clinical Professor of Psychiatry at Harvard Medical School in the United States of America. He has 25 years of experience in the clinical medical practice as a psychiatrist in treating a range of neuropsychiatric disorders, including depressive and conversion disorder. He is a co-founder of the Programme in Psychiatry and The Law. He has assisted in ongoing criminal investigation conducted by the Massachusetts State Police in

conjunction with the state policy crime laboratory. He worked with nationally recognized criminal profilers focusing on predictions and preventions of violence by the mentally ill and neuropsychiatrically impaired. He is also a court qualified forensic psychiatric expert witness regarding neuro-psychoanalysis, diminished capacity, and mitigation. Dr. Bursztajn has been chosen by his peers to be listed among the "Best Doctors in America". His neuropsychiatric opinion on the appellant was based on a review and analysis of data comprising inter-alia, (a) a structured and unstructured interview and observation which took place in the course of an examination of the appellant over a period of six and a quarter hours on 1 and 2 May, 2006 in the Cayman Islands (b) a psychological testing and formal self-report data. These Reports included inter-alia the Minnesota Multiphasic Personality Inventory (MMPI), the Personality Assessment Inventory (PAI), Neuro-behavioural Functioning (NFI), for the appellant and other members of his family, questionnaires in respect of the Davidson Trauma Scale and Beck Depression Index, Dissociative Experience Scale, Cognitive Symptom Checklist. The doctor also had regard to a number of other documents and factors including the conversion validity test and examination of data analysis, instruction given to counsel; police and witness statements, crime scene photographs, medical records on the appellant from the Cayman Island, the medical record on the appellant from Dr. Bensimon and collateral interviews of Lee Gouldbourne and Madge Gouldbourne, the parents of the appellant, which were conducted by Tracy McNally. The doctor also reviewed and analyzed the relevant literature on forensic psychiatry, dissociative disorders; malingered psychosis and deception and traumatic dissociation.

[13] Dr. Bursztajn expressed the opinion that at the time of the incident on 18 August, 2004:

".....Mr. Gouldbourne was severely impaired by reason of a mental disorder in the spectrum of major depressive states, (incompletely treated in August 2003) with deep dissociation, approaching a psychotic level of impairment and

expressed as conversion and major impairments which effectively dissociated his executive functions (including judgment, reasoning, planning and decision making) from action.

[14] In reaching this conclusion, Dr. Bursztajn set out in his report the factors which he considered relevant for the conclusion which he reached. The Professor said:

“...based on his reasonable and substantially corroborated reports, Mr. Gouldbourne was enmeshed in a life long dynamic of unrequited love for women, beginning with his hypercritical, demanding, rejecting mother and continuing in the same high level of dysfunctional pattern through three marriages in which he reported having been exploited financially and emotionally. The last of the three marriages ended in May 2003, and Mr. Gouldbourne was treated for depression shortly thereafter. The downward spiral of his life accelerated in September 2003 when his mother was hospitalized for heart surgery and then was hospitalized again for depression. In January 2004, Mr. Gouldbourne, who had already lost his business and his financial well-being in the course of three failed marriages, gave up a promising job opportunity in the United States and moved back to the Cayman Islands to help take care of his mother. Caught between a mother who claimed his loyalty while devaluing and demeaning him and a loving preoccupied father whose resources were drained off by his other sons (who did not share Mr. Gouldbourne’s sense of responsibility to care for his mother) Mr. Gouldbourne found himself by the summer of 2004 in an untenable life situation, with both his emotional and financial resources drained beyond repair. Living in a tiny, disorganized two-room apartment without even proper cooking facilities, while caring for his well-

off elderly divorced parents, he felt trapped, with no prospect of improvement, escape or (probably most important) gaining his mother's appreciation, approval and love; which he had craved since childhood. His depression (untreated since he gave up taking his medication in 2003) deepened into near-psychotic level of dissociation. By the time of the encounter with Ms. Williams on the 18th of August 2004, Mr. Gouldbourne's capacities were so diminished that on ordinary social interaction that would normally be experienced as frustrating became overwhelming. By then he could no longer distinguish between William's demands to be driven to different places and his mother's haughty, controlling disapproving manner. At that moment, his repressed, unconscious terror of being left without love and material sustenance suppressed itself in the form of displacement, dissociation, and a tragically misdirected eruption of terror and rage"

[15] We now return to the evidence of Dr. Othello. On 11 May 2006, she received, by e-mail, the neuropsychiatric report of Dr. Bursztajn. Crown counsel requested Dr. Othello to give her comments on that report. In her initial response, also sent by e-mail, having confirmed that her perusal of the report was brief, she stated that:

"The psychological tests applied are in fact objective assessments. The history obtained by the defence psychiatrist is compelling and certainly support the diagnosis. The information (family history, past psychiatric history, state of living space, etc) was not available to us when we assessed him at hospital and it would therefore be very difficult to refute their conclusions..."

[16] Later on 11 May 2006, Dr. Othello, having studied the report from Dr. Bursztajn, sent a letter to Crown counsel setting out her thought on how the report affected the Crown's case.

The doctor stated:

“The conclusions are supported by psychological testing which involves the use of objective evaluation tools. The test did not detect any evidence of malingering.

The defence was able to unearth relevant information about Mr. Gouldbourne's family history, past psychiatric history and significant inter-personal relationships. This information was unavailable to me due to Mr. Gouldbourne's failure or (as it now appears) inability to co-operate with me.

It would be very difficult to prove that Mr. Gouldbourne was of sound mind at the time of the offence in the light of this report since the conclusions are entirely reasonable and are well supported.

While I still have a “gut feeling” that Mr. Gouldbourne could have been malingering during his hospital stay, as you know better than I do, that's useless in court without adequate proof. The prosecution had not conducted its own psychological test, however, if this were requested now it is now more than likely that the defendant will resume the uncooperative posture he demonstrated when he was seen by the current Government psychiatrist. Even if he were to co-operate, there is no guaranty that the result will be different (I must state however, that I have not seen the actual psychological test reports quoted in Dr. Bursztajn)”.

[17] The other psychiatrist called by the prosecution was Dr. Marc Lockhart who said that he completed his medical training in 1989 in the Dominican Republic. He had pursued his

undergraduate studies at Wayne State University in Detroit Michigan, where he returned to complete his psychiatric training. He said that before he completed his training, he had the opportunity to work as a consultant. He completed his formal training in 2000, after which he worked as practicing psychiatrist in the Cayman Islands from 2001. In 2006, he was in private practice, working part time at the Chrissie Tomlinson Memorial Hospital. He is also the Director of Psychiatric Service at the Health Services Authorities for the Cayman Islands Hospital. He is also the Director of Forensic Services at the Cayman Islands Hospital. By this, he says he meant that he was in charge of all forensic issues at both the Northward and Fairbanks Prison.

[18] Dr. Lockhart examined the appellant in August 2004. The appellant was awake but kept his eyes closed and did not respond to verbal commands. On 22 August he was responsive to painful stimuli and his vital signs were stable. He was eating and excreting liquids within a normal fashion. He reviewed the medical notes including tentative diagnoses that were contained in the notes. On examination he found no abnormal movements of gestures. His clinical finding was that the appellant was aware of his surrounding. Consequently, he reached the conclusion that the appellant was malingering – exaggerating or faking of symptoms. He authorized the appellant's release into the custody of the police.

[19] In discussing his relationship with his mother, the appellant told Dr. Lockhart that even though he is in prison, he is still the primary care giver for his mother. The doctor considered that this was significant when contrasted with the conclusion of Dr. Bursztajn concerning the appellant's mother's attitude toward him and his feeling towards her. Dr. Lockhart did not find any hostility or resentment by the appellant towards his mother. The doctor concluded that the

appellant had great respect and love for his mother. These findings by Dr. Lockhart are contrary to the finding of Dr. Bursztajn.

[20] The sole issue which arose on the evidence was whether the killing which occurred took place in circumstances under which the appellant was suffering from diminished responsibility and therefore reduced the offence of murder to one of manslaughter. Section 185 of the Penal Code (2007 Revision) states:

- (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 in doing or being a party to the killing.

While the burden was on the prosecution to establish the offence of murder, the burden shifted to the defendant to establish on a balance of probability that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for the killing.

[21] Before dealing with the grounds of appeal it is necessary to set out the history of this matter. On 8 May 2006, this matter came on for trial but was adjourned until 16 May 2006. The reason given for the adjournment was that the report from the defence psychiatric expert Dr. Bursztajn was not yet available to the defence. The examination of the appellant had taken place on 1 and 2 May 2006. Mr. Janner had intimated to the judge, in the absence of the entire jury panel, that it was highly likely that the defence would offer a plea of diminished responsibility. Counsel informed the court that he needed time to discuss the report with the appellant.

[22] On 16 May 2006, when the matter came on for hearing, Crown counsel applied for an adjournment until 22 May 2006. The ground given was that the Crown wanted an opportunity to consider the psychiatric report which was submitted by the appellant. The application was not opposed by the appellant.

[23] The matter again came on for hearing on 22 May 2006 but was adjourned until 23 May 2006 when the trial eventually commenced. On 25 May 2006 the prosecution called Dr. Othello. At the outset of her evidence, Mr. Mon Desir, Crown counsel, informed the court that Dr. Othello who had in an earlier opinion deferred in certain respects to Dr. Bursztajn's report had, by then, seen the material which Dr. Bursztajn had used to support his conclusion. Crown counsel intimated to the judge that in order to understand the evidence that Dr. Othello was going to give it would be necessary for the court to look at Dr. Bursztajn report. Crown counsel then sought the permission of the judge to refer to the report of Dr. Bursztajn, even though he had not given any evidence and his report had not been admitted into evidence at that stage.

[24] It was at this stage that the trial took an unusual turn. The prosecution was permitted to lead evidence from Dr. Othello and Dr. Lockhart in which these witnesses commented, mostly adversely on the report of Dr. Bursztajn, at a time when he had not yet given evidence. Counsel for the appellant did not object to the procedure and consequently the judge reluctantly agreed. It is this procedure which permitted Dr. Othello and Dr. Lockhart to give evidence in rebuttal to, and comment adversely on, the report of Dr. Bursztajn before he had given evidence and before his report was introduced into evidence that, the appellant took objection to on appeal.

Ground One

[25] The appellant called the two doctors Dr. Othello and Dr. Lockhart before the defence led evidence from Dr. Bursztajn. By the date on which Dr. Bursztajn was available to give evidence, 30 May 2006, Dr. Othello and Dr. Lockhart had not yet completed their evidence. The evidence of Dr. Bursztajn had to be re-scheduled for the following week until 6 June 2006. On that occasion, Dr. Bursztajn's evidence was received by video link.

[26] Counsel for the appellant submitted that the prosecution should not have been permitted to lead the evidence of Dr. Othello and Dr. Lockhart which was intended to rebut the evidence of the experts which the defence was proposing to call before it was in fact given in evidence by the defence. Counsel for the appellant further submitted that this procedure had a very prejudicial effect on the jury in that the jury was prejudiced against the medical evidence of Dr. Bursztajn even before it was given. The defence alleged that both Dr. Othello and Dr. Lockhart had severely criticized the report of Dr. Bursztajn in detail, and in trenchant terms. Dr. Othello, counsel submitted, accused the doctor of seeking to mislead the court in his report.

[27] In commenting on the material used by Dr. Bursztajn to reach his conclusion as set out in his report, Dr. Othello said that from the mental status examination of the appellant, and her review of the data provided by Dr. Bursztajn, she did not find any evidence to suggest that the appellant was suffering from major depression. Neither did she find any evidence to support any finding that the appellant was experiencing deep disassociation or any out-of-body experience. No evidence of a conversion disorder was found by Dr. Othello. She referred to Profile Validity Section of the MMPI report whose validity is assessed based on the person's response to the questions presented in the report. The report states that "unrealistic claims of virtue, as shown in this profile, reflect conscious attempts to influence the outcome of

proceedings by giving the appearance of having high moral virtue and honesty.” The MMPI report continues that the “test-taking attitude weakens the validity of the test and shows an unwillingness or inability on the part of the client to disclose personal information. The resulting MMPI-2 profile is unlikely to provide much useful information about the client because he is too guarded to be co-operative in the self-appraisal. Many reasons may be found for this pattern of uncooperativeness. These reasons include conscious distortion to present himself in a favourable light, lack of psychological sophistication or rigid neurological adjustment”. Dr. Othello pointed out that this validity is not referred to by Dr. Bursztajn in his report.

[28] Reference is made to the MMPI report to the conscious efforts of the client to influence the outcome of the evaluation. An attempt to project positive self-image produces a MMPI that substantially underestimates the client’s psychological maladjustment. Dr. Othello said that a conscious attempt to influence is the exact opposite of what is found in dissociation. She pointed out that “a person in a dissociative state is acting in a manner that is separate from their conscious awareness and memory and judgment...so that they cannot be consciously attempting to distort the result of the test.”

[29] Dr. Othello referred to the following paragraph of the MMPI – 2 where it is stated that “the client’s conscious efforts to influence to the outcome of the evaluations and to project an overly positive self-image produced an MMPI – 2 profile that substantially underestimates his psychological maladjustment”. She was critical of Dr. Bursztajn’s report on the ground that part of that sentence was used in the report without the entire sentence being quoted. The word “conscious” is omitted from the sentence and therefore, she stated, a different conclusion is projected from that which is presented in the psychological test report. She expressed her concern that the absence of a keyword used by a person who was trained to interpret the report

would present a totally different picture. The person who conducted the MMPI – 2 report was of the view that the validity of the report was affected by the appellant’s conscious effort to influence the outcome of the upcoming court proceedings by presenting himself in unrealistically positive light. She was adamant that this is key information which Dr. Bursztajn should have presented in his report which should have been subjectively prepared. In the Profile Validity Section of the MMPI – 2 report ends with a warning that the test interpretation should proceed with caution that, “the clinical picture reflected in the profile is probably an overly positive one and may not provide sufficient information for evaluation.”

[30] On 8 May 2006 Dr. Lockhart, at the request of the Crown, examined the appellant in order to give a second opinion. He reviewed the report from Dr. Bursztajn, the previous medical examinations, the police and witness statements, crime scene data. He examined the appellant at the Cayman Islands Hospital for an hour and a half. He conducted a mental status examination. The doctor said that he explained to him the purpose of the evaluations and informed the appellant that his findings would be discussed at his trial.

[31] Dr. Bursztajn painted a picture showing the appellant was a victim or had been abused or had been taken advantage of in his previous relationships. However, from what the appellant said to him and from the record, Dr. Lockhart found the opposite to be the correct position. He noted that throughout the interview he did not observe any features of any anxiety or unease and his answers were spontaneous. His thought process was considered to be intact as a result the doctor concluded that there was evidence of any type of delusions or bizarre ideation – no psychotic feature. No evidence of any mood – related symptoms such as mood swings, any

unusual irritability, sleep or appetite disturbances were found. The appellant's overall level of personal insight and understanding were deemed to be good by Dr. Lockhart.

[32] Dr. Lockhart said that he used his neuropsychiatric evaluation and interview plus a review of the documents listed above and his "cultural understanding of the Cayman Islands and of Caribbean mentality" to come to his conclusion that there was no clinical evidence to show any psychotic behaviour. He considered that the appellant's level of functioning is adequate and within normal limits. He described the appellant's behaviour as malingering which he defined "as exhibiting deliberate behaviour for a known external purpose." In his opinion, his findings did not establish that the appellant was suffering from any disease which could have affected his mind in order to support a plea of diminished responsibility.

[33] Mr. Janner specifically complained that Dr. Othello said:

"However, when I read the documents which Dr. Bursztajn quoted in his report, I recognized that in many instances the actual tests were not correctly represented in Dr. Bursztajn's reports. In other words, the conclusions Dr. Bursztajn drew, based on the psychological test reports, were inconsistent with the results documented in the actual reports. I also noticed that the medical reports that were used as a basis for the diagnosis of depression being severe did not adequately support that diagnosis.

[34] Complaint is also made that Dr. Othello said that, having conducted a mental status examination of the appellant and having reviewed the data provided by Dr. Bursztajn, she did not find any evidence that suggested that the appellant was suffering from major depression (see paragraph 18 above).

[35] Mr. Janner submitted that Dr. Othello claimed that D. Bursztajn's report did not reflect findings that were contained in the PAI which had the effect of deliberately misrepresenting the report. In support of this submission counsel referred the Court to aspects of the evidence of Dr. Othello.

[36] Dr. Othello was asked to identify these areas of the PAI, Clinical Interpretive Report by Leslie C. Morey PhD which she took into account and which assisted her in reaching her findings. She referred to the section dealing with the validity of test results where it stated that "the PAI provides a number of validity indices that are designed to provide an assessment of factors that could distort the result of testing. Such factors could include failure to complete test items properly, carelessness, reading difficulties, confusion, exaggeration, malingering or defensiveness". The PAI report goes on to indicate that "given this apparent tendency to repress undesirable characteristic, the interpretive hypothesis in this report should be reviewed with caution" Dr. Othello said that this note of caution was not reflected anywhere in the report of Dr. Bursztajn. Dr. Othello also pointed out the assertion that the appellant may not have answered in a completely forthright manner was also not found or reflected anywhere in Dr. Bursztajn's report. The doctor stated this is important and ought to have been reflected in the report as it would have alerted anyone reading Dr. Bursztajn's report that any conclusion drawn therein with respect to the appellant's personality traits or occurrences of psychological difficulty should be reviewed with caution as advised in the PAI.

[37] In the PAI, it is stated that "with respect to positive impression management, the client's pattern of responses suggests that he tends to portray himself as being relatively free of common shortcomings to which most individual will admit and he appears somewhat reluctant to recognize minor faults in himself." The PAI report continues that "given this apparent tendency

to repress undesirable characteristics, the interpretative hypothesis in this report should be reviewed with caution. Although there is no evidence to suggest an effort to intentionally distort the profile, the results may under-represent the extent and degree of any significant finding in certain areas due to the client's tendency to avoid negative or unpleasant aspect of himself." In Dr. Bursztajn's report, the words "the interpretive hypothesis is this report should be reviewed with caution" are omitted and replaced by three dots. Dr. Othello said that had these words been included in the report from Dr. Bursztajn which she read on 11 May 2006, she would not have been so quick to send the response which she did. She considered that omission is something that could affect the sentence and create a distinctly different impression. Had she read these words Dr. Othello said she would have hesitated in giving an opinion without seeing the complete report. She pointed out that this was the reason she had earlier expressed her reservation that she had not seen the MMPI reports. Dr. Othello stated that the words which were omitted are important to her because they form the background against which she would assess the quotations that paint a picture of the appellant's psychological functioning.

[38] It is also stated in the PAI that "Despite the level of defensiveness noted above, there are some areas where the client described problem of greater intensity than is typical of defensive respondents. These areas could indicate problems that merit further inquiry". Dr. Othello said that validity of the test reports did not indicate that there was any need for further inquiry for severe depression, dissociations or any form of conversion.

[39] Under the section of the PAI entitled *Clinical Features*, it is stated that the "clinical profile reveals no elevations that should be considered to indicate the presence of clinical psychopathology". Dr. Othello said that this conclusion was not reflected anywhere in Dr. Bursztajn's report.

[40] In response to an observation made by the court, Mr. Mon Desir submitted that Dr. Othello was saying that these omissions were gravely misleading when taken against the background of Dr. Bursztajn's conclusions. Counsel went on to assert that, if Dr. Bursztajn had included these things in his report, he could not have said what he did in his report. Counsel continued that it was not simply that the data is misleading, but the insertion of 'dot' 'dot' 'dot' to fill blanks gives a totally different picture from the diagnosis made by Dr. Bursztajn. At this stage Dr. Janner objected stating that he could not believe that Mr. Mon Desir was saying that the professor of psychiatry at Harvard University deliberately misleading the court.

[41] Compliant was also made that, in dealing with the Diagnostic and Statistical manual of Mental Disorder (DSM), Dr. Othello noted a list of nine clinical symptoms as set out under the caption of *Criteria for Major Depressive Episode*. Of these nine clinical symptoms, a patient must have at least five in order to make a diagnosis of a major depressive illness. Having reviewed this criteria, Dr. Othello concluded that, at the time when the tests were concluded, the appellant was not suffering from a major depressive disorder. This conclusion was in direct conflict to the conclusion reached by Dr. Bursztajn.

[42] The Davidson Trauma Scale (DTS) was intended to reflect a person's response to a trauma which he had experienced or perceived. Dr. Othello said that when she looked at the actual DTS the appellant did not endorse any symptom that would be associated with a severe reaction or resulting from significant trauma. As a result, she concluded that the appellant did not perceive himself as suffering any severe psychological distress as a result of severe traumatic event. This option was also contrary to what was stated by Dr. Bursztajn.

[43] Lee Gouldbourne, the appellant's father, in an interview, reported that there was nothing out of the ordinary regarding the appellant's behaviour or mood on 18 August 2004. Dr. Othello noted the appellant's father, someone who was seeing the appellant on a regular basis, did not report anything out of the ordinary regarding the appellant's behaviour or mood. The doctor observed that this was not what she would have expected to find in a person with a mood disorder such as depressive disorder. She recalled that the criteria for a major depressive episode must either cause the patient significant distress or significant impairment in his social, occupational and other areas of interpersonal functioning. This may be reflected by the subjective report of the patient and observation made by others. Dr. Othello expressed the opinion that the observations is of a man who went about his activities in a normal manner. In addition, she said that there was no indication of the appellant looking depressed or tearful or of him being irritable or in anyway different from his normal deportment. Dr. Othello concluded that these observations gave the impression that the appellant was functioning in a totally normal way which was consistent with his normal level of functioning. Counsel for the appellant complained that this conclusion by Dr. Othello is also contrary to the conclusion reached by Dr. Bursztajn. These observations were made by Dr. Othello in respect to the Neurobehavioural Functioning Inventory (NFI) Report by John Gouldbourne.

[44] In respect to the NFI Report by Madge Gouldbourne, the mother of the appellant, Dr. Othello said that when she read the NFI Report, she saw a woman who cared about her son and who is traumatized by the fact that the appellant has been charged with the offence of murder and had been incarcerated. She also saw a mother who had questioned God about why all of this is happening to her son. Dr. Othello formed the impression that, regardless of the things she may have said to her son over the years that may have been unkind or probably unfair, deep down inside the mother cared about the appellant and had been traumatized by what had

happened and was sad and crying. Dr. Bursztajn had concluded that Madge Gouldbourne was an extremely sick woman who may even be psychotic. He based his conclusion on references to her lifestyle, clothing, household, including the contents and description. Dr. Othello, however, expressed the view that there was nothing to suggest that the mother was psychotic. She arrived at this conclusion on the ground that her conversation reflected clear, coherent and logical thought.

[45] Mr. Janner also complained that Dr. Othello ended her examination – in – chief by claiming that, nothing in any of her clinical assessments of the appellant or in any of the reports made by his relatives and other persons who had seen him around 18 August 2004, would lead her to a diagnosis of dissociation.

[46] In cross examination, Dr. Othello asserted that, having read all the other information which was supplied to her, she disagreed with Dr. Bursztajn that the appellant was not malingering. In re-examination, when asked whether, apart from the mental status examination performed by Dr. Bursztajn, she agreed with his conclusion, Dr. Othello replied that she could not agree with his final diagnosis. Dr. Othello said that, having finally had access to all the reports, she disagreed with the conclusion reached by Dr. Bursztajn. She remained convinced that her diagnosis made in August 2004 that the appellant was malingering was correct and that the appellant was of sound mind at the time of the offence.

[47] The appellant also complained about the evidence of Dr. Lockhart who was also called as a witness during the prosecution's case and prior to Dr. Bursztajn giving evidence. Dr. Lockhart emphasized the need for a cultural understanding of the person being evaluated. He stated that it was very important to keep in mind that there are whole areas of psychiatry that are

called trans-cultural psychiatry. He pointed out that there are certain culture – bound syndromes in psychiatry which happens in certain cultures and not in others. He cited eating disorders and anorexia as examples. Dr. Lockhart disagreed with several point items in Dr. Bursztajn's report in the way he characterized the appellant's relationship with his mother and differed and disagreed with his conclusion. In particular, he disagreed with Dr. Bursztajn conclusion regarding the appellant's feeling that he was victimized. He was of the view that in the Caribbean Society, it is very common for men to feel that if they cannot have a particular woman, then no one else should be able to have her. He expressed the view that it was very plausible and possible that the appellant acted the way he did on 18 August 2004. He referred to a number of cultural differences. He pointed out to the jury that he lived in Cayman Islands and was here at the time of the hurricane in September 2004 which caused severe damage in the islands. It was, in his view, impossible for Dr. Bursztajn flying to the island to get a full understanding of the trauma suffered by the resident of the Islands. Dr. Lockhart was critical of Dr. Bursztajn because he sought to draw certain conclusions in his report without having the cultural understanding of Caribbean people. In re – examination, Dr. Lockhart contrasted Dr. Bursztajn's scholarship, which he recognized, with his treating psychiatric patients on a daily basis in Cayman Islands. In addition, he referred to his giving evidence in court, Dr. Lockhart reminded the jury that, unlike Dr. Bursztajn, he had examined the appellant on 22 August 2004.

[48] In respect of the relationship between the appellant and his mother, he disagreed with the conclusion of Dr. Bursztajn that the appellant was a victim of abuse by his mother. Dr. Lockhart expressed the opinion that he did not find any hostility or resentment on the part of the appellant towards his mother. On the contrary, Dr. Lockhart was of the view that the material showed that the appellant was highly respected and loved by his mother. In respect to the interview with the appellant's father, Dr. Lockhart stated that it gave an overall picture of the

functioning of the appellant prior to and including the 18 August 2004. He however, observed that what was disclosed in the interview did not correlate with the appellant having severe depression or a near psychotic or a psychotic episode or that he was suffering with severe memory deficit.

[49] Crown counsel invited Dr. Lockhart to comment on the report by Dr. Bursztajn along with the material upon which that report was based. Mr. Janner complained, that in conducting this exercise, Dr. Lockhart took the opportunity to allege that Dr. Bursztajn had deliberately misrepresented, in his report and in conclusion, the findings in the data. Mr. Janner referred the court to a number of examples.

[50] In respect of the MMPI, Dr. Lockhart stated that a number of factors assisted him in making an assessment of the appellant's state of mind. He said that the first factor is to look to see whether the person had passed or failed the MMPI test – that is whether the clinical profile was within the normal limits. No clinical diagnosis was provided by this test. He pointed out that the MMPI – 2 indicated that his profile was within normal limits. He considered that it was relevant that the report stated that the profile reflected some conscious attempts to influence the outcome of the court proceedings. This, Dr. Lockhart stated, supported his findings that the appellant was malingering and was not being honest with his symptoms.

[51] As regards the PAI, Dr. Lockhart stated that clinical profile, no elevations were revealed that ought to be considered an indication of the presence of clinical psychopathology. In his opinion, there was no evidence to show that the appellant was suffering from any abnormality of the mind or that he had any mental disorder. The clinical profile of the PAI was, in his opinion, entirely within normal limits. He indicated that if the appellant, as suggested by Dr. Bursztajn,

was suffering from severe depression or was suffering from dissociative symptoms for the length of time suggested in his report, it would have been likely that the PAI tests would have picked up some features.

[52] Reference was made to the two NFI forms Dr. Lockhart stated that, looking at these tests as a whole, he did not consider the findings of the test to be significant. As regards the Cognitive Symptoms Checklist (CSC) Dr. Lockhart said that the focus was on memory, visual process and attention and concentration. He found it unusual for the appellant not to have any memory of any of the details prior to the incident on 18 August 2004 but was able to write down his doctor's name, the need for glasses, contacts, the exact measurement needed for both eyes. When viewed in its entirety, Dr. Lockhart considered that it pointed to the conclusion that the appellant was malingering.

[53] Complaint is also made of the comments by Dr. Lockhart on the significance of the statements contained in the notes of Dr. Bensimon which were made in October 2002. Dr. Lockhart referred to the diagnosis of depression and the anti-depressant drug which had been prescribed. He pointed to the fact that when the appellant was again seen by Dr. Bensimon in April 2003, there was absolutely no mention of any type of psychiatric pathology or any mention of medications. Having reviewed these notes, he concluded that the appellant had been suffering from a minor situational depressive reaction and not severe depression. Dr. Lockhart indicated that by severe depression he meant a whole series of symptoms and possible reaction that a person may have. He went on to point out that Dr. Bursztajn conclusions were that the appellant had suffered from a severe depressive episode that was inadequately treated and which continued to be exacerbated. Dr. Lockhart stated that he did not find any clinical evidence to substantiate this conclusion. Dr. Lockhart considered a number of factors relating to the

appellant's overall functioning since his return to the Cayman Islands and to the notes of Dr. Bensimon and it was his conclusions that it did not indicate that the appellant was severely depressed with a downward continuing spiral.

[54] Mr. Janner submitted that Dr. Lockhart's conclusion were highly critical of and wholly contrary to the conclusion reached by Dr. Bursztajn. Dr. Lockhart said that after considering all the data that had been produced and, having regard to his initial assessment of the appellant, he found absolutely no data or evidence to suggest that, on 18 August 2004, the appellant was severely impaired. In addition, the doctor found absolutely no evidence that the appellant was severely impaired by reason of any mental disorder. Likewise, he found no evidence to support a diagnosis that the appellant was severely impaired by reason of a mental disorder in the form of major depression or that he was suffering from deep dissociation. Dr. Lockhart specifically rejected the assertion of Dr. Bursztajn that the appellant had a near psychotic level of impairment. He indicated that he was not comfortable with the terminology of "near psychotic" since as far as he was concerned, a person is either psychotic and out of his mind or he is not. He went on to indicate that, in his opinion, there was no evidence which pointed to the appellant being psychotic. Dr. Lockhart further took issue with Dr. Bursztajn's conclusion that the appellant was suffering from some conversion disorder and major impairment of his faculties. He said that he saw no clinical evidence that the appellant was suffering from some conversion disorder and major impairment of his faculties. On the contrary, Dr. Lockhart deduced that from the statement of the appellant's father concerning his behaviour on the 18 August 2004, the appellant was functioning quite well.

[55] In relation to the crime scene, Dr. Bursztajn said that "the nature, setting and circumstances of the offence are consistent with dissociation leading to severe impairment of

the executive functions and loss of behavioural control rather than with a deliberate, premeditated act..." Dr. Lockhart said that his interpretation of the crime scene data along with his interview with the appellant did not substantiate the conclusion reached by Dr. Bursztajn.

[56] Dr. Bursztajn stated that the killing took place in a relatively public part of the multi-occupant apartment near a window house where there was a high probability of discovery. Dr. Lockhart disagreed with Dr. Bursztajn that the killing showed a certain amount of disorganization. He said that the fact that shell casings were found in the car showed that the appellant had the weapon prior to his entering the house.

[57] In relation to the clinical data, Dr. Bursztajn concluded that a "review and analysis of the records of Mr. Gouldbourne's hospitalization after the offence, and of available records of his previous mental - health history and family mental-health history are consistent with a clinical picture of psychotic depression, conversion disorder, and paralysis fear, and are not consistent with malingering..." Dr. Lockhart said that he completely disagreed with this conclusion and gave his reason for so doing. He said that a psychotic depression is more serious than a major depressive disorder. Further he said that there is absolutely no evidence in the records showing that he was suffering a psychotic depression. He also stated that the way the appellant functioned in the United States and after his return to the Cayman Islands and in particular his father's description of his daily routine with him in the store on 18 August 2004 did not show any features of any psychotic behaviour on his part. Dr. Lockhart was unsure how Dr. Bursztajn could have reached his conclusion about psychotic depression or a conversion disorder or paralyzing fear, as the appellant, insofar as he was concerned had no features that could have led to such a diagnosis.

[58] In respect to the appellant's family history, Dr. Bursztajn concluded that the appellant's "descent into severe depression with psychotic features and the resulting conversion reaction can best be understood in the context of his family relationship. Mr. Gouldbourne's initially very inhibited and minimized self reports with respect to the nature of these relationships have been corroborated and greatly expanded upon by multiple informants in his family". In commenting on this conclusion, Dr. Lockhart said that he saw absolutely no evidence which would corroborate this suggestion. In fact, Dr. Lockhart considered that the appellant was very dedicated to his mother and took care of her while in the United States and returned home to continue to take care of her. In respect to his father, the appellant spent time together sharing breakfast and praying. The dynamics of these relationships, he said, were within normal bounds.

[59] Mr. Janner complained that under cross-examination Dr. Lockhart maintained his criticism of and disagreement with Dr. Bursztajn's report and in particular with portions that were put to him. It is not necessary to set there out in detail as many have already been mentioned. Early in the cross-examination, Dr. Lockhart said that there were no direct features that would confirm that the appellant was a psychopathically sick man.

[60] Mr. Janner submitted that the proper and fair way in which the evidence should have been given was for Dr. Bursztajn first to have given his evidence as part of the defendant's case and then the prosecution called its witness to rebut the evidence of Dr. Bursztajn. In other words it was only after Dr. Bursztajn had complete his evidence that Dr. Othello and Dr. Lockhart should have given their evidence insofar as it related to comments and criticisms of the report of Dr. Bursztajn and his finding and conclusions. Mr. Janner indicated that he found no authority which permitted the prosecution's experts to be called in this manner. Permitting the witness to give evidence in the wrong order counsel added, had the effect of unfairly influencing

the mind of the jury before the evidence of Dr. Bursztajn was even heard. In these circumstances, he said, it was inevitable that the jury would have approached the evidence of Dr. Bursztajn in a highly skeptical and prejudicial way. He said that this unfairness was compounded by the detailed commentary by Dr. Othello and Dr. Lockhart on the material which formed part of Dr. Bursztajn's report before the conclusions of Dr. Bursztajn had been given by him in evidence. Counsel further contended that the approach adopted was particularly damaging to the appellant as the burden of proving that defence of diminished responsibility rested on the defence. In the circumstances, counsel contended that the appellant had the difficult task of surmounting the evidential burden especially as the two local psychiatrists had made severely disparaging comments on Dr. Bursztajn and his report as detailed above

[61] Mr. Janner conceded that he consented to the procedure which was adopted. He did so because of what he considered to be the extreme difficulties and pressures placed on both the prosecution and defence by the dates on which the psychiatrists could attend at the trial. Dr. Othello had flown in from overseas. Dr. Bursztajn was not available before 6 June. Counsel was concerned that if the trial had to be adjourned, it would have been put back for several months. The trial had earlier been subjected to a series of adjournments which have been set out earlier in this judgment. However, even though he had agreed with the procedure adopted, counsel now submitted that the judge ought not to have permitted the evidence to be given in the manner in which it was given.

[62] Mr. Janner asserted that, on reflections, had he been aware that Dr. Othello would have changed her mind and would have reached an entirely different conclusion to that she had set out in her email on 11 May 2006, he would not have agreed to the trial proceeding as it did. Counsel also said that he did not anticipate that Dr. Othello would have been so severely critical

of Dr. Bursztajn's report. Counsel indicated that he had objected to the admissibility of Dr. Othello's evidence on the ground that it had not been reflected in her short witness statement. In addition, counsel submitted, that it was not expected that Dr. Lockhart would have gone beyond his witness statement. Mr. Janner said that, while the judge had correctly expressed concern about the procedure which was being adopted, the judge did not conclude that the procedure was wrong. Counsel submitted that, as it was a material irregularity, it was incumbent on the judge to rule that it was a procedural irregularity and that he would not permit it.

[63] Mr. Janner submitted that it was the responsibility of the judge to ensure that the appellant had a fair trial and that no irregularity occurred; it was not the responsibility of Counsel. Counsel relied on the unreported case of **Chaaban [2003] EWCA Cr .1012** in which the Court of Appeal in England in which Judge L. J. said:

35 "The trial judge has always been responsible for managing the trial. That is one of his most important functions. To perform it he has to be alert to the needs of everyone involved in the case. That obviously includes, but it is not limited to, the interest of the defendant. It extends to the prosecution, the complainant, to every witness (whichever side is to call the witness) to the jury, or if the jury has not been sworn to jurors in waiting. Finally, the judge should not overlook the community's interest that justice should be done without unnecessary delay. A fair balance has to be struck between all these interests.

[64] In *Jisl and others* [2004] EWCA Crim 696, Judge L. J. reiterating what he had said earlier in Chaaban's case said at paragraph 116:

“Active, hands on, case management both pretrial and throughout the trial itself, is now regarded as an essential part of the judge's duty”

Mr. Janner also referred to *Von Slark v. R.* [2000] IWLR. 1270, at page 1275 where Lord Clyde said:

“The function and responsibility of the judge is greater and more onerous than the function and responsibility of counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submission.”

[65] The Solicitor General submitted that the single issue in the case was whether the appellant, at the time of the killing was suffering from abnormality of the mind such that he ought not to be convicted of murder but of manslaughter. Counsel further submitted that the onus was on the Crown to prove beyond reasonable doubt that he was not. Counsel pointed

out that prior to calling the evidence, the manner in which the evidence would have been led was raised with the judge. Mr. Mon Desir, who appeared for the prosecution at the trial, informed the judge that the prosecution was in a peculiar situation in that it was aware of the evidence which the defence intended to lead by way of its expert Dr. Bursztajn and therefore, as the defence of diminished responsibility was the live issue, the prosecution was required to lead evidence in rebuttal. It was submitted that the principle of *ex improviso* requires that the prosecution, if it reasonably foresees that certain evidence is relevant to its case, adduce that evidence as part of its case. Reference was made to **R. v. Day [1940] 1 All E.R. 402** where it was held that "it was wrong to admit evidence which did not arise *ex improviso* or evidence was such that the necessity for which no human ingenuity could have foreseen." Counsel also referred to **R v. Hutchinson [1985] 82 Cr. App. R. 51** where the court of Appeal in England considered the issue of *ex improviso*. The Court of Appeal referred to the case of **Pilcher and Others (1974) 60 App. R1**, where at p. 5 it was said that it is clearly established that there are exceptions to the general rule that evidence available to the prosecution *ab initio*, the relevance of which does not arise *ex improviso* and which remedies a defect in the prosecution's case, is inadmissible". It is recognized that an exception to this rule is "evidence which becomes relevant in circumstances which the prosecution could not have foreseen at the time when they presented their case".

[66] Counsel for the appellant informed the judge that he had no objection to procedure which was proposed. Not only did the counsel not object, but during the course of the Crown's evidence-in-chief he suggested that, in order for the jury to understand and to make sense of what was being said, it was necessary to introduce the material from Dr. Bursztajn on which she was commenting. Mr. Janner informed the judge that the procedure which was being adopted was the only way to deal with the evidence that was being given. He indicated that it was being

done because both the prosecution and defence had to accommodate the giving of the evidence by the experts. In the circumstances Mr. Janner submitted that the procedure adopted was correct. Counsel further indicated to the judge that both he and Crown counsel had agreed that, in any event, the vast majority of the reports would be read out to the jury.

[67] In **Barry Victor Randall v The Queen Privy Council Appeal No. 22 of 2001**, Lord Bingham of Cornhill, speaking of the defendant's right to fairness in criminal trial, said:

“But the right of a criminal defendant to a fair trial is absolute. Then will come a point when the departure from good practice is so gross or persistent or so prejudicial or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the ground for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial. The crucial issue in the present appeal is whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial.”

[68] The procedure adopted was not correct. The report of Dr. Bursztajn was subjected to severe criticism and comment before Dr. Bursztajn had given evidence and, before the report was admitted into evidence. In our view, the correct procedure to be followed is for the defence witness to be called to give evidence in respect to the defence of diminished responsibility in which the onus of proof rest on the defence. There is a presumption of sanity and, therefore, the prosecution is not required to lead evidence to prove that the defendant was sane at the time when the defendant committed the offence. It is only where the defendant had called evidence

in support of the defence of diminished responsibility that the prosecution is required to call evidence to rebut the evidence given in support of that defence in order to establish that at the time when the defendant did the act he was sane. In our opinion, we do not consider that the principle of *ex improviso* arises in a case such as this.

[69] It was significant that in his submission Mr. Janner made no complaint of the summing up by the judge especially the manner in which the judge dealt with the expert evidence and the issue of diminished responsibility. Counsel for the prosecution and the defence adopted this procedure to accommodate their respective expert witnesses. This was done even though the judge had expressed his reservations. It was the responsibility of the judge to ensure that a defendant who is charged with a criminal offence has a fair trial. Part of that responsibility is to ensure that the procedure adopted for the trial does not in any way prejudice the defendant's right to a fair trial. While the judge did express his concern, even though both counsel had agreed on the procedure adopted, the judge ought to have insisted that the correct procedure be followed. In this case, the prosecution ought not to have been allowed to give evidence critical of the report of Dr. Bursztajn at a stage when his report had not been introduced into evidence.

[70] In our view, while the correct procedure was not followed in relation to the prosecution witnesses, being allowed to give evidence in rebuttal of the expected defence of diminished responsibility, it is necessary to ask whether this procedural irregularity in itself resulted in such prejudice to the appellant that it prevented him from having a fair trial. It is therefore necessary to examine the trial as a whole to ascertain what prejudice, if any, was suffered by the appellant. The main issue in the trial was whether the appellant was suffering from such abnormality of mind as substantially impaired his mental responsibility at the time he inflicted the injuries on Morean Williams which caused her death. As stated earlier, no complaint of the summing-up

has been made by counsel for the appellant. The judge directed the jury that it was for the defendant to prove that he was suffering from such abnormality of mind that his mental responsibility was substantially impaired. The judge pointed out to the jury that the defendant did not have to make them feel sure but rather all he had to do was to prove, on a balance of probabilities, that it was more likely than not that when he killed Moreen his mental responsibility for his action was substantially impaired.

[71] The judge went on to point out that, in respect to the defence of diminished responsibility the defence had to prove three elements. Firstly, the defence had to prove that at the time of the killing the defendant suffered from an abnormality of mind. The judge explained that the word "mind" include perception, understanding, judgment and will. He also explained that an abnormality of mind meant a state of mind which was so different from that of the ordinary human being that a reasonable person would judge it to be abnormal. Secondly, the abnormalities of mind must arise from a condition of arrested or retarded development of mind or any inherent cause or was induced by disease or injury. Thirdly, the abnormality of mind must have substantially impaired the responsibility of the defendant for the act which caused the death.

[72] The judge reminded the jury that although the medical evidence was important, they had to consider not only the evidence of the doctors but also the circumstances of the killing. He told them that they had to consider the behavior of the appellant before and after the killing. The judge reminded the jury that there was disagreement among the psychiatrists but that it was for them as a judges of the facts to decide which of the experts, if any, they accepted.

[73] In our view, the issues were properly left to the jury. They had to decide whether the appellant was suffering from such abnormality of the mind at the time of the killing as to substantially impair his mental responsibility. When viewed in its entirety, we do not consider that, even though the incorrect procedure was adopted, the appellant suffered any prejudice that would make the trial unfair. There was more than ample evidence which, if accepted by the jury, they would come to the conclusion that the appellant was in fact malingering and was not suffering from any abnormality of the mind. Consequently this ground of appeal fails.

Ground Two

[74] It is alleged that the judge wrongfully refused an application to hold a voir dire to determine the admissibility of the evidence of Dr. Othello. Mr. Janner submitted that a voir dire should have been held to determine whether Dr. Othello was competent to give evidence as an expert. Counsel contended that there were strong ground for contending that Dr. Othello was not competent and/or that her evidence should not have been admitted under section 78 (1) of the Police and Criminal Evidence Act 1984, by reason of its clear unreliability. He based his submission on the grounds that Dr. Othello changed her opinion on four occasions without having examined the appellant since 2004. Firstly, when the appellant was detained in hospital initially after 18 August 2004, Dr. Othello concluded that he was suffering from conversion disorder; secondly, on 25 August 2004, Dr. Othello changed her mind agreeing with Dr. Lockhart that the appellant was malingering; thirdly, in May 2006, she initially agreed with the conclusion reached Dr. Bursztajn; and fourthly, after the commencement of the trial, Dr. Othello again changed her mind now disagreeing with Dr. Bursztajn. Counsel submitted that had a voir dire been held, it would have demonstrated that Dr. Othello's central claim that she had been misled by Dr. Bursztajn's report was without any proper or fair foundation. Dr. Othello's claimed that Dr. Bursztajn had failed to reflect the PAI, MMPI and NFI reports.

While she dealt with this issue in her evidence-in-chief, counsel said that her evidence was not detailed in her statement of 25 May 2006. Counsel submitted that a proper analysis of Dr. Bursztajn's report would show that he summarized these reports and reached a perfectly proper conclusion based on them. He indicated there was evidence which corroborated his conclusion

[75] The Solicitor General submitted that the primary test of admissibility is relevance. She contended that Dr. Othello's evidence was plainly relevant to the defence of diminished responsibility and was not prima face incapable of belief. Dr. Othello was the first psychiatrist who examined the appellant on 19 August 2004. Counsel further submitted that there were no issues as to her qualification which would have required the judge to hold a voir dire. The Solicitor General further submitted that the issue as to whether Dr. Othello had changed her opinions and whether there were reasonable explanations for such changes were matters of fact for the jury. Dr. Othello's opinions and alleged changes of her testimony have all been set out above. The defence placed much weight on her initial response of 11 May to Dr. Bursztajn. But counsel for the respondent submitted that the response was qualified as Dr. Othello stated that she had not seen the actual psychological tests which were quoted in Dr. Bursztajn's report. In cross-examination when she was asked if what she had written was true, Dr. Othello replied that it was based on her knowledge at the point in time. It should be noted that at the conclusion of the evidence of Dr. Othello the following exchange occurred between Mr. Janner and the judge.

THE COURT: Yes. But you have had the opportunity to...opportunity to cross-examine her at length and in detail before the jury.

MR. JANNER: No complaint, of course. Absolutely properly.

THE COURT: So it's a matter now for the jury to assess her evidence and to give it what weight they consider of it.

MR. JANNER: Absolutely right, of course.
Absolutely right.

THE COURT: Yes.

MR. JANNER: And I have no complaint in any shape or form about the practice and procedure in relation to her.

[76] Whether a witness is competent to give evidence as an expert is for the judge to determine. In *R. v. Bonython* (1984) 38 S.A.S.R.45 King C. J., in the South Australian Supreme Court, said:

“...Where the witness possesses the relevant formal qualification to express an opinion on the subject, an investigation on the voir dire of his method will rarely be permissible on the issue of his qualifications. There may be greater scope for such examination where the alleged qualification depends upon experience or informal studies... Generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to the competence of the witness to express an opinion...

If the qualifications of a witness to give expert evidence are in issue, it may be necessary to hear evidence on the voir dire in order to make a finding as to those qualifications”

[77] In *R. v. G* [2004] 2 Cr. App. R. 38 the Court of Appeal in England approved the judgment King C.J. in *R. v. Bonython* (1984) 38 S.A.S.R. 45. Scott Baker L.J. said:

30. “We were not shown any English authority on the question of holding a voir dire to decide whether a purported expert should be allowed to give

evidence. In the vast majority of cases it seems to us the judge will be able to make the decision from the written material before him.

31. A judge should be astute to avoid unnecessary satellite litigation which is likely to increase expenses and increase the length of the trial.
32. The judge therefore had a discretion in this case to direct a voir dire, but it was a discretion that had to be exercised sparingly...

[78] A judge does have discretion whether to hold a voir dire but it is a discretion which should be rarely exercised. The judge was apparently satisfied with the qualification of Dr. Othello and in those circumstances no voir dire was held. We also agree no voir dire was required. Indeed, a close analysis of the submission by the counsel for the appellant that she had changed her evidence on four occasions shows that the appellant was not in fact concerned with the qualification of Dr. Othello and the admissibility of her evidence but rather with the weight to be applied to that evidence. The weight to be attached to her evidence was a matter for the jury to determine after being directed by the judge.

[79] The Solicitor General referred to the judge's direction to the jury as to how they should approach the evidence of the expert witnesses. The judge told the jury:

"A witness called as an expert is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinion expressed about the expert's evidence when coming to your own conclusion about aspects of the case that they viewed. You should bear in mind that if having given the matter careful consideration, you do not accept the evidence of a particular expert, you do not have to act upon it. Indeed, you do not

have to accept even the unchallenged evidence of an expert. Where experts have given conflicting evidence, it is for you to decide whose evidence and whose opinions you accept, if any. You should remember that this evidence related only to a part of the case and that whilst it maybe of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence”.

[80] In the circumstances the jury could not have failed to appreciate the issue relating to the expert witnesses. It was made clear to them that they had to assess the expert witnesses and determine which of the witnesses, if any, they accepted. This was a matter that fell entirely within the province of the jury. It was for them to decide whose evidence they accepted and what weight they attached to it. No criticism has been made by the appellant of the manner in which the judge directed the jury of the issue of the experts. Submissions relating to PACE have no relevance as PACE does not apply to the Cayman Islands. Consequently we hold that this ground of appeal fails.

Grounds Three and Four

[81] In the third ground of appeal, it is submitted on behalf of the appellant that on 30 May 2006, the judge wrongfully refused the defence application for legal aid and an adjournment to allow a second psychiatrist to be instructed for the defence to conduct a psychiatric examination of the appellant. By allowing the prosecution to call two psychiatrists and restricting the defence to one, it was further submitted, that the judge breached the principle of equality of arms. In the circumstances, the appellant is said to have inevitably suffered major prejudice. Counsel said that the judge implied recognized that this was unfair and in his summing up, on two occasions, he directed the jury that it was not a numbers game and that they could not base their decision

on the fact that the prosecution called two psychiatrists while the appellant only called one. However, counsel asserted that the direction failed to overcome what he described as the central unfairness in the trial. Counsel also contended that the unfairness was compounded by Dr. Lockhart "playing the local card" during the course of his evidence emphasizing the difference between himself and Dr. Bursztajn who was an American.

[82] The Solicitor General said that the request by the defence came at a stage when it was clear that it could not be granted. After Dr. Othello had completed her evidence Mr. Janner informed the court that he was making an application for the defence to have a second psychiatrist on that basis that the defence thought that the Crown was only tendering Dr. Othello. Mr. Janner told the judge:

"My difficulty now is, of course, that I am bound to lose when I've got two psychiatrists against one, who are severely critical, bound to unless your Lordship says well you the defence can have your second psychiatrist. So I have to make the formal application which I know in the state of this case cannot be accepted, and your Lordship will say, well I can't possibly have this stage..."

Later in replying to the submission of Crown counsel, Mr. Janner recognizing that his application was being made at a late stage of the trial told the judge:

"It's far too late. But the refusal has the effect that I'm substantially disadvantaged because I cannot get a second opinion"

The judge, after considering the submission, said:

“...I also refuse the application made by the defence to have the matter adjourned so as to have a second opinion in relation to their case”

[83] The appellant alleged that the combination of the change of mind by Dr. Othello, the prosecution's reliance on two psychiatrists and the difficulties inherent in Dr. Bursztajn giving his evidence by way of video link severely unbalanced the overall fairness of the trial. It was submitted that the appellant suffered prejudice because the prosecution's two expert witnesses had given their evidence in person before the jury, whereas the defence expert because of time constraints, could not give evidence in the same way. Again because of time constraints, the evidence in chief of Dr. Bursztajn was given by way of his report being read into evidence and then supplemented by only few questions via the link while the vast majority of his evidence consisted of the doctor being cross-examined.

[84] These submissions ignored what actual took place at the trial. After calling one witness for the defence, Mr. Janner sought the judge's permission to tell the jury that its expert Dr. Bursztajn was due to give evidence “on Tuesday of this week” but it was not possible to get to him because of the two psychiatrists had given evidence for the prosecution so that his evidence had to be put back. Mr. Janner then informed the court that the only remaining for the defence was Dr. Bursztajn and that the best way to deal with his evidence was to read his report into evidence in order to save the time of the video link. Rather than leading the evidence from Dr. Bursztajn by way of examination-in-chief counsel said that he would read his report to the jury. Counsel indicated to the court that he would only ask the doctor one or two questions to supplement the report but that “the day will be taken with” counsel asking questions via video link.

[85] Immediately prior to the report being read, Mr. Janner told the court and the jury:

“...Welcome to the modern world. We begin actually by doing something which isn't so modern which is my reading Dr. Bursztajn's report to you. The idea being it saves him having to go through it all on this video link process tomorrow and the reason we are in here, as you will recall is that we are going to link up with him in the States. I think he is going to be in Boston tomorrow...”

[86] Mr. Janner then proceeded to read the report. On 6 June 2006, the judge informed Dr. Bursztajn that his report had been read into evidence the previous day and Mr. Janner would ask him a few preliminary questions. Mr. Janner then briefly examined the witness.

[87] The reading of the report into evidence rather than having Dr. Bursztajn give evidence of its contents by way of examination-in-chief was the conscious decision of Mr. Janner. The record does not show that the defence was in any way forced by the court to adopt this procedure. Any suggestion of saving time, it would appear, voluntarily came from Mr. Janner and does not appear to have been imposed upon him by the court or the prosecution. It therefore appears that the decision to have Dr. Bursztajn give his evidence via video live link was that of the defence and not imposed upon it by the court or the prosecution. Consequently we do not find any merit in this submission. The appellant did not elaborate on the alleged problem with the video link.

[88] Counsel submitted that the principles of Article 6 of the European Convention for the Protection of Human Rights should be applied in the determination of the appeal as persuasive authority in determining of a fair trial. The Crown submitted that the European Convention for the Protection of Human Rights do not apply as the Conventions has not been included into the

domestic legislation in the Cayman Islands. (See **R. v. Allan Ebank** Court of Appeal of Cayman Islands 2007). However, in Archibald (2007 Edition) at paragraph 16-64 it is stated:

“The right to a fair trial involves observances of the principle of “Equality of Arms under which the defendant in criminal proceeding must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent”

[89] In **R. v. Attorney General’s Reference (No. 82a of 2000)** **R. v. Lea**, **R. v. Shallwell** [2002] 2 Cr. App. R. 24. The Court of Appeal said at paragraph 14:

“14...The principle of Equality of Arms is as readily identified in the common law as it is in the Human Rights Act 1998. It is a principle that entitles any defendant to a fair trial.”

[90] The Solicitor General submitted that on 26 May 2006, Crown counsel informed the judge that the prosecution only received the working papers of Dr. Bursztajn on 24 May 2006. He indicated that it was only then that Dr. Othello and Dr. Lockhart had an opportunity to examine the supporting documents used by Dr. Bursztajn. The defence would have been aware that Dr. Othello had made certain reservations in her e-mail of 11 May 2006 on the basis that she had not seen the documents.

[91] We do not consider that the failure to grant the legal aid to the defendant to call another expert in anyway offended the principle of Equality of Arms. Counsel for defence seemed to have based his application entirely on the basis of numbers - the prosecution has called two

psychiatrists therefore the defence is entitled also to call two. However it is to be noted that during the cross-examination of Dr. Othello, Mr. Janner asserted that Dr. Bursztajn was far more qualified than the expert witness for the prosecution. The defence had emphasized that Dr. Bursztajn was a world authority on the issue of whether a person was malingering or was suffering a conversion disorder. He was the Associate Clinical Professor of Psychiatry at Harvard and co-founder of the program in Psychiatry and The Law. In support of his credibility the defence had put forward his twenty-five years of service as senior clinical faculty member at Harvard Medical School in addition to his twenty-five years experience in clinical practice as a psychiatrist treating neuropsychiatric disorders including depressive conversion disorder. It is clear that the defence was relying on the qualification of its expert and his undoubted experience.

[92] Mr. Janner claimed that the unfairness which occurred by reason of the refusal to grant legal aid for a second psychiatrist and by Dr. Bursztajn having to give evidence by way of video link were compounded by what counsel called the wholly intemperate and unjustified attack on Dr. Bursztajn's character and motives in cross-examination and in the closing address to the jury by Crown counsel. This, counsel asserted, amounted to allegations of professional misconduct. Suggestions had been made during the trial that the report had been based on speculation and that it was deliberately padded intending to overwhelm the reader rather than giving a 'dispassionate diagnosis.

[93] The Solicitor General submitted that the trial was fair. She asserted that the comments by Crown counsel were fair and legitimate having regard to the conclusion reached by Dr. Bursztajn which counsel suggested, in his closing speech, were inconsistent with the background tests which had been carried out and the information obtained from those tests. She referred to

R v Harris [2006] 1 Cr. App. 5. Gage L.J. speaking of the obligations of an expert witness said at paragraph 271:

“It may be helpful for judges practitioners and experts to be reminded of the obligations of an expert witness summarized by Cresswell J in the National Justice Cia Naviera SP v Prudential Assurance Co. Ltd. (Ileirian Reefer [1993] 2 Lloyds Rep 98 at 81. Cresswell J. pointed out amongst other factors the following which we summarized as follows:

- (1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- (2) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.
- (3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.
- (4) An expert should make it clear when a particular question or issue falls outside his expertise.
- (5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.
- (6) If after exchange of reports an expert witness changes his view on material matters. Such changes of view should be communicated to the side without delay and when appropriate to the court.

[94] It was the prosecution's case, in rebuttal to that asserted by the defence, that Dr. Bursztajn had omitted from his report material considerations which were set out in this background tests. These omissions, the prosecution affected the conclusions reached. In these circumstances whether these assertions were correct would be a question for the jury to determine in order to give weight to the opinions expressed by the experts. The criticisms may have been strong but in our opinion they did not transcend the rules of fairness for them to be considered unfair. In Randall's case (*supra*) Lord Bingham said:

“...strong criticism may properly be made of a witness....so long as the criticism is based on evidence or the absence of evidence before the court....”

[95] In **G. B. v. France** 35 E.H.R.R. 36 the European Court of Human Rights had to consider *inter alia* whether it was unfair that an application by the appellant to be granted a counter-expert witness was refused. The court held:

“The mere fact that an expert expresses an opinion in the witness box that is different to that which he has written is not in itself contrary to the rules of a fair hearing. Similarly, right to a fair hearing does not require a national jurisdiction to appoint a new expert, at the request of the defence, when the opinion of an expert chosen by the defence would be likely to corroborate the allegation. Consequently, the refusal to order a counter-expert should not in itself be considered as being unfair.”

[96] The appellant submitted that this case is comparable to **G.B. v. France** since in the course of the trial and unknown to the defence before the trial Dr. Othello changed her opinion completely. In addition, Dr. Othello whose evidence was severely adverse to the appellant was anticipated to support the evidence of Dr. Bursztajn and was to be tendered for cross-examination. He further alleged that the reason for Dr. Othello's change of mind was unsustainable. Alternatively, if the reasons were sustainable, the weight of her evidence and that of Dr. Lockhart severely unbalanced the fairness of the trial. Counsel asserted that without the second opinion for the defence the jury were bound to be unfairly influenced against the defence.

[97] Dr. Bursztajn's Report had been served on the Crown, by email, on 10 May about 10pm. On 11 May 2006, Dr. Othello responded to Crown counsel, by way of email, making it clear that her reply was based on her brief perusal of the document which had been submitted. Later on the 11 May 2006, Dr. Othello again submitted her comments to Crown counsel. On this occasion, she commenced by saying that she had studied the report submitted by Dr. Bursztajn. She indicated that it would have been very difficult to prove that the appellant was of sound mind on 18 August 2004 in the light of the report "since the conclusions are entirely reasonable and are well supported". She expressed her reservation that she still had "a gut feeling" that the appellant was malingering. She however expressed the caveat that she had not seen the actual psychological tests report which Dr. Bursztajn had quoted in his report.

[98] On 26 May 2006 Crown counsel informed the court that after receiving the report on 10 May 2004 the Crown sought to obtain from the defence "a number of articles resource materials, reference material, test reports etc." which Dr. Bursztajn used in his report to reach his neuropsychiatric opinion. These documents were not submitted to the prosecution until 24

May 2004. These were the documents which Dr. Othello said, in her caveat, she had not seen. Mr. Janner conceded that the request made by Dr. Othello was “perfectly proper”.

[99] Prior to Dr. Othello giving her evidence on 26 May 2006 the defence was aware that she had earlier indicated that she had not seen the actual psychological test reports quoted in Dr. Bursztajn and that these were only given to her on 24 May 2006. Dr. Othello conceded that after reading the report submitted by Dr. Bursztajn she found it quite compelling. However after reading the documents which Dr. Bursztajn quoted in his report she:

“...recognized that in many instances the actual test were not correctly represented in Dr. Bursztajn reports. In other words, the conclusion Dr. Bursztajn drew, based on the psychological test reports, were inconsistent with the result documented on the actual report. I also noted that the medical reports that were used as a basis for the diagnosis of depression being severe did not adequately support that diagnosis.”

[100] It was in this setting that Dr. Othello disagreed with the conclusions reached by Dr. Bursztajn and reverted to her original diagnosis of malingering. In these circumstances, we do not consider the principle of equality of arms required the court to grant legal aid to the defendant to obtain an additional psychiatric expert and to adjourn the trial for that purpose.

[101] In dealing with the issue of the expert witnesses, the judge in summing up advised the jury in relation to the numbers:

“...I just wasn't to give you a few words of caution in terms of numbers...you will not be using numbers to come to any decision as far as the psychiatrists evidence is concerned. You will observe that

there are two psychiatrist called by the prosecution and there is only one called by the defence. So do not use number to come to any conclusion as I will indicate to you later in my direction to you.”

Later his Lordship told the jury:

“As you will see, Madam Foreman and members of the jury, there are two conflicting medical views of the defendant’s condition at the material time. I should warn you that you do not decide the issue on the basis of numbers. It is not because the prosecution has called two psychiatrists as against the defendant calling one that you say I accept the evidence of presented by the prosecution. You will have to consider the evidence of each witness and decide whose evidence you will accept or reject. And in addition, as I have told you before that you will need to consider all the circumstances in addition to the medical evidence.”

[102] The jury could not have failed to appreciate the issues relating to the experts. It was made clear to them that they had to assess the expert witnesses and decide which witnesses if any they accepted and which they rejected.

[103] In his final submission, Mr. Janner stated that in assessing the overall safety of the conviction it was important to emphasize that the appellant had a strong arguable defence and would have been acquitted had the procedural irregularities not occurred. In support of this submission, counsel suggested that Dr. Bursztajn was one of the worlds leading psychiatrist. He asserted that Dr. Bursztajn had concluded “that the setting and circumstances of the offence are

consistent with dissociation leading to severe impairment of executive functions and loss of behavioral control, rather than with a deliberate, premeditated act". This conclusion was supported by the lack of motive for the attack and the absence of any previous argument or bad blood between the appellant and the deceased. There was no evidence of any sexual relationship between them. The evidence suggested that the appellant was not aware of his actions. Counsel submitted that if he intended to murder the deceased, he could have shot her instead of inflicting 67 stab wounds with a knife before shooting her at point blank range. The evidence of the pathologist's evidence was consistent with a frenzied attack performed by a mentally ill person. Counsel also relied on Dr. Othello's diagnosis of 20 August 2004 in which she expressed possible conversion disorder.

[104] On the other had, the solicitor general submitted that the trial was fair. She referred to **Walton v. R. [1978] AC788** in which the Privy Council rejected a submission that the jury was bound to accept the defence of diminished responsibility in the absence of uncontradicted medical evidence. Their Lordships held:

"These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality. It being recognized that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence. As was pointed out by Lord Parker C.J. in *Reg. v. Byrne*

[1960] 2 Q.B. 396, 404, what the jury are essentially seeking to ascertain is whether at the time of the killing the defendant was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way. In the present case their Lordships are of the opinion that, in so far as they can judge of the medical evidence from the trial judge's notes, the jury were entitled to regard it as not entirely convincing. Dr. Patricia Bannister, whose evidence was subjected to quite lengthy cross-examination, expressed an opinion as to the defendant's state of mind which in terms satisfied the statutory definition. The particular mental abnormality which she identified was that of an extremely immature personality. Mr. Browne the clinical psychologist, found the defendant to be of average intellectual ability with good observation ability and clear thinking. He supported Dr. Patricia Bannister's evidence by describing the defendant as having an inadequate personality enhanced by emotional immaturity and a low tolerance level. The evidence of Dr. Lawrence Bannister was merely to the effect that he treated the defendant for depression, with disappointing results. It is plain that the quality and weight of this medical evidence fell a long way short of that in **Reg. v. Matheson [1958] 1 W.L.R. 474**, and in **Reg. v. Bailey [1961] Crim.L.R. 828**. The jury also had before them evidence about the conduct of the defendant before, during and after killing, including that of a number of conflicting statements about it made by him to the police and to Dr. Patricia

Bannister. They may well have thought there was nothing in that evidence indicative of a man whose mental state bordered on insanity. There was also the defendant's unsworn statement regarding his having suffered in the past from sever headaches, blackouts, sleeplessness and lack of memory, supported to some extent by Miss Watson, but no objective evidence of any history of mental disorder. In both these aspects the case is in marked contradistinction to **Matheson's** case.

[105] In leaving the issues to the jury, the judge told them:

“Members of jury, you should look at this case in a broad common sense way. You bear in mind what the doctors have said and knowing what this man did, knowing the whole story. If the defence has failed to prove any or more of the element relating to diminished responsibility that I have direct you on, providing the prosecution has proved the ingredients of murder to which I have also referred, your verdict ha to be guilty of murder. If, on the other hand, the defence has satisfied you that it is more likely than not that all element of the defence of diminished responsibility were present when the defendant killed Moreen William, your verdict must be not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility.”

[106] Having considered the evidence, this Court is of the view that it was perfectly reasonable for the jury to reject the evidence of Dr. Bursztajn and accept the evidence of Dr. Othello and

Dr. Lockhart and conclude that the appellant was in fact malingering and was not suffering from any substantial abnormality at the time of the kill.

[107] Before finally disposing of this matter it is important to recall the admonition of Lord Bingham in Randall's case (*supra*). His Lordship said:

“It is the responsibility of the judge to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both the prosecution and defence.”

Later his Lordship speaking of the rules for ensuring a defendant has a fair trial stated:

“It cannot be too strongly emphasized that there are no rules of game. They are rules designed to safe guard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness error and abuse.”

[108] As stated earlier, although the correct procedure was not followed, we did not consider that, having regard to all the circumstances of the case and for the reasons given above, the appellant suffered such prejudice as to make his trial unfair.

[109] It was for these reasons that the appeal was dismissed and the conviction affirmed.

Zacca, P.

Taylor, J.A.



Mottley, J.A.