Hilary Term

[2017] UKPC 6

Privy Council Appeals No 0084 of 2014 and 0046 of 2015

JUDGMENT

Lester Pitman (Appellant) v The State (Respondent) (Trinidad and Tobago)
Neil Hernandez (Appellant) v The State (Respondent) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lady Hale

Lord Kerr

Lord Clarke

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

23 March 2017

Heard on 16 and 17 May 2016

Appellants	Respondent
Edward Fitzgerald QC	Peter Knox QC
Paul Bowen QC	Tom Poole
Alison Macdonald	
Ruth Brander	
Amanda Clift-Matthews	
Daniella Waddoup	
Katherine Buckle	
(Instructed by Simons Muirhead & Burton LLP)	(Instructed by Charles Russell Speechlys LLP)

LORD HUGHES:

1.
The Board has heard together two appeals brought by defendants convicted in Trinidad and Tobago of murder and sentenced originally to death. The principal question which arises concerns the law

applicable to persons convicted of offences carrying a death sentence where they are to an extent mentally impaired. This point is of importance although neither of these appellants now faces a death sentence, owing to the very lengthy time which has elapsed since their convictions.

2.
In the case of Pitman, although not of Hernandez, there is also an appeal against conviction. That raises two distinct questions. The first is connected to the issue of mental impairment, for it is contended that the decision to admit in evidence his confession statement is vitiated by what is now known about his mental condition. The second is unconnected and arises from the recent decision of the Board as to the law of joint responsibility in R v Jogee and R v Ruddock [2016] UKSC 8 and [2016] UKPC 7: [2016] 2 WLR 681.

Pitman; facts

3.
As long ago as 11 December 2001 John Cropper, a respectable householder in the Cascade area of Port of Spain, was murdered together with his sister-in-law and 83-year-old mother-in-law by robbers who entered his home and stole jewellery, television sets and other possessions. The three deceased were left in the bathroom of the house with their throats cut, and were found about 36 hours later. The appellant Pitman and a co-defendant Agard were arrested within about a week and stood trial together. Both were convicted by the jury.

4.
The evidence against Pitman consisted essentially of three parts. Firstly, he was identified at an identification parade nine days after the killings by a woman who had seen two men hanging about outside the targeted house on the evening of the murders. Secondly, a local man gave evidence that Pitman engaged him on the morning after the killings to drive him and Agard to collect much of the stolen property, later identified as such by Mr Cropper's widow, from the place where it had been left. Thirdly, the State relied on a written statement of confession made by Pitman to the police. In it he narrated going to the house with Agard, waiting outside until a number of tea-party guests had left, and then entering together. He said that Agard had held onto Mr Cropper and he had held his sister-in-law. When Mr Cropper tried to escape, Agard produced a knife. The two captives had been put in the bathroom tied and gagged, and when the older lady was found she was treated likewise. His account was that Agard had killed the occupants. After stealing what they wanted, and as they were ready to leave, Agard had gone into the bathroom with the knife and that when he had looked he had seen the bodies there. They had left together and stored some of the stolen property. He had himself also taken $500 from a dressing table, which he kept for himself.

Pitman: trial and appeals

5.
At the trial both men denied the offence. Agard knew the Cropper family. He asserted an alibi. He had made a confession admitting presence but blaming all the violence on a man called "Cudjoe". He denied that this confession was true, saying that it was obtained by a false promise of immunity against a background of rough handling. He accounted for his fingerprint in the house by previous visits to work there, and for his proven use of Mr Cropper's bank card the following day by asserting that it had been given to his sister to help her out. He was convicted by the jury. His conviction was subsequently quashed by the Court of Appeal on grounds unconnected with Pitman's, and a re-trial ordered.

6.
Pitman challenged the admissibility of his confession and a voire dire was held. His case was that he had refused to make any statement and had not said any of the things recorded; on the contrary, he had said that he knew nothing about the crime. He had maintained this refusal despite inducements offered by the police to the effect that he would go home uncharged and be treated as a witness for the State. He had, however, signed a piece of paper on which something was already written; this he had done, he said, because he had been told he would be treated as a witness. He gave evidence in the voire dire. His assertions about the making of the statement were flatly contradicted by the interviewing police officer and by a woman officer brought in to record what he said. In addition, the statement had been made in front of a senior JP and former permanent secretary. That gentleman gave evidence that he had spoken privately to Pitman on arrival at the police station and had asked if he was ready to make a statement. Pitman told him, he said, that he was “not in a frame of mind to give a statement now”, and this the JP reported to the officers, who accepted it. Later in the evening the JP said that Pitman asked to speak to him again, privately, and said that he was now ready to make a statement, whereupon what was written down came from him. Thus the principal part of Pitman’s case went not so much to admissibility as to whether he had ever made the confession. At all events, the judge admitted the evidence and the challenge to it was renewed by assertions made in cross examination of the police, apparently over some days, in front of the jury. Pitman did not, however, give evidence before the jury. There was also challenge to the reliability of the identification evidence, including a disputed assertion that he had stood out at the parade because he alone was shirtless. It would seem that there was also a challenge to the truthfulness of the evidence of the driver who said he had helped the two defendants to recover the proceeds the next day. The trial took no less than two months.

7.
There was no significant legal issue at the trial relating to Pitman’s mental capacity. It was in evidence from his aunt that he was slow generally and had been well behind at school; he had fallen on his head as a five-year-old and had had lengthy hospital treatment for a fractured neck and possible brain damage; he was able to hold down a job. A priest called in the voire dire described him as intelligent but slow. He was referred to by his counsel to the jury as a “dunce”. This was not, however, suggested to relate to any legal issue. It was referred to by the judge in summing up in the context of the law of joint responsibility and what he must or might not have foreseen, if the confession was indeed made.

8.
Pitman appealed his conviction to the Court of Appeal, represented by counsel different from the advocate who had conducted the trial. Some 12 grounds were advanced. They related to the suggested failure of the State to nail its colours firmly to the mast either of joint responsibility or felony-murder, to the contention that the re-enactment of the latter rule had had the effect of abolishing the law of joint enterprise, and to suggested imbalance in the summing up. None of them related in any manner to Pitman’s mental capacity. The appeal was dismissed, and none of the grounds then rejected has been renewed.

9.
Upon further appeal to the Board, there were proffered for the first time expert reports on Pitman’s mental capacity. One came from a neuro-psychologist, Dr Bramham, who had examined Pitman on one occasion in prison and had administered standard psychological tests. The other came from Professor Kopelman, a professor of neuro-psychiatry, who had reviewed the papers. There was also put before the Board a statement from a former teacher of Pitman, who had taught him for a year at the age of

eight, to the effect that he was extremely slow and withdrawn, having difficulty in simple tasks and in expressing himself. The expert reports, particularly that of Professor Kopelman, went so far as to conclude that Pitman would have been (a) unfit to plead and to be tried as unable to understand or participate in the process, (b) insane as unable to know what he was doing or that it was wrong, as well as (c) substantially impaired in his responsibility at the time of the killings. The Board accepted the explanation for the omission of any such evidence at the trial, namely that although there had been some consideration given to having the defendant examined by a psychiatrist this had never occurred, either through lack of money or oversight. It admitted the evidence and remitted the case to the Court of Appeal for consideration of the various possible legal consequences to which it might lead: [2008] UKPC 16.

10.
Before the Court of Appeal at this second appeal, the potential issues were accordingly the impact of Pitman's mental impairment, whatever it was, on (1) fitness to plead, (2) insanity, (3) ability to participate in a joint venture, (4) diminished responsibility, (5) the admissibility of the confession and (6) sentence. Before the Court of Appeal there were also new reports obtained on behalf of the State from Dr Maharaj, a psychologist and Dr Othello, a consultant forensic psychiatrist. None of this evidence and none of these issues had been before the court of trial. The Court of Appeal conducted oral hearings at which evidence was given by all the experts and also by counsel who had conducted the trial on behalf of Pitman. The court affirmed the conviction. It held that it was quite clear that Pitman had been able to participate in the trial, and to give evidence; he had been neither unfit to plead nor insane, nor had his responsibility for the killings been diminished. The confession had been properly admitted. Because more than five years had now passed since the pronouncement of the death sentence, however, the court set that sentence aside under the rule in Pratt and Morgan v Attorney General for Jamaica [1994] 2 AC 1. It substituted life imprisonment and specified that Pitman should not be released before the expiry of 40 years.

11.
Before the Board now, the case has yet further altered its shape. Mr Fitzgerald QC does not now contend that Pitman was unfit to plead, or insane, or that his conviction ought to be quashed because through diminished responsibility he was guilty only of manslaughter. He confines his argument in relation to conviction to the admission of the confession, plus a new ground of appeal based on R v Jogee and Ruddock. His principal focus is in relation to sentence. His argument is that Pitman's mental impairment was such that the pronouncement of a death sentence was unlawful. Although that sentence has now been quashed, he further submits that the sentence which has been substituted is premised on the original mandatory death penalty and/or does not sufficiently take into account the mental impairment of the defendant.

Pitman: mental impairment

12.
Dr Bramham had measured Pitman's intellectual functioning in June 2006 using the standard Wechsler Adult Intelligence Scale (WASI-III). He returned a full-scale score of 52 without either significant variance between verbal and performance results or any indication of deliberate underperformance. His reading was at a level roughly equivalent to an (English) child of six and a half. A supplementary test used for children (Raven's Coloured Matrices) suggested performance at a level roughly equivalent to an (English) child of nine and a half. A digit span test for working memory was significantly better performed but showed mild impairment compared with peers of his own age. There was no impairment of visual recall, but he had some difficulty with recall of verbal information.

13.
Dr Maharaj conducted similar but not identical tests in March 2009. They returned a full-scale score of 67, again without internal inconsistency or signs of deliberate underperformance. The reading level was similar to that found by Dr Bramham. He found no significant impairment in recall of familiar subjects, learning new material after rehearsal (without reading) or reproduction of figures from visual stimuli. Except for the numerical level of the full-scale score, and perhaps the verbal information recall test, these findings were broadly consistent with those of Dr Bramham. As to the full-scale score, there was a possibility of cultural bias somewhat depressing the score on Dr Bramham's tests, whilst Dr Maharaj's test was, according to Dr Bramham, arguably less accurate at low levels.

14.
The severe childhood fall was confirmed, as was a history of being well behind and struggling at school. Pitman had been held back at primary school when his peers went on to senior school at 11, and remained there until he left at 14. He had never passed his common entrance. Those examining him also noted difficulty in engaging with him; he did not readily make eye contact and was frequently silent and blank. This was consistent with the report from his childhood schoolmaster. He had had various jobs of relatively short duration which he appeared to have done sufficiently well. He was perfectly well able to get out and about by himself.

15.
The conclusions of Dr Bramham and Professor Kopelman as to the extent of Pitman's mental impairment and as to his abilities to give evidence and cope with the process of trial were significantly undermined by the fact that they had not seen the transcript of his evidence on the voire dire, which plainly showed that he could indeed give evidence and deal adequately with cross examination. Having had sight of the transcript, both, in oral evidence, somewhat modified their assertions. Dr Bramham now said that he would have difficulty giving reliable evidence, and Professor Kopelman modified his assertion of complete inability to comprehend the trial to saying that his ability to do so would have been compromised. The voire dire also showed that, rather than demonstrating the suggestibility to which Dr Bramham had said he was likely to be prone, he had stoutly insisted that he had told the JP that he did not want to make a statement, as distinct from that he was not in a frame of mind to do so, and that those who said otherwise were putting words into his mouth. Dr Bramham's contention that he was likely to demonstrate compliance proved to be illustrated, so far as she was concerned, with a series of questions in the voire dire to which he responded simply "yes" or "no", as indicated by the questions. But these were closed questions asked in chief simply to elicit the uncontroversial fact that his signatures appeared on the confession statement and his known assertion that he signed it in order to go home; they provided no evidence of inappropriate compliance. Further, the conclusions as to overall impact of his impairment which were drawn by both Dr Bramham and Professor Kopelman were significantly undermined by the assertion that he was unfit to plead and, in the case of the latter expert, that he was insane for the purpose of the M'Naghten rules.

16.
The Court of Appeal also had the clear evidence of counsel who had represented Pitman at trial over some two months. His evidence demonstrated that he had had several detailed discussions with Pitman about the conduct of the trial and had received, at differing times, definite instructions as to the facts. He had no difficulty communicating with his client. He had originally thought that it might benefit his case for there to be a psychiatric or psychological assessment so as to support the

argument for the exclusion of the confession, on the basis that the defendant might well not have understood the caution and his right to silence. But he had learned that the defendant had previous experience of arrest on a very serious charge, when he had successfully exercised his right to silence. That and the defendant's case on what he had said to the JP, as made clear in his evidence in the voire dire, persuaded him against pursuing a report, as well as the expense of obtaining it.

17.
Given all this evidence, the Court of Appeal was plainly justified in its conclusion that Pitman had demonstrated that he knew what he wanted to say and said it, on several occasions supplying additional information beyond what was already apparent. Where he disputed what was put to him, he said so in terms. There was no sign whatever of an inability to know what acts he was performing, or that what was alleged to have happened was wrong. The court's rejection of unfitness to plead and insanity was the only possible conclusion, and the rejection of diminished responsibility was a perfectly legitimate one; all these conclusions are confirmed by Mr Fitzgerald's present stance.

18.
Even without the overstatements of Dr Bramham and Professor Kopelman, however, Dr Maharaj's overall conclusion was of mild subnormality with underdeveloped reading and spelling skills; he said that Pitman was functioning at a level where he could easily be influenced and misled by the unscrupulous. Dr Othello reported that at his level of mild retardation many could live independently and achieve sufficient social and vocational skills for minimum self-support, but with appropriate support. Dr Bramham offered a very similar assessment in oral evidence; he did not need to be institutionalised, but did need some support with certain activities of daily living, such as managing his finances. Given that average IQ is 100, a full-scale level of 67, the highest offered, was a measure of significant learning disability. As the Court of Appeal described it, a level below 70 is definitely subnormal, albeit displayed by an appreciable number of those accused of crime. There was no challenge to Dr Bramham's statistical statement that at 67 he would be in the bottom 1% of the population, whilst if the correct reading was in the low 50s he would be in the bottom 0.1%. There was, therefore, an identifiable mental impairment.

Pitman: the confession

19.
Mr Fitzgerald asks the Board to say that the fresh evidence of learning difficulties necessarily means that the confession was inadmissible. It was inadmissible, he contends, because it was made by a person with mental impairment who had had the advice and assistance of neither a lawyer nor a person fulfilling the role which would be required under the English Police and Criminal Evidence Act 1984 of an appropriate adult. The Court of Appeal, says Mr Fitzgerald, did not squarely address the issue of Pitman's vulnerability in the police station, but, rather, concentrated upon his capacity to give evidence and to say what he wished, and proceeded directly from that to the admissibility of the confession.

20.
The essential rule in relation to the admissibility of a confession is that it must be shown to be voluntary, in the sense that it has not been obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression. That rule is reflected in principle (e) of the Judges' Rules of 1964, adopted by the judges in Trinidad and Tobago in 1965. A trial judge has additionally the power, sometimes called a discretion but better described as an exercise in judgment, to refuse to admit evidence tendered on behalf of the prosecution if its effect will be unfair to the

defendant: Noor Mohamed v The King [1949] AC 182, 192. In some jurisdictions there are in addition rules of conduct or codes of practice binding the police in relation to dealings with suspects. The English Codes of Practice made under the Police and Criminal Evidence Act 1984 are an example. Where there is a breach of such a code, that is a relevant factor in the exercise of the judgment whether evidence obtained in consequence ought to be excluded as unfair. Even if there is such a specific provision, exclusion of evidence depends on a judgment that its effect will be unfair and does not follow automatically from a breach. England does have such a code which requires an appropriate adult to be present at the interview of a mentally disordered or mentally vulnerable suspect: see Code C under the 1984 Act, para 11.15. But Trinidad does not have such a rule, and contrary to Mr Fitzgerald's submission so specific a provision cannot be imported on the grounds that it represents an essential feature of the common law. That would be to impose on Trinidad a rule which it has not chosen to make. Trinidad does have a rule, enshrined in section 5(2)(c)(ii) of the Constitution, that a suspect in custody must be informed of his right to retain, instruct and communicate with a lawyer of his choice. A breach of that right may well justify exclusion of confession evidence through the Noor Mohamed route, although once again whether it does so will depend on the nature of the breach and its effect on the suspect.

21.
Accordingly, the test of admissibility in the present case was (a) voluntariness and (b) absence of unfairness. The judge determined that the confession was voluntary after hearing evidence, including that of Pitman himself. He disbelieved Pitman's assertion of inducements. The evidence of the JP was plainly very important. It clearly established that Pitman's account of being presented with a ready-written document was false, that he had spoken privately to Pitman, that Pitman had exercised his own choice as to when he was ready to make a statement about the offence, and that when he did so the content came from him without threat or inducement. Nothing in the fresh evidence of mental impairment bears on the question of voluntariness. Nor does it give grounds on which the confession ought to have been excluded as unfair. It might or might not have done so if there were scope for legitimate fear that the making or content of the confession owed anything significant to Pitman's learning difficulties, but there was not. The JP was not briefed on his task as if he were an appropriate adult attending an English police station, for the very good reason that he was not. Even if he had been, he would have been told that he was there to advise the suspect, to observe that the interview proceeded fairly, and to facilitate communications. The JP saw Pitman on his own, reported that he was initially not willing to be interviewed, and this was respected. Later he ascertained that he was willing to be interviewed, and the interview ensued with the JP present. It is not the law that a neutral person such as the JP is duty bound to advise a suspect not to answer questions, nor to refuse to say what has happened, whether it involves admission or not. So far as the right to contact a lawyer is concerned, the judge found that Pitman was well aware that he had such a right, having been told so at various times both well before and at the time of the confession. In those circumstances there are no grounds for departing from the ruling of the trial judge that the confession was properly admissible, nor was there anything unfair about its admission in evidence.

Pitman: Jogee and Ruddock

22.
The trial judge faithfully directed the jury in accordance with the law of joint responsibility as it was understood at the time (Chan Wing-Siu v The Queen [1985] AC 168 and R v Powell and English [1997] UKHL 45; [1999] AC 1). That involved the direction that the defendant would be guilty of murder as a secondary party if he continued to participate in the robbery with the foresight that his accomplice

might intentionally kill or do grievous bodily harm. It is now established by Jogee and Ruddock that the correct condition for guilt is that he intended, whether conditionally or otherwise, that there should be at least grievous bodily harm. It follows that there was to that extent a misdirection. The Board already had before it an appeal against conviction for which leave had been given. In those circumstances it permitted Pitman to argue that he should be given leave to appeal additionally, out of time, on this new point.

23.
It does not follow that leave to appeal should be granted on the new point, nor, if it is, that the appeal should succeed. As the Board made clear in Jogee and Ruddock at para 100, exceptional leave out of time to appeal against a conviction which has been arrived at by faithfully applying the law as it stood at the time of trial will be granted only if substantial injustice would be done to the defendant if it were refused. In the present case, the State contends that, if directed as now required, the jury would have arrived at the same verdict; this was, it contends, a clear case of conditional intent at least. That may be so, but the question of the intent of the defendant has never been determined. Much more importantly, however, Pitman was plainly guilty of murder in any event. The jury clearly accepted the confession. On that basis, he was unarguably guilty of robbery, an arrestable offence involving violence, and the triple deaths were occasioned in the course or furtherance of it. The faint suggestion that Pitman's participation in the robbery was over before the killings took place is untenable. Moreover, if tenable, that would have provided a defence also to joint responsibility and must therefore either have been rejected by the jury or not argued at all. Accordingly, this was murder under the felony-murder rule, whether or not the defendant intended death or grievous bodily harm: section 2A of the Criminal Law Act 1979. The difference between foresight and intention examined in Jogee and Ruddock is irrelevant to felony-murder. So to say is not, as was submitted on his behalf, to exercise the appellate power to substitute a verdict for a different offence. It is to recognise that the defendant was unarguably guilty of the precise offence of which he was convicted, namely murder.

24.
It is true that in the present case the judge elected to leave the case to the jury solely on the basis of intention/joint responsibility, rather than on the basis of felony-murder. He did so after hearing submissions in which the State invited him to leave felony-murder. It may be that he wished to simplify the case for the jury as far as possible. Whatever his reasons, they cannot have included any possible view that the conditions for felony-murder were not made out, providing of course that the jury accepted that Pitman was present and participating in the robbery when the victims were killed. The consequences for the defendant of this way of leaving the case were mixed. In a sense murder on the basis of intention/joint responsibility required something more to be proved than felony-murder. On the other hand, murder on the basis left carried a mandatory sentence of death whereas felony-murder carries a discretionary death penalty. But even if the view be taken that there was some benefit to the defendant in the way that the case was left to the jury, it does not begin to follow that he has suffered a substantial injustice if, 12 years later, his conviction is not quashed, and a re-trial considered, by reason of a change in the understanding of the law which was not foreseeable at the time of trial. Since he was unarguably guilty of murder in any event, he has not. For the same reasons, even if leave to appeal on this point were granted, the conviction must stand. The defendant was guilty of the offence (murder) of which he stands convicted. The question of sentence is considered below.

Hernandez: facts

25.

Hernandez, then aged 32, lived in the remote eastern part of Trinidad at Cumana and had worked briefly on an estate adjoining the sea. On the morning of 2 May 2000 he encountered on the beach the wife and children of the estate foreman, who had gone there to bathe. He killed both the mother and her six-year-old son with repeated blows to their heads with a cutlass which he carried, apparently for cutting coconuts. In both cases the cause of death was several chops to the head, with underlying skull fractures. The mother was found, fatally wounded, on the beach by two men, and was able to name her attacker to them. The defendant was arrested the same afternoon. Later he made a statement under caution to the police in the presence of a JP in which he said that he had been "hustling" (helping himself to) coconuts, and that the lady had remonstrated with him and set off to tell her husband; he had, he said, intended no more than to "planass" the two victims, ie to strike them with the flat of the blade. At his trial he gave evidence that he was not at the beach at all and knew nothing of the deaths. He repudiated the statement, saying that he had always denied to the police being present at all but that they had tricked him into signing a pre-written document which they had told him recorded his denials; that was contradicted by the JP.

Hernandez: trial and appeals

26.
Hernandez was tried in November 2004 and convicted by the jury. No issue was raised at the trial connected with his mental condition. He gave coherent evidence of denial and of his movements, albeit disbelieved by the jury. The judge passed the mandatory sentence of death in respect of each murder.

27.
Hernandez appealed against his conviction on grounds which were unconnected with any question of mental condition. They related chiefly to complaints about the summing up, such as a suggested failure to leave provocation. Those grounds were rejected by the Court of Appeal in June 2005 and none of them has been revived. There was no appeal against sentence.

28.
In October 2007 the appellant lodged before the Board a further application for leave to appeal against conviction. A new ground was relied upon, namely the suggested failure of the judge to give a sufficient identification direction in relation to the dying declarations of the mother. In due course after a hearing before the Board that ground was rejected (February 2008) and neither that nor any other challenge to the conviction is now maintained.

29.
In the meantime, in January 2008, just before the hearing by the Board of the conviction appeal, there was lodged for the first time an appeal against sentence. It relied upon a new expert report from Dr Gray, a clinical psychologist, who had seen Hernandez in October 2007 and assessed his condition. It has never been suggested that Dr Gray's report was relevant to conviction. The grounds of appeal against sentence were essentially those now pursued, that the sentence of death was unconstitutional because of the mental condition of the defendant. The Board in due course (May 2008) allowed that appeal to the extent only of remitting to the Court of Appeal the question whether this fresh evidence ought to be admitted and, if it was, the consequences in law for the sentence.

30.
In July 2014 the Court of Appeal determined that the fresh evidence ought to be admitted. It rejected the argument that the sentence of death had been unconstitutional. However, in view of the passage of time, it allowed the appeal against sentence on the sole ground that to carry out the sentence of

death had become unconstitutional under the rule in Pratt and Morgan v Attorney General for Jamaica . The court substituted concurrent sentences of life imprisonment and ordered that he should not be released before the period of 25 years and five months had passed since his conviction; that was calculated after time in custody pending trial was taken into account and represented a total minimum period of 30 years.

Hernandez: mental impairment

31.
There is in this case no issue about Dr Gray's report, which the State accepts. Hernandez has two relevant mental conditions. Firstly, there is long-standing depression. He is convinced that he was an unwanted and rejected child, is troubled by intrusive thoughts to this effect and is frequently tearful. His childhood was indeed disrupted and involved periods of sleeping rough when under 12 years of age. Secondly, he exhibits very significant learning difficulties. His full-scale WASI-III score was 57, with consistent subscores and other test results such as adult reading. That, reports Dr Gray, puts him below the first percentile and in the lowest category used by those who measure cognitive functioning. Dr Gray's conclusion was that this assessment had not been brought down by the depression but was a level of functioning independent of it. There was no sign of deliberate underperformance; he appeared to be co-operative and doing his best.

Sentence of death: the appellants' arguments

32.
Section 4 of the Offences against the Person Act 1925 ("OAPA") provides a mandatory death penalty for murder in the following terms:

"4. Every person convicted of murder shall suffer death."

This has been the law in Trinidad for as long as there has been a law of murder - see for example section 2 of the 1842 "Ordinance for Assimilating the laws of the Colony relating to Offences against the Person to the laws of England in the like cases", which was, so far as material, in identical terms: "shall suffer death". Section 4 was last amended, without altering its sense, in 1979. Since then the Act has been amended on a number of occasions without touching this rule. Notably, in 1985 the partial defences of diminished responsibility and provocation were added by the insertion of sections 4A and 4B. These have the effect of reducing cases of murder to manslaughter, for which the sentence prescribed by section 6 is not death, nor any mandatory sentence, but is a maximum of life imprisonment. The implications of these amendments are considered below.

33.
The case for both appellants is that, notwithstanding section 4, for a person suffering from their level of mental impairment the sentence of death was unlawful, or at least unlawful without a judicial determination of whether, given their impairment, it would constitute cruel and unusual punishment. That case was put on twin bases.

(i)
There is, and always has been, a common law prohibition on the execution of those of unsound mind. Accordingly, section 4 and its predecessors are to be read as subject to this rule. The common law has developed with the progress of psychiatry and medical understanding of mental disability, and with modern standards of decency; its prohibition on execution now extends to those whose mental

disability is such that a death sentence would constitute cruel and unusual punishment. Such development is supported by international covenants and comparative material.

(ii)
The Constitution of Trinidad and Tobago prohibits cruel and unusual punishment by section 5(2)(b) and prevents Parliament from imposing it except by amendment to the Constitution via special majorities under section 54. The imposition of a death sentence without judicial determination whether it amounts to cruel and unusual punishment by reason of the mental disability of the defendant is a breach of this constitutional rule. In consequence, such a sentence without this determination is also a breach of section 4(a), which guarantees the right not to be deprived of life save by due process of law, of section 5(2)(h) which guarantees such procedural provisions as are necessary for giving effect to this right, and generally of the principle of the separation of powers which is implicit in the Constitution.

The common law argument

34.
The Board was provided with an extensive survey of English legal materials from Bracton onwards. Interesting as much of the argument was, it can be simplified, at least to some extent. There is no doubt that by one means or another it was consistent practice from at least the 16th century not to execute those who were insane or who were, as then described, “idiots”, by which latter term was meant those who exhibited a total lack of reason or understanding, as also it was the practice not to execute expectant mothers. There is also no doubt that in the 18th and early 19th centuries the trial judge had power to grant the convicted prisoner a temporary delay either in passing sentence or its being carried out. This was called a reprieve. It was recognised by writers such as Chitty (A Practical Treatise on the Criminal Law (1819) Chapter XIX) and Blackstone (Commentaries on the Laws of England (1791) Chapter 31 pp 394-395), and also by section 4 of the Offences Against the Person Act 1828 which required sentence to be pronounced immediately “unless the court shall see reasonable cause for postponing it”. There were many possible causes of such temporary reprieves, and insanity was one of them; another was where the judge felt misgivings about the propriety of the verdict - see Blackstone at p 394 and Chitty at p 523. The reprieve was temporary, and the prisoner was saved from execution not by it but by royal pardon, although no doubt that normally followed in cases of insanity. Blackstone (at p 394) makes clear that reprieve might in 1791 be before or after the pronouncement of the sentence.

35.
It does not follow that this represented, even then, a common law rule prevailing over statute. In the time of Henry VIII there had been a statute (33 Hen VIII c 20) which had explicitly allowed, if not required, the execution of those convicted of treason, even if insane. That statute had been repealed during the reign of Mary Tudor (1 & 2 P & M c 10), so there was an explicit statutory authority for the practice in relation to the insane. Next, once the 1861 Offences against the Person Act was passed, reprieve in anticipation of sentence in the case of murder disappeared. That Act required, by section 1, that every person convicted of murder should suffer death, and, by section 2, that the court “shall pronounce” that sentence upon conviction. This removed the power to postpone sentence which section 4 of the 1828 Act had recognised. Thereafter, if execution was not to be carried out a royal pardon was required, gradually over the years exercised by ministers and latterly by the Home Secretary. The sole remaining power of the judge was, having passed sentence of death, to stay execution to allow application for a pardon to be made. This was still referred to, frequently, as a reprieve, but it is better described as a stay since the sentence had been passed. It was regarded as

necessary to do this when the prisoner became insane after verdict: see Archbold's Criminal Pleading, Evidence and Practice 27th ed (1927) at p 235. The 26th ed (1922) of Archbold had recorded at p 241 the current state of the law. There was a statutory bar on passing a sentence of death on a person under 16 except for murder, treason, piracy and arson of the royal dockyards. There was a statutory power upon conviction for felonies other than murder for the judge to recommend the prisoner to mercy and if he did so to record that the offence carried death but not to pronounce that sentence. There remained a power, still non-statutory, to defer sentence on pregnant women; this had always spared them only until delivery and the practice was to bring the prisoner back before the court after the birth for the passing of the sentence. Interestingly, this power was superseded by statute a few years later when the Sentence of Death (Expectant Mothers) Act 1931 provided that in the case of pregnant women no sentence of death should be passed at all, but rather one of life imprisonment. There was no sign of any power to postpone sentence of death upon the insane; that was achieved by the prerogative of pardon and a stay of execution meanwhile.

36.
That there could be no common law rule prevailing over statute is unsurprising. The common law gives way to statute, not statute to common law. The provisions summarised above show that the practice of not carrying out a sentence of death on the insane was at some points achieved by not passing the sentence and more often by passing it but there ensuing a pardon of the offender. They also show that the passing of the death sentence in all cases of murder except pregnant women was regulated by statute from at least 1828, and that statute also intervened in their case in 1931. It is accordingly not possible to treat the English position as one in which the common law maintained a rule, supplementary to the statutory regime, providing that the insane were not to be subjected to a sentence of death.

37.
The law of murder in Trinidad has likewise been statutory since the Ordinance of 1842, which provided in terms identical to the English 1828 and 1861 Acts that every person convicted of murder shall suffer death. There are express statutory provisions prohibiting the passing of sentence of death on those under 18 at the time of the offence (section 79 of the Children Act 1925) and on expectant mothers (section 62(1) of the Criminal Procedure Act 1925). Those specific provisions, taken together with the unqualified terms of section 4 OAPA for murder, demonstrate that there is no room for the suggested common law rule.

38.
Mr Fitzgerald relied upon numerous examples of national and international pronouncements, some judicial and some from international bodies such as ECOSOC, to the effect that the mentally handicapped ought not to be executed. Those matters have relevance to the second part of Mr Fitzgerald's argument (his constitutional argument), but the courts are not at liberty to construe OAPA section 4 in a way which is inconsistent with its express language. Such international materials may be legitimate aids to the construction of statutes when the latter admit of debate as to their meaning, but that cannot be said of section 4 of OAPA. Any development of the common law in Trinidad must be measured by, and geared to, its own constitutional and legislative choices. There cannot be judicial legislation where the Parliament of Trinidad has chosen not to go.

39.
For similar reasons, the decision of the United States Supreme Court in Atkins v Virginia 536 US 304 (2002) cannot simply be transplanted into Trinidad. The decision there reached, that a sentence of death passed on a mentally retarded defendant amounted to "excessive" and cruel and unusual

punishment in breach of the 8th Amendment to the US Constitution was not based on a supposed common law rule.

The Constitutional argument

40.
Section 5(2)(b) of the Constitution of Trinidad and Tobago provides as follows:

“(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not -

…

(b) impose or authorise the imposition of cruel and unusual treatment or punishment …”

41.
However, section 6 of the Constitution excepts existing laws from its provisions. It says:

“6.(1) Nothing in sections 4 and 5 shall invalidate -

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(3) In this section -

‘alters’ in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

‘existing law’ means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);

‘right’ includes freedom.”

42.
The mandatory death sentence for murder, now found in section 4 OAPA has been modified in its language since it was enacted in 1925 (and indeed in the 1842 Ordinance) but only in order to accommodate the removal of the old categorisation of offences into felonies and misdemeanours. It is, accordingly, an existing law to which the prohibition upon Parliamentary authorisation of cruel and unusual punishments in section 5(2) does not apply. The Board so held in the cases of Matthew v State of Trinidad and Tobago [2005] 1 AC 433 and Boyce v The Queen [2005] 1 AC 400, decided on the same day. As the Board held at para 12 of Matthew, a mandatory death penalty is indeed a cruel and

unusual punishment but insofar as it is an existing law, it is immune from constitutional challenge on that ground.

43.
Mr Fitzgerald's first submission is that although the mandatory death penalty is, for this reason, not ipso facto unconstitutional, its application to a mentally impaired defendant is, because of what he contends to be the antecedent and underlying rule of common law which forbids the execution of such a person. The existing law, he says, was always subject to that overriding common law rule. Cast in this form, the argument is the same as has been considered above, and it must fail for the same reasons.

44.
There has, however, been an important change to the law of murder since the 1925 Act was enacted and after the Constitution was adopted in 1962. Parliament in Trinidad has given consideration to the position of mentally impaired persons who face charges of murder. It did so by adopting, by chapter 19 of 1985, amendments to OAPA to create the concept of diminished responsibility. Section 4A of OAPA, thus inserted, reads:

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

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder."

45.
The concept of diminished responsibility originates in Scotland in the late 19th and early 20th centuries. It was a development of the common law designed to alleviate the severity of what was then a mandatory death penalty for murder: see Lord Justice-General Rodger's helpful historical survey in Galbraith v HM Advocate 2002 JC 1 (paras 23 to 27), together with the report of the Scottish Law Commission SLC 195 (2004) at para 3.1. It was unknown to English law until it was borrowed by the Homicide Act 1957. It was then adopted for the same reason; there was at that time intensive debate about the death penalty but until 1965 no Parliamentary majority for its wholesale abolition. Diminished responsibility was adopted as a means of mitigating the mandatory death penalty in the case of the mentally disordered. Although it proceeds by the machinery of reducing the offence from murder to manslaughter, there is no room for doubt that mitigation of the penalty was its object and rationale. The formulation of diminished responsibility which has been enacted in Trinidad and Tobago exactly follows that of the English Homicide Act 1957. It was clearly enacted for the same reason. It follows that what has happened is a legislative recognition in Trinidad and Tobago that the mental impairment of the defendant at the time of the offence may be a reason why there should not be the cruel and unusual punishment of mandatory execution.

46.
In argument the State contended that the effect of this change was limited to those who successfully maintain the defence of diminished responsibility at their trial. But the rationale of the change may extend to some who did not advance such a defence. Firstly, it is well known that sometimes a defendant may refuse to permit diminished responsibility to be advanced, precisely because his mental condition inhibits him from making a rational decision: see the cases reviewed in R v Erskine [2009] EWCA Crim 1425; [2010] 1 WLR 183, especially Borthwick at para 47, Weekes at para 49 and

Erskine itself particularly at para 95. Secondly, some disordered defendants may refuse to be examined. Thirdly, it sometimes happens, although it should not, that through no fault of the defendant there is simply not the expert evidence available to investigate possible diminished responsibility. Lastly, in the case of some defendants the mental impairment may not have developed, or have been in abeyance, at the time of the offence, but may have supervened subsequently. Defendants in this last category are within the rationale of avoiding the death penalty for those whose mental condition meets the test of diminished responsibility although that condition was not operative at the time of the offence.

47.
It is necessary to begin with the proposition that a mandatory death penalty is a cruel and unusual punishment (Matthew para 12). Section 4 OAPA is saved from constitutional challenge insofar as it is an existing law. The sentence for murder has not changed. But the operation of that existing law has been significantly modified by the enactment of section 4A to cater for those whose mental responsibility is substantially impaired. In order properly to give effect to the combination of this change in the substantive law and the imperative of section 5(2)(b) of the Constitution, it is necessary that the court should be in a position to moderate the mandatory effect of section 4 not only for those who advance diminished responsibility at trial but also for those whose condition meets that statutory concept but who did not, for sufficient reason, then advance the partial defence.

48.
This can be done, first, by permitting an appeal against conviction to be brought outside the normal time limit in an appropriate case. The words “in an appropriate case” are important, because the Board sees considerable force in the observations of both Archie CJ in Pitman and Narine JA in Hernandez that it is unsatisfactory that the mental condition of defendants should be raised for the first time only on appeal, and often many years after the trial. Very similar concerns were expressed by Lord Judge CJ in the English context in Erskine. The admission of fresh evidence on appeal is a matter of discretion. Not only must the evidence appear credible but the explanation for its absence at trial is very relevant to the exercise of the discretion. The best prevention of such late appearance of medical evidence lies in the regular expert examination, at an early stage, of all defendants facing murder charges. It must be for individual jurisdictions to devise such means of seeking to achieve this as are practical in local conditions. It may nevertheless occasionally happen that fresh, and late, evidence is compelling, and that justice requires its admission.

49.
In the present appeals there has been no application to raise the defence of diminished responsibility out of time, and that is not surprising on the facts. The defence requires the defendant to establish that his responsibility for his actions was not merely impaired but substantially impaired at the time of the offence (as to which see now R v Golds [2016] UKSC 61; [2016] 1 WLR 5231). This is not necessarily established by demonstrating a particular level of IQ, although evidentially that may be highly relevant.

50.
What about those defendants who cannot discharge the burden of proving diminished responsibility, but who nevertheless suffer from significant mental abnormality, or whose mental condition may have significantly deteriorated since the commission of the crime? Given that the death penalty is itself a cruel and unusual penalty, which should therefore be reserved for the worst cases, the Board considers that it follows from the introduction of the partial defence of diminished responsibility that to carry out the death penalty on persons whose mental condition meets the level required for that

defence cannot now be constitutionally justified. Whether a person's mental functioning is significantly impaired will be a question of fact, but the Constitution is capable of accommodating such cases through the exercise of the prerogative of mercy, which importantly is subject to judicial control through judicial review: Lewis v Attorney General of Jamaica [2001] 2 AC 50. In the opinion of the Board, the existence of independent judicial control over the process provides sufficient constitutional safeguard for the cases under consideration, and it is axiomatic that there is no systemic unconstitutionality where existing processes are capable of providing sufficient constitutional safeguard. The Board considers it also axiomatic that the prerogative of mercy needs to be exercised in a way which takes proper account of the developing understanding of mental disability. That route has not been followed in either of the present appeals, but a person with a significant learning disability might be an example of someone whose mental functioning is significantly impaired and therefore entitled to constitutional protection from the infliction of the death penalty.

Pitman: disposal

51.
For the reasons set out in paras 19 to 24 above, Pitman's appeal against conviction must be dismissed.

52.
Pitman is no longer subject to a death sentence. Diminished responsibility was disclaimed in his appeal and it is not easy to see that, whatever the correct level of his undoubted learning difficulties, they amounted to such as would substantially diminish his responsibility for his actions. The lengthy minimum term attached to the life sentence imposed by the Court of Appeal was determined according to the gravity of the crime, which was a brutal triple killing in the course of robbery in the victims' own home. The determination of such a term is a matter for the Trinidadian courts. Accordingly his appeal against sentence must also be dismissed.

Hernandez: disposal

53.
The sole question previously remitted to the Court of Appeal, and thus considered by it, was the constitutional argument as to the imposition of the mandatory death penalty. That court was right to reject that argument as advanced before it. In doing so it appears to have deduced from the fact that conviction was not remitted to it, as it was in Pitman, a considered view of the Board that there was no arguable point on conviction. Nor was there, but that was because there was no appeal against conviction save on the identification direction point. The Board was never asked to consider, and did not consider, the impact of Hernandez' mental condition on his responsibility for his actions, and thus the Court of Appeal did not do so either.

54.
Dr Gray's report did not directly address the question of diminished responsibility, but it is clear from his report that Hernandez suffered from very severe learning difficulties, such that the Board accepts that it might well have been unconstitutional to carry out the death sentence. While there are good arguments why it would be preferable for that matter to be assessed by the trial judge, whether or not the defence of diminished responsibility was advanced, that is not the process under the Constitution and statute law of Trinidad and Tobago, and the Board considers that the procedure for the exercise of the prerogative of mercy, under judicial control, is capable of providing proper constitutional protection. As it is, the sentence of death has been set aside by the Court of Appeal, which has

substituted what it judged to be the appropriate minimum period of imprisonment. In these circumstances his appeal must also be dismissed.