Hilary Term

[2018] UKPC 5

Privy Council Appeal No 0025 of 2016

JUDGMENT

Chandler (Appellant) v The State (Respondent) (Trinidad and Tobago)

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

before

Lord Kerr

Lord Sumption

Lord Reed

Lord Carnwath

Lord Lloyd-Jones

JUDGMENT GIVEN ON

12 March 2018

Heard on 16 January 2018

Appellants	Respondents
Tim Owen QC	Tom Poole
Joanna Buckley	
Jessica Jones	
(Instructed by Simons Muirhead & Burton LLP)	(Instructed by Charles Russell Speechlys LLP)

LORD CARNWATH: (with whom Lord Sumption and Lord Reed agree)

1.
The appellant, Mr Chandler, was convicted on 17 August 2011 of the murder of Mr Kirn Phillip on 8 October 2004. He was sentenced to death by hanging. His appeal against conviction and sentence was dismissed by the Court of Appeal (Weekes, Soo Hon and Narine JJA) on 12 December 2013. His appeal to the Board raises an issue not considered below: that is whether new medical evidence should now be admitted relating to his mental state at the time of the offence, with a view to supporting a case of diminished responsibility. He also renews his appeal on one of the grounds rejected by the Court of Appeal, relating to the judge’s direction in respect of evidence of propensity.

The facts

2.
On 8 October 2004 the appellant and Mr Phillip were both remand prisoners at Golden Grove Remand Prison, Arouca. At about 11 am on 8 October, prisoners who were going to have visits from members of the public that day were brought to the holding bay, and called individually by name to line up in the centre of the remand yard where they were to be searched and handcuffed. Mr Phillip had been searched and was standing at the end of the line of prisoners close to Prison Officer Mohammed. The appellant was the last prisoner to be called.

3.
According to the prosecution, as the appellant approached Officer Mohammed he lunged towards Mr Phillip and then pursued him across the yard to the gate of the south wing. He had a metal object in his hand with which he was making an upward and downward and sideways movement towards the back of Mr Phillip. He came within one to two feet of Mr Phillip before Mr Phillip ran through the gate to the south wing of the prison. The appellant was then cornered by prison officers, and, after being hit with a baton by an officer, he dropped the metal object, which turned out to be an improvised knife. Mr Phillip was found to have a chest wound and was taken to the Arima Health Facility where he was pronounced dead on arrival. The cause of death was a stab wound to the chest.

4.
The prosecution case was that the wound had been inflicted by the appellant. At his first trial in March 2009, he was represented by counsel, Mr Larry Williams. He denied the stabbing. He gave evidence that, as he was being handcuffed to Mr Phillip, he had hit him in the face with his fist. This was because Mr Phillip had stolen $10 which he had given him to buy some cigarettes. When Mr Phillip had begun to run towards the south west gate, the appellant had followed him for a few feet, but was stopped by officers who beat him with a riot staff, after which he became unconscious. The first trial ended with a hung jury. At the second trial, beginning in June 2011, the appellant was again represented by Mr Williams. On this occasion he did not himself give evidence or call any witnesses. His case, as put in cross-examination, was to deny having a weapon, or having stabbed Mr Phillip; the implication being that he had been stabbed by another prisoner after he entered the south wing, and that the police officers were lying.

The propensity direction

5.
In the course of the trial the prosecution applied to admit evidence of “the Haynes incident”: that is, evidence that in May 2009, almost four years later, the appellant had admitted stabbing Mr Haynes (a fellow inmate) in the neck with an improvised knife. After legal argument the judge admitted the evidence. No issue is taken as to the judge’s decision to admit it as relevant to propensity in accordance with the guidance given by the Court in R v Adenusi [2006] EWCA Crim 1059; [2006] Crim LR 929. But there is a live issue as to the adequacy of the judge’s direction on this aspect. It is convenient to deal with this ground first, since Mr Owen QC, for the appellant, realistically accepts that on its own it would be unlikely to justify setting aside the conviction, although he relies on it as an additional indication that the verdict was unsafe.

6.
In admitting the evidence, the judge took account of the much longer period between the two incidents in the present case (as compared to Adenusi), commenting:

“Two factors … need to be borne in mind in this regard: The first is the significant degree of similarity which gives the evidence in this case … its probative force; and, secondly, that both allegedly occurred in the setting of the prisons. The effluxion of a considerable period of five years does not deprive the evidence of its potential probative force.”

He did not repeat these points in terms to the jury. However, before the evidence was heard, he directed them about its potential relevance to the issue whether the defendant had a propensity (or “tendency”) to commit an offence of the kind with which he was now charged, warning them of the need to guard against “unfair prejudice”, or treating it as in itself proving his guilt of the instant offence.

7.
When summing up this aspect at the end of the trial, he again explained the potential relevance of the incident to the question of his propensity or tendency to commit an offence of the kind now charged, and said:

“You must first consider whether the State has proved, so that you feel sure, the facts relied on by the State in the Hilbert Haynes incident. If you are not sure of the evidence relied on by the State in the Hilbert Haynes evidence, then you must reject the evidence and go on to consider other issues in the case. If you are sure of the evidence that the State has placed before you on the Hilbert Haynes issue, bearing in mind that the burden is on the State to prove these matters to the extent that you feel sure, that burden never shifting from the State at any time, you must then go on to consider whether the evidence of the defendant’s conviction for a disciplinary offence in prison establishes that the defendant has the propensity or tendency that the State is saying he has. You must first decide whether the propensity is proved so that you are sure of it. If it is proved, you must secondly decide whether if at all, and if so, to what extent that helps you when you are discussing whether the defendant is guilty of the offence charged …”

He added:

“Now, please bear in mind, Mr Foreman and Jurors, that this evidence on the Hilbert Haynes issue is but a small part of the State’s evidence in this case. You will appreciate that it is not direct evidence that the defendant committed the offence which you are now trying, but it is evidence of circumstances concerning the defendant which you are entitled to take into account when deciding whether he did. It is part of the circumstantial evidence that the State is relying on in this case.”

The Court of Appeal saw no error in this part of the summing-up. They noted that the judge had reminded the jury that the evidence on this issue was but a small part of the State’s evidence, and that it was not evidence that the defendant had committed the offence. His directions were clear and put the evidence of this incident in the appropriate context for the jury.

8.
Before the Board Mr Owen criticises the judge’s direction as lacking in detail. He refers to the English Crown Court Compendium section on directions on bad character: “The issues to which the evidence is potentially relevant must be identified in detail and the jury directed about the limited purpose(s) for which the evidence may be used …” (para 12-2: Direction 4). In particular, the judge failed to draw the attention of the jury to the lengthy period between the two incidents, and the apparently isolated nature of the second incident. These were aspects which would normally throw doubt on the relevance of the evidence, and which the judge rightly had in mind when deciding whether to admit the evidence. It was incumbent on him to address them specifically in his instructions to the jury.

9.
The Board sees some force in the criticism of lack of detail. The evidence of the Haynes incident took up some time at the trial, and there was a risk that it might have diverted attention from the limited purpose for which it was potentially relevant. It might also have been better if the judge had referred in terms to the significant gap between the two incidents. However, the jury would have been well aware of the difference in time, which was indeed emphasised by counsel for the appellant in his own closing remarks. The Board also notes that no criticism was made at the time by counsel of the judge's treatment of this issue, in spite of an invitation from the judge to indicate any matters which needed to be corrected or qualified. The Board agrees with the Court of Appeal that these possible criticisms are not sufficient to undermine the fairness of the summing-up as a whole, or to throw any doubt on the conviction.

The new evidence

10.
Mr Owen seeks to introduce new medical evidence, which, it is said, could have provided the basis of a defence of diminished responsibility under section 4A(1) of the Offences against the Person Act 1925, as amended. That provides that, where a person "kills or is a party to the killing of another", he is not to be convicted of murder if "he was suffering from such abnormality of mind … as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing", the burden of proof being on the defence (section 4A(2)). The new evidence comprises a report of Professor Eastman dated 22 November 2015, together with the medical records referred to by him, and three shorter supplementary reports by him responding to points raised.

11.
The principles relating to the admission of new evidence on appeal are well-established. Section 47 of the Supreme Court of Judicature Act of Trinidad and Tobago gives the Court of Appeal power in a criminal appeal to receive fresh evidence "if it thinks it necessary or expedient in the interest of justice". In Pitman v The State [2008] UKPC 16, para 31, the Board made clear that the "long accepted" requirements, that fresh evidence should appear to be capable of belief and that a reasonable explanation be furnished for the failure to adduce it at trial, were not necessarily conclusive, and that an appellate court had the "overriding" statutory power to admit the new evidence "if it is in the interest of justice".

12.
As Mr Owen recognises, such an application faces a particularly high hurdle where the new case, not merely was not advanced at trial, but is inconsistent with the case then advanced. This was explained by Lord Toulson giving the judgment of the Board in Brown (Richard) v The Queen [2016] UKPC 6, by reference to the guidance given on corresponding provisions by the Court of Appeal of England and Wales in R v Erskine and Williams [2009] EWCA Crim 1425; [2010] 1 WLR 183:

"33. In Erskine and Williams the court held that the decision whether to admit fresh evidence on an appeal was fact specific and that the court has a wide discretion, focusing on the interests of justice. The fact that the issue was not raised at trial does not automatically preclude its reception. However, if an appellant were allowed to advance on appeal a defence which could and should have been put before the jury, the trial process would be subverted. If a defence was not raised at trial which could have been raised, or evidence was not deployed which was available to be deployed, it is unlikely to be in the interests of justice to allow it to be raised on appeal unless a reasonable and persuasive explanation was given for the omission.

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

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

35. No rule of law prevents a defendant from advancing at the trial a primary defence and an alternative fall back defence if the primary defence fails, but there are obviously major practical difficulties in pursuing inconsistent defences at the same time …"

On the facts of Brown the Board held that the defendant had failed to show either that he would have had a viable defence of diminished responsibility, or that it would be "in the interests of justice that he should be given an opportunity now to advance a case contrary to that which he has steadfastly maintained" (para 46).

13.
More recently in Pitman and Hernandez v The State (Trinidad and Tobago) [2017] UKPC 6; [2018] AC 35, Lord Hughes giving the judgment of the Board spoke of the problems created by the late admission of such evidence:

"… the Board sees considerable force in the observations of both Archie CJ in Pitman and Narine JA in Hernandez that it is unsatisfactory that the mental condition of defendants should be raised for the first time only on appeal, and often many years after the trial. Very similar concerns were expressed by Lord Judge CJ in the English context in R v Erskine [2010] 1 WLR 183. The admission of fresh evidence on appeal is a matter of discretion. Not only must the evidence appear credible but the explanation for its absence at 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." (para 48)

14.
On the other side, Mr Owen relied on two cases from Trinidad and Tobago in which new evidence was admitted by the Board: Brown (Nigel) v State of Trinidad and Tobago [2012] UKPC 2; [2012] 1 WLR 1577, and Daniel v The State (Trinidad and Tobago) [2012] UKPC 15. The first, in the Board's view, is of limited assistance, as the new evidence was directed to the issue, not of diminished responsibility, but of fitness to plead, and in turn raised doubts about the defendant's ability at the time of the trial to understand the case against him or to give adequate instructions for his defence. Daniel is more directly in point, because the Board decided to admit new evidence (as it happens, by the same expert as in the present case) relating to a possible defence of diminished responsibility not run at trial. The Board was satisfied that the decision not to run the defence at trial was not a tactical decision, but based on the limited psychiatric evidence then available (para 22). But Lord Dyson (giving the judgment of the Board) added, at para 23:

“In any event, even if the Board were satisfied that such a tactical decision was taken, it would not refuse to receive the fresh evidence if it thought that the evidence supported a defence of diminished responsibility which had real prospects of success. As was said at para 90 in Erskine: quoting R v Criminal Cases Review Commission, Ex p Pearson [1993] 3 All ER 498, 517. ‘But even features such as these [including a deliberate decision not to advance a defence known to be available] need not be conclusive objections in every case. The overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed, and not for psychological failings to which they may be subject.’ Those salutary words are of particular importance in a case where an appellant has been convicted of a charge as serious as murder. It is, therefore, necessary to consider whether there is a real possibility that the fresh evidence would support a successful appeal in this case.”

It will be necessary to consider that case in more detail later in the judgment.

15.
In Mr Owen’s submission, Professor Eastman’s evidence shows it as “more likely than not” that the appellant was in a psychotic state at the time of the offence, that a psychotic episode is capable of amounting to an “abnormality of the mind” for the purposes of the relevant provision, and that, if satisfied that he was in a psychotic state at the time of the offence, a jury could reasonably conclude that this was sufficient to amount to substantial impairment of his mental responsibility. The explanation for the failure to adduce such evidence at trial, he submits, is that no proper consideration was given to his mental condition, by his legal representatives or the court. Mr Williams, who represented him at the trial, has not responded to emails. Mr Rajcoomar, who represented him on the appeal, has confirmed that the issue of his mental condition was not raised at that stage. These factors, in Mr Owen’s submission, are sufficient to throw serious doubt on the safety of the conviction, and to require in the interests of justice that the matter be remitted to the Court of Appeal so that the issue can be properly considered (as occurred for example in Daniel).

16.
For the respondent, Mr Poole does not accept that the report, even if admitted, would offer a viable defence of diminished responsibility, which would also be quite inconsistent with the case which was advanced at trial. He also emphasises three matters about the background. First he submits, there is no reason to think that possible issues about his mental condition would have been overlooked by the experienced counsel, Mr Williams, who represented him at both trials. Secondly, the appellant himself, who has been found to be of normal intelligence, has never said anything to suggest that the conditions identified by the report had anything to do with the killing of Mr Phillip. Thirdly, even now there is no reason to think that, if there were a re-trial, he would change the position he has consistently maintained throughout.

Professor Eastman’s report

17.
There is no issue as to Professor Eastman’s expertise as a Forensic Psychiatrist, nor as to the care with which he has conducted his assessment. The main report runs to more than 200 paragraphs. It includes a detailed account of his interviews with the appellant himself (four hours) and with his mother (two hours), and of the relevant records. The Board has considered it in detail, but in this judgment will refer only to the points which appear most directly relevant to his mental state at the time of the alleged offence.

18.

The family history showed that his father, who had died over twenty years ago, had played a very small part in his life; but that his mother had a history of psychiatric disorders, including psychotic symptoms. The appellant (who was born in December 1978) had a history of drug and alcohol dependence from his teens. In his interview he spoke of having been admitted to the psychiatric ward of San Fernando Hospital at the age of 15, and of having heard voices sometimes telling him that people wanted to kill him or telling him to attack them. Professor Eastman asked him specifically about his state in the period immediately before the index offence. He said that he had taken marijuana at 4.30 am that night. The report continues:

"90. I then asked the appellant whether he had had any mental experiences around this time and he said 'hearing voices … noises … I wasn't understanding clearly what they said, it was more like noises … different people talking … I can't (recall) if they instructed (me)'. He said that these experiences had occurred during the night of the alleged offence but he had not had them when the prison officer had come to his cell. He then said that the experiences had started again the night after the index offence and after him having been in hospital. He said he next took drugs the following day, and the voices had returned.

91. In response to a direct question he said that the voices had talked about the victim about once two months prior to the index offence. I asked him what sort of things the voices had said and he replied 'move away from him because he wants to kill you'. However, the appellant said that he had not heard this voice during the period of two months up to the index offence."

Questioned more generally about the index offence he said that he "could not remember whether he had or had not committed it …" (Later in the report, Professor Eastman commented that it was more likely than not that he did have recollection of the index offence: para 203).

19.
He was also asked about the Haynes incident:

"97. The appellant had already said that he had taken drugs, cannabis, an hour before the alleged offence. He said that he had thought he had been hearing voices. He said Haynes had been in the cell opposite him but he had not known him well. He then said he had heard voices talking about Haynes, in terms 'not a good person … don't trust him'.

98. When I asked the appellant whether he had heard the voices when he had attacked Haynes he replied 'yes'. When I had asked whether he had heard the voices close to the time of the assault he told me that they had compelled him to attack because of the danger to him …

100. I asked the appellant whether, if he had stabbed Haynes as a result of voices the same might be true in relation to the index offence, and he replied 'could be'."

20.
Summarising the extracts from his medical records, the report notes his admission to St Ann's Hospital in July 2003 following a court order, as recorded in a letter of Dr Bissessar dated 21 July 2003. The letter recorded that this was his first admission and that he "was on several charges"; that on admission his mental state examination was normal, but that further examination had revealed that "this patient clinically had an anti-social personality disorder". The letter concluded:

"In my opinion, he was of sound mind at the time of the alleged offences. It is recommended that, while he is in the justice system, he should continue to be reviewed by a psychiatrist. He no longer has to remain in St Ann's Hospital."

The report refers to later running records which noted, inter alia, complaints about nightmares, but without any indication of further investigation; and lastly a reference to “a diagnostic conclusion in terms ‘personality disorder - sociopathic’”, with an additional instruction “P(Plan) clinical psychologist to see”, but without any indication that it was followed up by any clinical psychological assessment.

21.
In a section headed “Opinion”, Professor Eastman notes the difficulty of assessing the case because of the lack of detailed assessment at the relevant time, and regrets that at the time of his admission to St Ann’s Hospital there had been no detailed questioning about his complaint of nightmares, given their likely consistency with other possible symptoms of psychotic episodes. Under the heading “Psychosis”, the report indicates as “the most likely diagnostic conclusion” that “he experiences, and has experienced since probably his mid-teens, psychotic symptoms in episodes, most likely precipitated by drug ingestion” (para 167). Although his assessment at St Ann’s Hospital during the remand period had “apparently revealed no evidence of psychosis” (para 174), the report suggests that the assessment was inadequate for reasons which are set out. Under the heading “intelligence”, it is noted that there was nothing to suggest that the appellant’s intelligence was less than normal (para 183).

22.
The final part of the report is headed “Legal implications”, and begins with a section on “Abnormality of mind”. Having expressed the view that a psychotic episode can amount to an abnormality of mind, and noted that it is not possible to be confident about the diagnosis of personality disorder, the report continues (in what appears to the Board to be the most significant passage):

“189. What is clearly at issue, however, given the apparently episodic nature of the appellant’s likely experience of psychosis, is whether, specifically at the time of the alleged offence, as well as the time of the attack upon Haynes (so far as that is relevant to determining the appellant’s likely state of mind at the time of killing the victim of the index offence), he was suffering from a psychotic episode, and therefore an ‘abnormality of mind’.

190. The history I gained from the appellant pointed to it being more likely than not that, at the time of the attack upon the victim of the index offence, he was in a psychotic state.

191. Specifically, first, he gives a history of having taken cannabis, as well as possibly cocaine, close to the time of the attack in the index offence. Specifically, he said that he had taken drugs at about 4.30 am, the index offence having occurred (on his account, I have not checked this from the legal papers) at 11 am. And, even if the time gap between his most recent ingestion of drugs and the killing was longer than just described, the fact that psychosis precipitated by drugs can persist for hours or days, sometimes much longer in an individual with genetic or other vulnerability, determines that the time profile is not at all crucial.

192. Further, he describes hearing voices, or noises consequent upon such drug ingestion around the time of the index offence.

193. As regard whether the voices instructed him to attack the victim, in my opinion, unless there was a clear rational basis in ordinary thinking on his part likely, and sufficient to have driven the assault (for example, in relation to some dispute over cigarettes), it is reasonable to conclude that it is more likely than not that he did experience auditory hallucinations, and that these at least disinhibited him in regard to the assault.”

23.
It is unnecessary to refer in detail to the other reports, save to note that (in his second report dealing with specific points raised by the respondent) in response to the question whether the appellant was suffering from symptoms of a mental illness at the time of the offence, he says:

"… in my opinion, the appellant was, more likely than not, in a psychotic state at the time that he killed the victim. And such psychosis both likely disinhibited his behaviour, even for example if there was also an ordinary explanation of his attack …, and also likely determined that he felt abnormally threatened by the victim by virtue of specific psychotic symptoms." (para 25)

24.
Finally it is necessary to refer to a letter from St Ann's Hospital to the Prison Medical Officer dated 5 December 2005, referring to the admission of the appellant "for psychiatric evaluation after complaining that he was hearing voices". The letter (signed by a Dr Dosumu) recorded that he claimed to have been hearing voices since the age of sixteen and that recently the voices had been "compelling" him to stab prison officers, and telling him to attack officers and other inmates. The letter stated that in interview "he displayed fair judgement and insight, though he had no remorse for the crimes he was alleged to have committed". The doctor's opinion was that he had "anti-social personality disorder" but was "not suffering with a psychotic illness". This letter is not addressed in terms in Professor Eastman's report.

Discussion

25.
The Board finds this in some respects a troubling case. Professor Eastman's report is thorough and balanced, and provides convincing evidence that the appellant had experienced psychiatric problems from an early age, which could potentially have been relevant to his condition at the time of the index offence, and of which the prison authorities were aware. In addition, the 2005 letter from St Ann's Hospital shows the appellant himself drawing attention to these issues at that time, well before his first trial. It is unfortunate that there is no information as to the extent to which any of this was known to those advising him at the time of his trials, or what if any attention was given by them to his mental condition. It is unfortunate that his then counsel, Mr Williams, has not responded to requests for comments. However, the critical issue, as Professor Eastman accepts, is what light if any this throws on the appellant's state of mind specifically at the time of the index offence, and whether it amounts to evidence sufficiently compelling that the interests of justice require its admission at this late stage to enable him to advance a new defence based on it.

26.
As already noted, reliance has been placed on the decision in Daniel. It is necessary to provide a brief review of the facts. The defendant was a man of 25 of previous good character, who was convicted in December 2005 of the murder (with a younger friend, Osei) of his 16-year old cousin, Suzette, with whom he had had a "close friendship". At his trial the defendant gave evidence that he had not intended to kill his cousin, but that "it was a demon inside my head", and that he did not know what he was doing: "I was seeing a dark object in front of me and I did not know what it was". Consideration had been given to his mental condition before trial, and a number of psychiatric reports had been produced. However, the latest, by a Dr Hutchinson, had expressed the view that it would "not be possible to make a case for insanity or diminished responsibility", because the personality disorders which he had diagnosed "(did) not constitute an abnormality of mind that could support such a position".

27.
Following his conviction, he was examined in November 2008 by Professor Eastman. He concluded (inter alia) that “the appellant’s personality disorder” could properly amount to an “abnormality of the mind” in terms of a potential defence of diminished responsibility, that it seemed “more likely than not” that he was in a psychotic state at the time of the offence, and that “his personality disorder would have made him more vulnerable to entering such a psychotic state under the influence of drugs”. There were supporting reports by two clinical psychologists. The Board was told, and accepted, that the decision not to advance a defence of diminished responsibility at trial was made because it was not supported by the psychiatric reports then available (para 22). Having reviewed the evidence and the submissions in detail, Lord Dyson concluded:

“This is a most unusual case. The appellant was a man of previous good character who, for no apparent reason, killed his cousin with whom he seems to have had a close platonic friendship. He inflicted multiple stab wounds on her in a sustained and violent attack. He then slit some of his own fingers. Self-mutilation is one of the classic indicators of borderline personality disorder. The fresh evidence raises a credible defence of diminished responsibility based on borderline personality disorder and alcohol and drug induced psychosis. It should have been raised at trial. The interests of justice require that it be considered now. It may be that, when tested by cross-examination and any medical evidence that the State decides to adduce, it will be seen that the fresh evidence does not support the defence. In the result, for the reasons that we have given, the case must be remitted to the Court of Appeal for them to hear the evidence (and any further evidence that may bear on the issue) and then decide how to dispose of the appeal.” (para 43)

28.
In the Board’s view that decision offers no parallel for the present case. The facts, as Lord Dyson made clear, were very unusual. In addition, it is important that the proposed defence was in no way inconsistent with the case advanced at trial. The defence had been that the defendant did not know what he was doing. The new evidence provided an explanation and support for that position, which had not been available at trial. By contrast, in the present case the new evidence is directly contrary to the case advanced at trial, and there is nothing to explain the change of position, or even to establish that it is a change which the defendant himself has made.

29.
Crucially, in the Board’s view, there is no evidence that the failure to advance a case of diminished responsibility at the trial was anything other than deliberate, and indeed a fair reflection of the appellant’s own position. It is important that he is accepted as being of normal intelligence, and there is no reason to doubt his understanding of the issues at trial or his competence to give instructions. Although his position changed between the two trials so far as regards his decision whether to give evidence, he stood by the case that he had not killed Mr Phillip. Neither then, nor at any time subsequently, did he link this event to the “voices” of which he had complained to the hospital in 2005. In his interview with Professor Eastman, there is in this respect a striking contrast with the specific link made by him in relation to the Haynes incident. The conclusion of the report, said to be derived from the history gained from the appellant, is expressed in understandably guarded terms: “more likely than not that, at the time of the attack upon the victim of the index offence, he was in a psychotic state”. But the report does not appear to explain how, given the appellant’s self-awareness on this issue (as reflected in the 2005 letter and his answers in the interview), this conclusion could be reconciled with his own failure to make any such assertion at the time or later. Furthermore, as Mr

Poole points out, there is no evidence even now that the appellant has himself changed his position, or would do so if there were to be a retrial.

30.
For these reasons, the Board refuses the application to admit new evidence and dismisses the appeal.

LORD KERR AND LORD LLOYD-JONES: (dissenting)

Introduction

31.
Experience shows that those accused of crime react in a wide variety of different ways. Some readily admit their guilt. Others brazenly proclaim their innocence, even in the face of overwhelming evidence. Some confess to crimes that they have not committed. Others insist on advancing mendacious defences when a perfectly valid alternative defence might have proved successful. All of this serves to show that while the reaction of some to an accusation of having committed a crime may provide a reliable insight into their likely guilt or innocence, this is by no means invariably so.

32.
Jay Chandler was convicted on 17 August 2011 of the murder of Kirn Phillip on 8 October 2004, when they were fellow remand prisoners in a prison in Trinidad and Tobago. The evidence that Mr Chandler had killed Mr Phillip, summarised in paras 3 and 4 of the Board's judgment, was, by any standard, formidable. Despite this, on his first trial he gave evidence that, although he had struck Mr Phillip and had pursued him, he was stopped by prison officers and beaten to the point of unconsciousness. The jury failed to agree and on his second trial Mr Chandler did not give evidence, nor did he call witnesses. He was convicted.

33.
At neither trial nor on his appeal against conviction was the issue of Mr Chandler's mental condition raised. Several reports have now been obtained from Professor Eastman in which he discusses the question whether the appellant, Mr Chandler, might have suffered from an abnormality of the mind amounting to diminished responsibility at the time that Mr Phillip was killed.

The medical evidence

34.
The first of Professor Eastman's reports is dated 22 November 2015. This report was based on, among other matters, interviews with Mr Chandler and his mother; medical records of the appellant; a statement of the appellant in which he admitted assaulting Hilbert Haynes, (this was the incident on which the trial judge's directions on propensity were based); various trial documents, including a transcript of the judge's charge to the jury; and some medical records of the appellant's mother. Professor Eastman had requested further documents, including the appellant's school records and some other medical records in relation to the appellant's mother but these were not available before he prepared his first report. All of this speaks clearly to the careful preparation undertaken by Professor Eastman and this is complemented by the thorough and comprehensive nature of his reports.

35.
It is important to note that the professor did not accept the appellant's account uncritically. To the contrary, he made careful observations about a number of inconsistencies and implausibilities about that account. Ultimately, however, after a painstaking and balanced investigation of the appellant's

case, he concluded that it was “more likely than not that, at the time of the attack upon [Mr Phillip] he was in a psychotic state”.

36.
The contents of the various medical reports and records have been considered extensively in the judgment of the majority of the Board. They need not be rehearsed here. It has been suggested that Professor Eastman expressed his conclusion in “understandably guarded terms”. If, by that it is proposed that the professor had reservations about the correctness of his opinion, we do not agree. Clearly, Professor Eastman had to reach a decision based on the weighing of various competing factors. The most that he could do, given that he was examining the issue for the most part on a retrospective analysis of material, was to express an opinion as to where the balance of the various factors lay. It would be impossible for him (or any similarly qualified expert) to arrive at a wholly confident, unqualified conclusion. The decision that he reached was the product of careful and well-reasoned analysis, however. In our view, Professor Eastman’s conclusion establishes that, given the opportunity, there is at least a reasonable possibility that the appellant could show to the requisite standard of proof, that at the time he killed Mr Phillip, he was suffering from diminished responsibility. For reasons that we will discuss, we consider that, in the particular circumstances of this case, this is sufficient to require the admission of Professor Eastman’s evidence and, in consequence, to require the appeal to be allowed.

37.
It is, of course, the case that there may be much material to challenge Professor Eastman’s opinion. Any court faced with the task of deciding whether it has been shown that Mr Chandler was suffering from diminished responsibility would have to pay close regard to the failure of the appellant or his legal advisers to raise the question of mental condition until the appeal before the Board. Contrary medical opinion, already foreshadowed in the reports of Dr Bissessar and Dr Dosumu, may well present a significant challenge to the accuracy of the professor’s opinion. The appellant would be required to confront the fact that, not only did he not raise the question of his mental state at the time of the killing but that he ran a defence wholly inconsistent with a case that he had killed the victim while suffering from an abnormality of the mind which substantially impaired his mental responsibility. The circumstance that he has failed, even to the time of the hearing of his appeal by the Board, to make a frank admission that he did indeed kill Mr Phillip, would undoubtedly be a significant factor in deciding whether he suffered from diminished responsibility.

38.
All these considerations are for the future. They cannot at this stage detract from the central conclusion of Professor Eastman. Of course, such considerations may serve to undermine his opinion. Or the failure of the appellant to raise the issue of his mental state and his espousal of a case in flat contradiction of that which it is now proposed to advance may make it impossible to accept that case. But these are essentially matters of speculation. Until all issues are fully canvassed and assessed, Professor Eastman’s opinion cannot be discounted or diminished.

39.
Mr Poole for the respondent advanced three principal arguments against the admission of Professor Eastman’s evidence. These are referred to in the Board’s judgment at para 16. As to the first of these (that possible issues about the appellant’s mental condition would not have been overlooked by his counsel), the plain fact is that this was not investigated before the appellant stood trial. And Mr Williams has steadfastly refused to answer queries from the appellant’s current legal team as to why this issue was not explored. It is at least highly questionable that any inference, adverse to the case

that is now sought to be made on behalf of the appellant, can be drawn by making assumptions about Mr Williams' performance as counsel for Mr Chandler. In any event, as Professor Eastman's reports demonstrate, if investigation of this issue had been carried out, there is every reason to suppose that the basis for a diminished responsibility defence would have become known.

40.
The second reason that Professor Eastman's report should not be admitted, said Mr Poole, was that the appellant, although of normal intelligence, had never suggested that his mental state had anything to do with the killing of Mr Phillip. We have accepted that this could well be a significant factor in any assessment of whether Mr Chandler in fact suffered from a mental abnormality. It might not be, however. At this point, it is impossible to predict how important this feature will be. One may also comment that the failure of the appellant or his lawyer to raise the question of diminished responsibility does not have any direct bearing on whether he in fact suffered from a mental abnormality.

41.
As we have observed (at para 31), persons accused of a criminal offence sometimes decide to put forward a defence which is less plausible than that which might constitute a genuine defence to the charge. In this instance, the appellant chose to contest the case against him on the basis that he did not kill Mr Phillip. If he had succeeded in that defence, he would have been completely exonerated. The fact that he did not advance a case of diminished responsibility does not per se show that he did not suffer from a mental abnormality sufficient to establish the defence. It may simply reflect an attempt to secure an acquittal. To deny that he had killed Mr Phillip would be unworthy in those circumstances, of course. But it does not necessarily show that he did not have diminished responsibility.

42.
Mr Poole's third argument that Professor Eastman's report should not be admitted was that there was "no reason to suppose that if his conviction was quashed, and there was a re-trial, he would advance a different defence from that which he has always advanced." We are afraid that this argument must be rejected as wholly fanciful and improbable. Agreeing, as we do, with the Board's judgment as to the adequacy of the trial judge's directions to the jury on the issue of propensity, the only defence available to the appellant in the event of a retrial is one of diminished responsibility. He would have simply no alternative to accepting that he had killed Mr Phillip but that, at that time, he had suffered from an abnormality of the mind sufficient to support the defence of diminished responsibility. A quashing of his conviction would be on terms that the conviction could not be regarded as safe because the question of the appellant's mental state and whether he suffered from diminished responsibility had not been investigated. The opportunity to repeat his defence that he did not kill Mr Phillip would no longer be available.

The authorities

43.
In R v Erskine and Williams [2009] EWCA Crim 1425; [2010] 1 WLR 183, Lord Judge CJ, said at para 82:

"… notwithstanding the forensic difficulty of raising mutually inconsistent defences which involve denial of involvement in the killing on one hand, and diminished responsibility for the killing on the other, the trial process demands that the defendant, no doubt after considering legal advice, must decide which defence to advance. In an ideal world, of course, if he were responsible for the killing,

he would admit it. But even if he is responsible, he may, and often does, choose to plead not guilty. What he cannot do is to advance such a defence and then, after conviction, seek to appeal in order to advance an alternative defence, such as diminished responsibility. There is one trial, and that trial must address all relevant issues relating to guilt and innocence. Once convicted by the jury, he is guilty of the murder he has denied committing. The defence suggestion that he is not guilty has been rejected, and he has elected not to advance diminished responsibility. If he pleads guilty to murder, he has ignored the opportunity available to him to advance diminished responsibility as a defence. The trial process is concluded."

44.
If this passage was to be taken as suggesting that in no circumstances can a defendant be permitted to advance a case of diminished responsibility, having previously run a defence of non-involvement in the killing, we would not agree with it. But we do not understand Lord Judge CJ to have meant that, for he had said at para 39 that the "discretion to receive fresh evidence is a wide one focussing on the interests of justice." And at para 90, he made these observations:

"… where it is proposed to raise diminished responsibility for the first time on appeal, the court is examining the appellant's mental state at the time of the killing in accordance with section 2 of the Homicide Act 1957. It should normally be necessary to refer the court to no more than the terms of section 23 of the 1968 Act, and the approach suggested in R v Criminal Cases Review Commission, Ex p Pearson [1999] 3 All ER 498, 517:

'Wisely and correctly, the courts have recognised that the statutory discretion conferred by section 23 cannot be constrained by inflexible, mechanistic rules. But the cases do identify certain features which are likely to weigh more or less heavily against the reception of fresh evidence: for example, a deliberate decision by a defendant whose decision-making faculties are unimpaired not to advance before the trial jury a defence known to be available; evidence of mental abnormality or substantial impairment given years after the offence and contradicted by evidence available at the time of the offence; expert evidence based on factual premises which are unsubstantiated, unreliable or false, or which is for any other reason unpersuasive. But even features such as these need not be conclusive objections in every case. The overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed, and not for psychological failings to which they may be subject.'"

45.
In the present case there is no evidence that there was a deliberate decision on the part of the appellant not to advance "a defence known to be available". To the contrary, all indications are that the possibility of putting forward a defence of diminished responsibility was simply not investigated. Likewise, there is no reason to suppose that if evidence such as that now available from Professor Eastman had been proffered, it would have been nullified or effectively contradicted by evidence then available to the prosecution. Further, there is nothing to suggest that his evidence is "based on factual premises which are unsubstantiated, unreliable or false". Finally, so far from that evidence appearing unpersuasive, it appears to us (at this stage certainly) to be balanced, cogent and compelling.

46.
The majority of the Board in the present appeal relied particularly on the judgment of Lord Toulson, delivering the opinion of the Board in Brown (Richard) v The Queen [2016] UKPC 6. It should be noted, however, that in stark contrast to the present case, in Brown there was no "psychiatric evidence adequate to support a defence of diminished responsibility" - see para 45 of Lord Toulson's

judgment. On that account, at para 46 of his judgment, Lord Toulson said that the appellant had failed to show that “he had or would have a viable defence of diminished responsibility” (emphasis added). In our view, in the present case the appellant plainly does have a viable defence on the grounds of diminished responsibility.

47.
Another case considered by the majority of the Board in this appeal is that of Daniel v The State (Trinidad and Tobago) [2012] UKPC 15. The facts of that case have been fully set out in the majority’s judgment at paras 26 and 27 and need not be repeated. It is suggested that the judgment in Daniel offers no parallel for the present case - para 28. We do not agree. Of course, there are points of distinction but we consider that these are of little significance. The similarities between the two cases, on the other hand are extremely important.

48.
In the first place, in both cases Professor Eastman concluded that there was evidence that the appellants’ abnormal mental states amounted to drug induced psychosis - see para 17 of Lord Dyson’s judgment. It was more likely than not that both were “in a psychotic state at the time of the offence” - again para 17. Furthermore, in both instances, there is “no basis for holding that a deliberate tactical decision was taken not to run the defence of diminished responsibility because it would … undermine the principal defence” - para 22 of Lord Dyson’s judgment.

49.
In the majority’s judgment in the present appeal, it is said (at para 29) that there is “no evidence that the failure to advance a case of diminished responsibility at the trial was anything other than deliberate”. This is a significantly different approach from that of the Board in Daniel. It implicitly suggests that it is for the appellant to show that the decision not to advance the diminished responsibility defence was not deliberate, whereas in Daniel it was decided that the proper approach was to ask whether there was any basis for holding that it was. We consider that the approach of the Board in Daniel to this question is correct. Unless there is a sound basis for concluding that the appellant neglected to advance a defence that he knew was available to him at the time of his trial, it should not be presumed against him that he was aware of the possibility of such a defence and deliberately chose not to proffer it.

50.
In any event, all the available evidence suggests that the question of a diminished responsibility defence was not considered at all by the appellant or his defence team. The majority’s judgment suggests that the appellant was aware of “this issue” - para 29 and refers to the letter from Dr Dosumu of 5 December 2005. That letter refers to the appellant having undergone psychiatric evaluation after complaining that he had been hearing voices. It does not address the question of whether the appellant was alive to the possibility of advancing a diminished responsibility defence at either of his trials. In our opinion, there is no reason to conclude that the appellant knew that a diminished responsibility defence was available to him but deliberately decided not to advance it.

51.
Finally, we note that in Daniel the Board concluded (at para 23) that even if such a tactical decision had been made, it would not refuse to receive the fresh evidence if it considered that that evidence supported a defence of diminished responsibility which had a prospect of success.

Disposal

52.
We would therefore have allowed the appeal and remitted the case to the Court of Appeal of the Republic of Trinidad and Tobago on the issue of whether, at the time of the killing of Mr Phillip, the appellant was suffering from an abnormality of the mind which substantially impaired his mental responsibility.