JCPC / 2025 / 0022

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THE COURT OF APPEAL OF THE REPUBLIC OF TRINIDAD AND TOBAGO

B E T W E E N:

URIAH WOODS

Appellant

and

THE STATE (No 2)

Respondent

APPELLANT'S CASE

References to the Record of Proceedings are in the format: [EB/ page number/paragraph or line number]
References to the Joint Bundle of Authorities are in the format: [AB / Tab number/ EB page number]

STRUCTURE OF THE APPELLANT'S CASE

I. SUMMARY OF THE APPEAL

1. The Appellant appeals with the leave of the Board dated 31 July 2025 [**EB/493**]. There are two grounds of appeal.

    i. Whether the fresh evidence raises a serious issue as to whether the Appellant was not guilty of murder but was guilty of manslaughter on the grounds of diminished responsibility ('**Ground 1**').

ii. Whether the trial judge materially misdirected the jury as to the elements of provocation ('**Ground 2**'). This in turn involves two sub-grounds:

a. The effect of the fresh evidence on the subjective ingredient as to whether the Appellant was as a matter of fact provoked.

b. Whether the trial judge erred in his direction on the objective inquiry, in particular whether the trial judge was wrong to direct the jury to consider whether the reasonable person might have reacted "*exactly*" as the Appellant did.

2. Ordinarily, provocation would be dealt with first. However, while the fresh evidence is material to both grounds, it is more intimately bound up with the issue of diminished responsibility. In turn, the Appellant will <u>first</u> deal with diminished responsibility (Ground 1), during which the Appellant will address the fresh evidence and its admissibility. The Appellant will <u>second</u> turn to provocation (Ground 2), which, while partially based on the fresh evidence, also contains more profound issues of law.

II. <u>GROUND 1: DIMINISHED RESPONSIBILITY</u>

A. The law

3. Section 4A(1) of the Offences Against the Person Act provides that [**AB/Tab 1/EB 613**]:

> "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."

4. In ***Robinson v The State*** [2015] UKPC 34, Lord Hughes stated at [2] [**AB/Tab 23/EB 989**] that;

> "By section 4A(2) the onus of establishing diminished responsibility is placed upon the defendant; as in the case of any other burden of legal proof which is laid upon a defendant, this is to be discharged by proof on the balance of probabilities. By section 4A(3) diminished responsibility, if established, reduces the offence from murder to manslaughter."

5. It is submitted that the fresh evidence makes out a sufficient case that, had it been available at trial, "*the defence of diminished responsibility* ***might well have succeeded***": ***R v Campbell*** [1997] 1 Cr App R 199 at [**AB/Tab 32/EB 1102E-F**] per Lord Bingham CJ. Given that this ground is entirely based on fresh evidence, the Appellant will first summarise the fresh evidence.

B. Summary of the fresh evidence

(i) Introduction

6. The Board has before it the expert reports of Dr Richard Latham (consultant forensic psychiatrist) dated 28 March 2020 [**EB/397**], Ms Patricia LeeWah-Cooper (clinical psychologist) dated 18 January 2024 [**EB/418**], and Dr Stephen Attard (consultant forensic psychiatrist) dated 1 February 2024 [**EB/429**]. The Board also has the Joint Expert Statement dated 2 October 2024 [**EB/461**]. Given that the Board refused leave to appeal on "*the arguments based on unfitness to plead or to stand tria*l" [**EB/493**], the following summary does not focus on those aspects. However, as the Respondent accepted in their Objections at [12] [**EB/487**] "*Questions over the Appellant's intellectual and cognitive ability may, however, go to the question of the instructions given by the Appellant to his trial counsel and more generally the failure to raise diminished responsibility at trial.*"

(ii) The Joint Expert Statement

7. In the Joint Expert Statement dated 2 October 2024, the experts conclude at [1] [**EB/461**] that the Appellant has a "*mild to moderate learning (intellectual) disability*" and a delusional disorder "*mixed – jealous and persecutory – type*". Further, at [1.1.1], both abnormalities of mind were likely present at the time of the offence. The experts continue that [**EB/461**]:

> "**1.1.2. Whether that abnormality of mind influenced:**
> **1.1.2.1. His general perceptions and understanding;**

The nature of his intellectual impairment means that his general cognitive function, affecting his understanding, communication and reasoning would have been severely impaired.

1.1.2.2. His ability to exercise rational thought;

Mr. Woods' intellectual impairment and delusional beliefs were likely to have had an impact on his ability to exercise rational thought. Delusions are, almost by definition, irrational. They affected his ability to appraise the situation he was in, objectively.

1.1.2.3. His ability to appreciate consequences; and

Mr Woods' delusional beliefs would not have absolutely prevented him being able to appreciate the consequences of his actions. However, in the moment, he was likely to have been impaired because of the cognitive problems he has, which are identified, in the neuropsychological assessment.

1.1.2.4. His ability to exercise self-control.

There are several findings in the assessments, including the neuropsychological assessment which provide evidence for his ability to exercise self-control being impaired. Most of these are highlighted by the psychological findings but the impact of delusional beliefs on managing or inhibiting his behaviour would also contribute to this question. …

5. …

Delusional disorder is a medical diagnosis. The diagnosis is not based on accepting that Mr Woods had never been violent. The delusional disorder type that has been diagnosed is however known to be associated with violence. The opinion on the significance of his mental disorder is that it was a contributory factor. The relevance of other factors, such as any tendency he had towards violence more generally is not discounted. There has been a suggestion that the delusional disorder was 'triggered' by the poisoning in 2005. This is not our opinion, and the onset of the delusional disorder cannot be accurately described. However, it was likely present at the time of the index offence"

(iii) Psychiatric Report of Dr Richard Latham, 28 March 2020 [EB/397]

8. Dr Latham assessed the Appellant in Frederick Street Prison, Port of Spain, Trinidad. In his report dated 28 March 2020, Dr Latham concludes that [**EB/409**]:

"46. In summary, Mr Woods has held and continues to hold beliefs about the deceased. These beliefs seem likely to have arisen before the offences. These beliefs relate to a perception of her **infidelity** as well as believing that she wanted and had tried to **kill him by poisoning**. These beliefs are likely to be relevant in understanding why he killed her although he does not seek to justify his actions on the basis of these

> beliefs. The difficulty however is twofold: i) Were they fixed and false beliefs (delusions)? and ii) In the absence of any clear recollection from Mr Woods about his state of mind at the time, any opinion on the association between his beliefs and his actions at the time is difficult. However, it seems likely that, if these beliefs are delusions, the **diagnosis of delusional disorder** is appropriate. This would then provide the foundation for the partial defence of **diminished responsibility**." (Emphasis added).

9. Dr Latham continues at [49] that if the Appellant's partner had multiple relationships for many years and she was trying to poison him, then the Appellant could not be considered delusional. Dr Latham continues [**EB/411]**:

> "49. … There are however some clinical factors that suggest he may be delusional even if there was a real event that served as a trigger. Delusionally jealous people often interpret small pieces of evidence in a way that is highly distorted. They may also seek these small pieces of evidence in a very determined way. Mr Woods was adamant that he could smell other people on his wife and that he could tell she was having sex with other men from her underwear. He was unshakeable in his beliefs about this. This kind of assertion is commonly seen in people who are delusionally jealous."

10. Dr Latham accepts at [53] that "*there is some uncertainty about the nature of the beliefs that Mr Woods has and the relevance of determining facts"* but concludes that the Appellant suffers with *"delusional disorder*", which was likely present at the time of the index offence [**EB/412**].

11. In relation to the nexus between the delusional beliefs and the index offence, Dr Latham states at [54] that the belief that Sandra Miller was trying to poison him and / or being unfaithful over a period of years would be "*likely to have contributed to his anger*" and would have had "*a clear impact on his ability to make rational judgement*": his "*delusional beliefs were likely to have impaired his ability to control himself*." [**EB/413**].

12. Dr Latham notes at [55] that delusional beliefs "*severely impair*" "*the ability to consider conflicting information or adapt your decision-making based on possible consequence*s" [**EB/413**]. By virtue of the delusions, the Appellant would lack the "*inhibitory factors*" to be expected if he did not have those delusions.

13. In relation to the Appellant's cognitive functioning, Dr Latham notes at [51] that the Appellant appears to be in the "*lower than average range of intelligence*", and that a "*full assessment of cognitive function … suitable in people with interrupted education*" is required [**EB/412**].[1] Later, at [56], Dr Latham states that due to the Appellant's "*low intellectual function*", he would not have the "*cognitive reserves*" to reason and rationalise his delusional beliefs [**EB/414**].

14. Dr Latham concludes that:

> "59. In summary, Mr Woods has beliefs which, in my opinion, are likely to be delusional. These beliefs have been present for many years and if they are delusions lead to the medical **diagnosis of delusional disorder**. The case is unusual however in that I cannot categorically say that I know his beliefs are false. It may be, as is often the case with delusional disorder, that his delusions arose out of real events so that in his mind reality and delusion have become one. If my diagnosis is correct then these delusions were likely to have been relevant at every stage of his trial. I have recommend (sic) that there is a psychological assessment of Mr Woods' intellectual function and personality traits. It may also be of assistance for there to be a second psychiatric assessment considering the issue of delusional disorder." [**EB/415**]

(iv) Psychology Report of Ms Lee Wah-Cooper, 18 January 2024 [EB/418]

15. Ms LeeWah-Cooper assessed the Appellant on 27 July 2023 for three hours. She noted that during testing the Appellant had "*great difficulty in understanding instructions and retaining them in memory*". Full comprehension required information "*to be read slowly, using as simplified language as possible, and broken down into shorter sentences*" [**EB/425**].

16. Ms LeeWah-Cooper concludes inter alia that:

17. First, under the Wechsler Adult Intelligence Scale (4th Ed), the Appellant's "***general cognitive ability is within the "Extremely Low" range of intellectual functioning, scoring a Full Scale IQ (FSIQ) of 53. His overall thinking and reasoning abilities exceed those of only approximately 0.1% of individuals his age.***" [**EB/419**]. This indicates an "*Intellectual Development*

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1. Dr Latham suggests at [51] that a *"psychological assessment of personality factors*" is undertaken.

Disorder", which is a neurodevelopmental disorder leading to difficulties with "*learning, communicating, thinking rationally, understanding social cue ands, making judgements reading or expressing himself. He may also have disordered logic, challenges with problem-solving and planning*" [**EB/425**]. Within this assessment:

i. The Appellant's results on the Working Memory Score activities "*were extremely low suggesting that his ability to hold and to mentally manipulate information stored in immediate memory is significantly below the age-appropriate level*". They indicate "*a marked neurocognitive deficit*": [**EB/421**]. This may result in "*difficulties regulating his emotions*" and "*a diminished ability to inhibit habitual responses*": [**EB/426**].

ii. The Appellant's results on the Processing Speed Index, which measures his ability to discriminate and identify information, make quick and accurate decisions and implement those decisions fell within the "*Extremely Low range*". His score aligns with characteristics of a learning disability: [**EB/422**].

18. Second, the Appellant's Adaptive Behaviour Assessment per the General Adaptive Composite Score gave a score of 73 which is in the low range [**EB/422**]. Within the "*conceptual domain*" "*[h]is ability to make independent choices, exhibit self-control and take responsibility when appropriate is in the Low range*" [**EB/423**]. His "*speech, vocabulary, listening, conversation, and nonverbal communication skills*" and "*reading, writing, and mathematics, as well as functional skills like taking measurements and telling time*" fall within the "*Extremely Low range*". The Appellant's "*ability to seemingly function with everyday tasks may be attributed to repeated practice*": [**EB/425**].

19. Third, the Comprehensive Executive Function Inventory assessment demonstrates his "*overall executive functioning is below average. This executive dysfunction indicates underdevelopment in the skills needed for the mental processes that enable him to focus attention, remember instructions, juggle multiple tasks successfully, regulate his emotions, and resist the urge to*

behave hastily due to frustration" [**EB/424**]. He scored below average for "*working memory*", "*mental flexibility*" and "*inhibition control*". In relation to "*inhibition control*" his score "*reveals that firstly, he has difficulty with keeping himself from doing things that he thinks he shouldn't do (behavioural control).*" [**EB/424**]. The Appellant's "*executive functioning falls significantly below the expected level for his age*" and suggests that he "*may struggle with self-control, exhibit greater impulsivity, and experience heightened disorganization, all of which can lead to increased instances of aggressive behaviour*": [**EB/425-426**].

20. Fourth, overall, "*Although Mr. Woods' Intellectual functioning and conceptual skills may be classified as severe, his social and practical domain are slightly better developed. Therefore, his overall results indicate that Mr. Woods meet criteria for* ***Intellectual Disability: Moderate***.": [**EB/426**].

(v) Psychiatric Report of Dr Attard, 1 February 2024 [EB/429]

21. Dr Attard assessed the Appellant on 12 January 2024 via zoom for 2 hours: [79] [**EB/448**].

22. In the light of Ms LeeWah-Cooper's report, Dr Attard concludes that the Appellant meets the criteria for **mild intellectual disability**, and that his IQ score "*suggests that, out of 1000 individuals his age, 999 would have thinking and reasoning abilities which exceed his. This score is at the more impaired end of the mild intellectual disability range, which is considered to be from 50-70.*": [87]-[89] [**EB/449-450**]

23. Dr Attard further concludes that:

    i. The Appellant likely meets the criteria for a **delusional disorder**: [93] [**EB/450**].

    ii. On the evidence, "*Mr Woods' belief regarding the victim of the index offence wishing to kill him and poisoning him in February 2005 to be a fixed false belief based on an inaccurate interpretation of an external reality, despite evidence to the contrary, which he has maintained for almost twenty years*": [101] [**EB/452**]. As a person with an intellectual

disability, the Appellant was more vulnerable to developing a delusional disorder: [102] [**EB/452-453**].

iii. There is **no significant evidence of malingering** or exaggeration: [107] [**EB/454**].

iv. "*It is likely that both his intellectual disability and likely delusional disorder had a significant impact on Mr Woods' mental state and functional ability at the time of the index offence*": [112] [**EB/454**]. The Appellant's "*mental disorders impaired his ability to form rationale (sic) judgement, and impaired his behaviour and consideration of consequences at that time*": [114] [**EB/455**].

C. Submissions on diminished responsibility

24. The Appellant submits that the fresh evidence is credible and compelling. It demonstrates inter alia that:

i. The Appellant has a life-long condition of a mild to moderate intellectual disability. He has an IQ of 53, which places him in the bottom 0.1 to 4 percent of people generally, or the "*extremely low range*". This impaired intellectual functioning would have been operative at the time of the offence. The Appellant draws attention to the Board's decision that in ***Pitman v The State*** [2008] UKPC 16 where the Board allowed the appeal and remitted the matter to the Court of Appeal on the basis inter alia that the appellant had an IQ of 52, which rendered the conviction for murder "*potentially unsafe*" and "*requiring review*": paras [27]-[34][**AB/Tab 20/EB 950-953**].

ii. The nature of the intellectual impairment means that his general cognitive functioning affecting his understanding, communication and reasoning would have been severely impaired, as well as to exercise rational thought. The assessment indicates a marked neurocognitive deficit which can result in difficulties regulating emotions and a

diminished ability to inhibit habitual responses. The Appellant's abilities to exhibit self-control are in the low range. His scores align with a learning disability. The Appellant's "*executive functioning falls significantly below the expected level for his age*" and suggests that he "*may struggle with self-control, exhibit greater impulsivity, and experience heightened disorganization, all of which can lead to increased instances of aggressive behaviour*": [**EB/425-426**]

iii. The Appellant also likely has a diagnosis of delusional disorder, mixed type (persecutory and jealousy). This would likely have impacted his ability to act rationally – delusions are almost by definition irrational, affecting the Appellant's ability objectively to apprise the situation he was in. The delusions equally impact on the Appellant's ability to manage to inhibit his behaviour. "*The opinion on the significance of his mental disorder is that it was a contributory factor … In Mr Woods' situation, our opinion is that delusional disorder had a significant impact on him so that violence was more likely*" [**EB/463-464**].

25. It is respectfully submitted that the effect of this evidence is that it renders the Appellant's conviction for murder unsafe such that it ought to be admitted and the matter remitted to the Court of Appeal to determine the way forward.

D. Admissibility of the fresh evidence

(i) The law

26. In ***Lundy v The Queen*** [2013] UKPC 28[2], Lord Kerr outlined the sequential steps that apply to an application to adduce fresh evidence [**AB/Tab 17/EB 857**]:

i. Is the evidence credible?

[2]. Described by the Board as "*the leading case on the admission of fresh evidence on appeal**": Edwards v The Queen*** [2022] UKPC 11 at [42][**AB/Tab 10/EB 755**].

ii. If so, could the evidence be obtained at trial with due diligence? If the evidence could not be so obtained, the evidence should be admitted unless it would have no effect on the safety of the conviction.

iii. If the evidence could have been secured at trial, is there a risk of a miscarriage of justice if the evidence is excluded given its strength and the potential impact on the safety of the Appellant's conviction?

27. Lord Kerr made clear that where evidence was not led at trial due to an error of counsel, its admission on appeal "*must be submitted to the same sequential testing that should be applied to all species of new evidence*": [126][**AB/Tab 17/EB 894**].

(ii) Application of the sequential tests in *Lundy*

28. First, the proposed expert evidence is **credible and capable of belief**:

i. Dr Latham [**EB/397**] is a distinguished forensic psychiatrist who regularly provides psychiatric assessments and reports for courts, especially in England & Wales. Dr Latham's report is based on a 1:1 interview with the Appellant. Dr Latham has been diligent to outline any matters which may undermine his opinion. He has been especially cognisant that it is not his role to determine the facts: see [49] of the Report [**EB/411**].

ii. Ms LeeWah-Cooper [**EB/418**] is a clinical psychologist based in Trinidad and Tobago. Ms Lee Wah-Cooper is a member of the Trinidad and Tobago Psychological Association. Ms Lee Wah-Cooper is currently a Resident Clinical Psychologist at the Eric Williams Medical Sciences Complex.

iii. Dr Attard [**EB/429**] is a consultant forensic psychiatrist at HMP Woodhill. He is a Member of the Royal College of Psychiatrists, and is approved by the Secretary of State under the Mental Health Act 1983 as having special experience in the diagnosis or treatment of mental disorder. Dr Attard has provided psychiatric reports to the criminal and civil courts since 2009.

29. Second, while no psychiatric assessment was secured at trial, there is **a reasonable explanation for not adducing such evidence at trial**, and the Appellant cannot be blamed for this omission. In particular:

    i. The Appellant's current legal representatives have been unable to establish contact with Mr Wright, trial counsel (Mr Lehrfreund's statement at [7] [**EB/465**]). It has not therefore been possible to confirm whether the Appellant's mental health was considered at first instance, although Mr Khan (the appeal lawyer) states at [10] [**EB/474**] that the Appellant had raised the issue of poisoning with his trial lawyer.

    ii. The Appellant raised the issue of his mental health on appeal with his appeal lawyer, Mr Khan, in a letter dated 9 Jun 2017 [**EB/481**]: "*I Uriah Woods am writing to remind you to please file as part of my legal arguments:- the fact of diminished responsibility or temporal insanity. Base[d] on this[,] the State failed to send me for an evaluation in which was & still is needed (sic). …*"

    iii. However, Mr Khan did not secure an assessment. Although he believed the Appellant to be of "*low intelligence*", he viewed the prospects of success of diminished responsibility were not reasonable in the light of the case law of the Trinidadian Court of Appeal: [6]-[9] [**EB/473-474**]. Mr Khan confirmed that the Appellant had a "*fixation*" that he was being poisoned by the deceased: [10]-[13] [**EB/474-475**]. Further, "*The above mentioned of (sic) low intelligence and fixation of the Appellant did cause **me deep concern**; and I humbly accept that it would have been **best practice** to have the Appellant evaluated*": [15] [**EB/475**] (see also [36] [**EB/480**]). Mr Khan was further concerned by the inevitable delay psychiatric investigations would have: [16] [**EB/475**].

30. Third, irrespective of whether the evidence could with due diligence have been secured at trial, the expert reports ought to be admitted as their **exclusion risks a miscarriage of justice**: The fresh evidence concludes that the Appellant has a "*mild to moderate learning (intellectual) disability*" (where 999 people out of a 1000 operate at a higher level) and a delusional disorder "*mixed – jealous and*

persecutory – type", both of which were likely present at the time of the offence. The experts agree that these disorders likely impacted on Mr Woods' general perceptions and understanding, and adversely affected his ability to exercise rational thought, to appreciate consequences, and to exercise self-control. **these issues strike at the heart of the defences of provocation and diminished responsibility**.

31. Fourth, it is submitted that the fresh expert evidence raises significant doubt about the correctness of the verdict in a capital case. As the Board held in ***Nigel Brown v The State*** [2012] 1 W.L.R. 1577 [**AB/Tab 18/EB 929**]:

> "71. The ultimate penalty, a sentence of death, was imposed on the appellant. Where a doubt remains about the correctness of the verdict which led to that penalty, any court would be bound to ensure that it should be, if it can be, removed or, if it cannot, that it should prevail against the carrying out of that sentence. The Board has decided that the fresh evidence must therefore be admitted."

32. Finally, the Respondent raised in their objections at [10] [**EB/486**] the decision in ***Chandler v The State*** [2018] UKPC 5 [**AB/Tab 8/EB 677**]. The Appellant responds as follows:

    i. In ***Chandler***, the appellant's case at trial was that he did not strike the fatal blow, and his attempt to rely on fresh psychiatric evidence on appeal ran "*directly contrary to the case advanced at trial*"; namely, that he struck the fatal blow but that he was suffering from a mental illness at the time: [28][**AB/Tab 8/EB 691**]. However, in **the Appellant's case** the defence of diminished responsibility based on mental disorder is not "directly contrary" to the defence of provocation. Both defences accept that the Appellant struck the fatal blow.

    ii. In ***Chandler***, the appellant was of normal intelligence: [29][**AB/Tab 8/EB 691**]. However, in **the Appellant's case** there is positive evidence from the experts and Mr Khan that the Appellant is of sufficiently low intelligence for it to qualify as a learning disability. Further, the Appellant has long maintained that he "*tripped*" at the time. This is not inconsistent with the expert evidence that the Appellant's delusional beliefs and low intellectual functioning would inhibit his ability to control himself and to

rationalise his actions

iii. In ***Chandler***, there was no evidence that the appellant had changed his position, or that he would do so if there was a retrial: [29][**AB/Tab 8/EB 691**]. However, in **the Appellant's case** the evidence shows that the Appellant actively sought a psychiatric evaluation, at least on appeal. Moreover, the Appellant has confirmed that he wishes to advance diminished responsibility on the basis of mental disorder.

33. In turn, the Appellant's appeal is entirely distinguishable from ***Chandler***. The Board is respectfully invited to rule the fresh evidence admissible.

E. Application for an extension of time

34. In his application for leave to appeal, the Appellant invited the Board to grant an extension of time to the Appellant to appeal. Although it does not appear that the Respondent takes a point on timing, and it is not an issue for determination within the Statement of Facts and Issues, for the avoidance of doubt, the Board is invited to extend time to lodge an appeal for the reasons given in Appellant's Précis at [46]-[63] [**EB/384**]. The Appellant maintains his submissions at [63] [**EB/387**] based on ***Hamilton and Lewis v The Queen*** [2012] 1 W.L.R. 2875 [**AB/Tab 12/EB 782**] that it is in the interest of justice for the time limit to be extended[3].

III. GROUND 2: PROVOCATION

A. Summary of the Appellant's position

35. The Appellant's summary position is that:

i. First, in relation to the **subjective inquiry** under the law of provocation, in the light of the fresh evidence as to the Appellant's mental health (if admitted), the trial judge's direction as to whether the Appellant was

[3]. The Appellant's Precis at [63(iii)][**EB/387**] asserts that Ms LeeWah-Cooper acted pro bono. This is in fact incorrect.

provoked has been rendered incomplete and inadequate, or requires material modification.

ii. Second, in relation to the **objective inquiry** under the law of provocation, the trial judge erred in directing the jury to consider whether the reasonable person "*would have been provoked to lose his control and do exactly as Uriah Woods did*" [**EB/284/44-48**]. Rather, the trial judge ought to have directed the jury that in the light of the gravity of the provocation on a person in the position of the Appellant but with the ordinary powers of self-control to be expected in society today, that person might have informed the intention to kill or cause grievous bodily harm to the victim and have acted on that intention.

36. These issues are dealt with in turn.

B. History of the partial defence of provocation

37. The legislative history of the partial defence of diminished responsibility, both generally and in relation to Trinidad and Tobago specifically, was set out by Lord Hughes in ***Daniel v The State*** [2014] AC 1290 at [4]-[11][**AB/Tab 9/EB 707-709**].

38. Section 4B of the Offences against the Persons Act 1925 (as amended by the Offences against the Persons Act 1985) provides that [**AB/Tab 1/EB 615**]:

> "4B. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

39. This is "*in terms essentially identical to those*" of section 3 of the English Homicide Act 1957: ***Daniel*** at [8][**AB/Tab 9/EB 708**].

40. The test for provocation at common law and under the OAPA involves a *"dual test; the provocation must not only have caused the accused to lose his self-control but must also be such as might cause a reasonable man to react to it*

as the accused did": ***R v Camplin*** [1978] AC 705 at [**AB/Tab 33/EB 1117C**] per Lord Diplock. It therefore involves "*two ingredients*" (***Attorney General v Holley*** [2005] 2 AC 580 at [5] per Lord Nicholls [**AB/Tab 6/EB 635**]) or a "*two-stage approach*" (***Daniel*** at [11] per Lord Hughes [**AB/Tab 9/EB 708**]); namely a subjective inquiry and an objective inquiry.

41. In ***R v Smith (Morgan)*** [2001] 1 AC 146 Lord Hobhouse broke down the constituent elements of the defence of provocation as follows [**AB/Tab 45/EB 1365**]:

> "(a) The defendant must have been provoked (whether by things done or by things said or by both together) to lose his self-control and kill or do whatever other act is alleged to render him guilty of murder. (b) This is a factual question upon which all relevant evidence is admissible including any evidence which tends to support the conclusion that the defendant either may have or did not lose his self-control. (c) If the jury conclude that the defendant may have been provoked to lose his self-control and do as he did, the jury should, as an exercise of judgment, but taking into account all the evidence, form a view as to the gravity of the provocation for the defendant in all the circumstances. (d) Finally, the jury should decide whether in their opinion, having regard to the actual provocation ((a) and (b) above) and their view as to its gravity (c above), a person having ordinary powers of self-control would have done what the defendant did.

42. Elements (a) and (b) relate to the subjective inquiry of whether the defendant was provoked, whereas elements (c) and (d) relate to the objective inquiry.

C. The first ingredient: the subjective inquiry

(i) The issue on the subjective inquiry

43. The Appellant submits that the fresh evidence, if admitted, means that the trial judge's direction now requires modification. This is because – understandably – the direction did not address the evidence relating to the Appellant's mental health. As the caselaw makes clear, this evidence is relevant to the subjective inquiry as to whether the Appellant was in fact provoked. This omission of itself requires the matter to be remitted.

(ii) General principles

44. The caselaw is at one when it comes to the subjective element. In ***R v Smith (Morgan)*** [2001] 1 AC 146, Lord Hobhouse stated the following about the subjective element [**AB/Tab 45/EB 1345-1346**]:

> "It is common ground that section 3 and the common law of provocation require two questions to be answered. The first is the factual, or as some prefer to call it the "subjective" question: was the defendant provoked, whether by things said or done to lose his self-control and kill? Since this is a factual question, **evidence of any mental or other abnormality which makes it more or less likely that the defendant lost his self-control is relevant and admissible**, as is any evidence concerning the defendant which helps the understanding or assessment of the evidence of what occurred. **In answering factual questions all relevant evidence is in principle admissible. For such purpose it does not matter whether the evidence relates to something which would be described as a "characteristic" of the defendant.** Thus, evidence may be relevant and therefore admissible that the defendant was at the time very drunk or under the influence of a hallucinogenic drug. Such evidence may of course cut either way. **It may show that anything said or done did not affect the defendant's conduct which was simply due to his delusions**. Or, it may show that something said or done which would not normally cause anyone to lose their self-control may have caused the defendant to do so." (Emphasis added).

45. Lord Millet (dissenting) held that for the subjective element, "*the jury must take the accused as they find him, warts and all*" [**AB/Tab 45/EB 1369-1370**].

46. More recently, Lord Nicholls in judgment for the majority in ***Holley*** stated at [5] that [**AB/Tab 6/EB 635**]:

> "5. … The first ingredient, known as the subjective or factual ingredient, is that the defendant was provoked into losing his self-control. This concept is not without its own difficulties, but it is not necessary to pursue them on this occasion. Suffice to say, in deciding whether this ingredient exists in a particular case all evidence which is probative is admissible. **This includes evidence of any mental or other abnormality** making it more or less likely that the defendant lost his self-control." (Emphasis added).

47. Lord Nicholls went on at [18] to endorse Lord Millet's statement in ***Smith (Morgan)*** at 210-211 that: "*when considering the subjective ingredient of provocation (did the defendant lose his self-control?), the jury must take the defendant as they find him, "warts and all"*" [**AB/Tab 6/EB 639**].

48. Picking up on Lord Slynn's dissenting opinion in ***Luc Thiet Thuan v The Queen*** [1997] AC 131 [**AB/Tab 16/EB 830**], Lord Nicholls went on at [25] to state that a woman "*suffering with postnatal depression, or "battered woman syndrome", or a personality disorder … may be relevant on two issues: whether she lost her self-control* [i.e. the subjective element]*, and the gravity of the provocation for her*" [**AB/Tab 6/EB 641**].

(iii) The trial judge's summing up

49. The material part of the trial judge's summing is as follows [**EB/284/17-37**]:

> "First, you must ask yourself whether the accused was so provoked, whether he was provoked in the legal sense. A person is provoked if he is caused by things that have been said and/or done by the deceased or by any other person to suddenly and temporarily lose his self-control. I repeat the definition of provocation, this is the definition of provocation.
>
> A person is provoked if he is caused by things that have been said and/or done by the deceased, or by another person, to suddenly and temporarily lose his self-control. If you are sure the accused was not provoked in that sense, that it was not caused by something or things said or done by the deceased, Sandra Miller, and her fiance (sic) Lawrence Stewart, or by any other person, then the defence of provocation does not arise and Uriah Woods is guilty of murder.
>
> But if you conclude so that you are sure that Uriah Woods was, or might have been provoked in the sense that I have explained, and that as a result of provoking words and/or conduct he suddenly lost his self-control, you must then weigh how serious the provocation was for this accused."

50. The trial judge went on to "*identify the things allegedly said and done that may, depending on how you view it, constitute provocation*". The trial judge continued [**EB/285/49 – 286/13**]:

> "The accused has given evidence that as far as he was concerned, Sandra Miller was still his wife. It is the evidence of the accused that when he saw Sandra Miller in her underwear and vest and Lawrence Stewart barebacked, only his boxers, lying on the bed, he was shocked and surprised, and as he put it, he just, "tripped," or "just lose it," and he remembers nothing after that until he awake in the hospital.
>
> Uriah Woods is identifying Sandra Miller and Lawrence Stewart lying on the bed with the lights off in the apartment in their underwear as the provoking conduct which caused him to suffer a sudden and temporary loss of self-control. And which caused him to inflict 22 chop wounds to

Sandra Miller, thereby killing her and chopping off the foot of his six-year-old son."

51. The trial judge went on to say that the jury needed to ask "*searching questions*" about the Appellant's evidence [**EB/286/14-37**]:

> "You must consider the evidence of the accused, and you may wish to ask yourself some searching questions. Do you accept that Uriah Woods, the accused, was still in a consensual relationship with Sandra Miller when -- given the evidence of the Prosecution witnesses? Now, if you accept what those witnesses say to be true, do you accept that Sandra Miller and the accused were still in a relationship? Did the accused continue to visit Leeward Croft, as he says, and to visit Sandra and his children in all the given circumstances? Was the accused invited to Leeward Croft that night, as he says, by Sandra, and was Sandra's conduct of going to sleep with the lights off, as he says, with Lawrence Stewart by her side, is that consistent with somebody expecting their former, their common-law husband to pop by?
>
> If you accept the evidence of the accused, is the conduct of Ryan, his son shouting, as the accused has given evidence, "Look daddy coming. 'Bra Dog', look daddy coming," is this in accord with a normal, expected visit of his father? In you accept the evidence of Ricky Guy that later that night the accused told him that he ain't done yet, he coming back to finish the job, was this consistent with the actions of someone who had suffered a sudden and temporary loss of self-control? Do you accept the evidence of the accused that he knew nothing about the engagement of Sandra Miller and Lawrence Stewart in the village of Parlatuvier, in which he is a known fisherman?
>
> If you consider the evidence as given by the accused and you accept what the accused says he saw that night, you must consider if it is this conduct on the part of Sandra and Lawrence which caused the accused to suffer a sudden and temporary loss of self-control. …"

(iv) Submissions on the subjective inquiry

52. The fresh evidence, if admitted, means that the subjective inquiry of the provocation direction as to whether the Appellant was provoked would need to include **a direction adequately dealing with the Appellant's mental health**. In particular, it would need to identify inter alia that:

i. The evidence that the mild to moderate learning disability would have severely impaired his general cognitive functioning, including his ability to reason. 999 individuals out of 1000 have thinking and reasoning

abilities which exceed the Appellant's ability. He has a significantly reduced capacity to exhibit self-control and to prevent himself from doing things he thinks he should not do. He experiences greater impulsivity. This all leads to increased instances of aggressive behaviour.

ii. The evidence that the delusional disorder is associated with violence, impairs the ability to self-control, erases rationality, distorts a person's perception of reality, leads to a loss of inhibitory factors, and impairs the ability to consider the consequences of a person's actions.

53. The Appellant submits that the fresh evidence, if admitted, renders the direction on the subjective inquiry materially inadequate or requires modification such that the conviction is unsafe.

D. The second ingredient: the objective inquiry

(i) Summary of the Appellant's position

54. For the following reasons, the Appellant submits that the trial judge erred in directing the jury to consider whether the reasonable person "*would have been provoked to lose his control and do exactly as Uriah Woods did*", i.e. "*chopping Sandra Miller 22 times, and chopping off the foot of his son*". The trial judge erred because he ought to have directed the jury that in the light of the gravity of the provocation on a person in the position of the Appellant but with the ordinary powers of self-control to be expected in society today, **the Appellant might have informed the intention to kill or cause grievous bodily harm to the victim and have acted on that intention**.

(ii) The elements of the objective inquiry

55. In relation to the second ingredient, Lord Nicholls in ***Holley*** stated at [6] that [**AB/Tab 6/EB 636**]:

> "6. The second ingredient, often called the objective or evaluative ingredient, raises, in the language of the statute, "the question whether the provocation was enough to make a reasonable man do as he did ...

> [taking] into account everything both done and said according to the effect ... it would have on a reasonable man". Broken down, this objective ingredient has two elements. The first element calls for an assessment of the gravity of the provocation. The second element calls for application of an external standard of self-control: "whether the provocation was enough to make a reasonable man do as he did."

(iii) The first element: the gravity of the provocation

56. In relation to the first element; namely, the gravity of the provocation, the caselaw provides that this is an objective assessment, which requires the jury to take into account the characteristics of the defendant. As Lord Diplock held in ***R v Camplin*** [1978] AC 705 at [**AB/Tab 33/EB 1118C-E**]:

> "…now that the law has been changed so as to permit of words being treated as provocation even though unaccompanied by any other acts, the gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded are true than it would be if they were not. It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts or insults when applied to the person whom they are addressed."

57. Lord Nicholls in ***Holley*** at [11] gave the example of a homosexual man being taunted for his homosexuality: "*the jury should consider whether a homosexual man having ordinary powers of self-control might, in comparable circumstances, be provoked to lose his self- control*" [**AB/Tab 6/EB 637**]. As Charon J (Supreme Court of Canada) said in ***R v Thieu Kham Tran*** [2010] 3 SCR 350 at [35][**AB/Tab 56/EB 1933**]; *"there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose*".

(iv) The second element: "whether the provocation was enough to make a reasonable man do as he did."

58. In ***Daniel***, Lord Hughes stated the following in relation to the second stage of inquiry at [11][**AB/Tab 9/EB 708**]:

> "11. … Second, if yes, might a reasonable person possessed of the ordinary powers of self-control to be expected of someone of his age and sex have reacted to the provocation as the accused did? This is an objective test for the jury and is the means by which the partial defence is limited to those for whose actions there is a limited, but reasonable, excuse."

59. The test of the "reasonable man" has posed difficulties given that, as Lord Nicholls observed in ***Holley*** at [7][**AB/Tab 6/EB 636**], it is "*difficult to conceive of circumstances where it would be "reasonable" for a person to respond to a taunt by killing his tormentor*". Rather, the "reasonable man" is "*intended to refer to an ordinary person, that is a person of ordinary self-control*" as articulated in ***R v Camplin*** [1978] AC 705 where Lord Diplock held that the test of the reasonable man for the purposes of provocation means [**AB/Tab 33/EB 1118A**]:

> ""It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today."

60. Lord Diplock continued that a judge should explain to the jury that [**AB/Tab 33/EB 1119E-F**]:

> "the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but *in other respects* sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did."

(v) The trial judge's summing up

61. Materially, the trial judge held that [**EB/284/38 – 287/22**]:

> "Now, the final part of your consideration would be, is there anything you have heard or anything you have been told about the accused which may have made what was said or done affect him more than it might any other man? Having regard to the actual provocation, and to your view as to how serious that provocation was for the accused, you must ask yourselves whether a person with the powers of self-control which are to be expected of an ordinary, sober, reasonable or normal person of the accused's age and sex, would have been provoked to lose his control and **do exactly as Uriah Woods did** on the night of the 14th July.

> …Therefore, the ordinary, sober, reasonable or normal person in this context is a person who is not exceptionally excitable or eager or quick to argue or quarrel or fight. The ordinary sober, reasonable or normal person is possessed of such powers of self-control as everyone is expected to have from their fellow citizens. The powers of self-control each of you is expected to have is what we are dealing with.
>
> If you are sure that such a person, as I have described to you, would not have done as Uriah Woods did in the given circumstances, then the Prosecution would have disproved or negatived provocation, and the accused is guilty of murder.
>
> If, however, you conclude that an ordinary, sober, reasonable or normal person of the accused's age and sex would or might have been provoked to lose his self-control in similar circumstances, and that such **a person would or might have gone on to do exactly as the accused did**, then in such a case your verdict would be one of not guilty of murder, but guilty of manslaughter by reason of provocation. …
>
> **Were the actions of the accused of chopping Sandra Miller 22 times, and chopping off the foot of his son**, were these actions what are to be expected of a reasonable man placed in those circumstances? That is the question you must ask yourself. …
>
> Now, this is what the accused has placed before you for consideration, that he suffered a sudden and temporary loss of self-control. He has asked you to accept the evidence he has given and find him not guilty of murder, but guilty of manslaughter. You must consider whether a person with the normal powers of self-control which are to be expected of the ordinary person, sober, reasonable or normal person of the accused's age and sex **would have done exactly as he did**?"

It is submitted that the passages in bold constitute a fundamental misdirection for the reasons set out below at **Part (ix) para [74]ff**.

(vi) The decision of the Court of Appeal in the Appellant's case

62. On appeal (Yorke-Soo-Hon, Narine and Mohammed JJA), the crux of the complaint was summarised at para [9] [**EB/360**]:

> "The appellant's complaint is substantially directed at the judge's direction to the jury to consider whether the appellant's reaction was reasonable in the circumstances. He submits that since provocation requires a loss of self-control, the reaction will inevitably be unreasonable. Therefore, the application of a test of reasonableness to a person who has lost his self-control, will in the appellant's submission "completely negate every, and all considerations the jury are required to examine"

63. The Court of Appeal concluded at [16] that the wording of section 4B OAPA expressly left for the jury's determination the questions of whether the provocation was enough to make a reasonable man do as the Appellant did [**EB/362**]. Further, the Appellant's submission that it was wrong to apply a reasonableness test to a person who has lost self-control sought to "rewrite section 4B": "*the objective criterion […] requires the jury to consider whether the provocation was enough to make a reasonable man do as he did and the requirement for the jury to determine this question according to the effect the provocative acts and/or words would have had on the reasonable man*": at [18][**EB/363**] (underlining in the original). The Court of Appeal concluded at [19][**EB/363**] that:

> "19. … The appellant's submission boils down to simply this: how do you expect an ordinary person who has been provoked to lose his self-control, to act reasonably? Clearly, as a matter of public policy, the law seeks, through the standard of conduct to be expected of the reasonable man, to introduce a standard of self-control that is acceptable by contemporary society. To do otherwise would be to provide justification for wholly unwarranted acts of aggression regardless of the circumstances and the gravity of the provocation."

(vii) The decision in *Liang Yaoqiang (No 2)*

64. In ***HKSAR v Liang Yaoqiang (No 2)*** [2017] HKCU 289 [**AB/Tab 50/EB 1512**], the Hong Kong Court of Final Appeal (HKCFA) (Ribeiro, Tang, Fok PJJ, Stock and Lord Millett NPJJ) considered a case where the appellant had killed the deceased, a woman with whom he was in an intimate relationship. While the judgment in ***Liang Yaoqing (No 2)*** was handed down on 7 February 2017, the Court of Appeal in the Appellant's case (handed down on 14 December 2017) was not referred to it, and it does not appear in the judgment.

65. The deceased had been cut at least 213 times and there were signs of strangulation. The appellant maintained that he was provoked by the deceased's infidelity and taunts. One of the primary issues (see [22][**AB/Tab 50/EB 1520**]) was the meaning of "*do as he did*" within section 4 of the Homicide Act (Cp. 339)[**AB/Tab 5/EB 625**]; a provision which is identical to section 3 of the English Homicide Act **[AB/Tab 4/EB 622**] and section 4B OAPA [**AB/Tab 1/EB 615**].

66. At para [68][**AB/Tab 50/EB 1534**], the HKCFA considered that there were four possible options for the interpretation of "*do as he did*":

(1) To lose self-control ("the loss of self-control meaning");

(2) To kill the victim (i.e. to form the intent to kill or cause grievous bodily harm and act on that intent) by whatever means ("the killing *simpliciter* meaning");

(3) To kill the victim using the means that the defendant did, e.g. by stabbing or shooting or strangulation ("the means of killing meaning");

(4) To kill the victim in exactly the manner the defendant did, e.g. by 6 shots of the gun or 213 chops of the knife ("the precise method of killing meaning").

67. ***Liang Yaoqing (No 2)*** held, in summary, that:

i. The "loss of self-control meaning" (meaning (1)) could "immediately be discounted" as (i) restricting the action to "loss of self-control" should be in the statute (as it is in the New Zealand Crimes Act 1961); and, persuasively (ii) loss of self-control is a state of being and does not necessarily imply an action, whereas the statue requires action: "*to do as he did*": [69]-[70][**AB/Tab 50/EB 1535**].

ii. The "precise method of killing meaning" (meaning (4)) was wrong. The HKCFA held at [108][**AB/Tab 50/EB 1545**] that "*Where the person with ordinary powers of self-control has been provoked to the degree necessary to cause him to lose that self-control, there is an inherent contradiction in then going on to ask whether his actions in that state of loss of self-control bear some proportionate relationship to the provocation offered by the victim.*" The precise method of killing meaning is the approach adopted by the trial judge in the Appellant's case.

iii. The "means of killing meaning" (meaning (3)) was wrong. The HKCFA continued at [108][**AB/Tab 50/EB 1545**] that "*To ask of the hypothetical "reasonable man" in section 4 whether the provocation might have been*

sufficient to make him lose his self-control to the extent of making a choice as to weapon (gun, knife or chapati pan) or to the extent of stabbing, say, once or twice in carrying out his intention to kill the victim rather than, say, 10 or 20 or even 200 times seems artificial and, more importantly, conceptually extremely difficult for a jury. The precise mode of retaliation may also be fortuitously dependent on the lethal instrument near at hand."

iv. The "killing *simpliciter* meaning", i.e. the forming of the intent to kill or cause grievous bodily harm and act on that intent, (meaning (2)) was the correct interpretation.

68. The reasons why the HKCFA went for the killing *simplicter* meaning are as follows:

i. Para [77][**AB/Tab 50/EB 1536**]: The principle at common law articulated in ***Mancini v DPP*** [1942] AC 1 per Viscount Simon LC that "*the mode of resentment must bear a reasonable relationship to the provocation*" – known as the reasonable relationship rule – supported the precise method of killing meaning [**AB/Tab 41/EB 1288**].

ii. Paras [79]-[80][**AB/Tab 50/EB 1537**]: However, since the passing of section 3 of the Homicide Act (identical to section 4B OAPA) the use of the reasonable relationship rule per ***Mancini*** should be avoided "*unless they are used in a context which makes it clear to the jury that this is* ***not a rule of law*** *which they are bound to follow, but merely a consideration which may or may not commend itself to them*": ***Phillips v The Queen*** [1969] 2 AC 130 per Lord Diplock [**AB/Tab 19/EB 937-938**].

iii. Para [82][**AB/Tab 50/EB 1538**]: Further, in ***R v Acott*** [1997] 1 WLR 306, Lord Steyn stated that: "*Moreover, although there is no longer a rule of proportionality as between provocation and retaliation, the concept of proportionality is nevertheless still an important factual element in the objective inquiry. It necessarily requires of the jury an assessment of the seriousness of the provocation*" [**AB/Tab 25/EB 1020-1021**].

iv. Paras [88]-[93][**AB/Tab 50/EB 1539-1541**]: Decisions of the High Court of Australia concluded that the key issue was whether the provocation might cause the ordinary person to form an intention to kill or do grievous bodily harm: "***it is the formation of an intent to kill or do grievous bodily harm which is the important consideration rather than the precise form of physical reaction***": ***Masciantonio v The Queen*** (1995) 129 ALR 575 [**AB/Tab 53/EB 1804**].

v. Paras [94]-[95] [**AB/Tab 50/EB 1541**]: This does not mean that the proportionality of the response is irrelevant. It may be relevant in the objective inquiry as to the impact the provocation upon the ordinary person, as per Lord Steyn in ***Acott*** at [**AB/Tab 25/EB 1020-1021**].

vi. Paras [96] to [106] [**AB/Tab 50/EB 1542-1545**]: The New Zealand caselaw, albeit founded on different statutory wording, concluded that a direction regarding "*the relationship between the degree of provocation and the level of response assists them in deciding whether the accused did lose the power of self-control will be of assistance*". It is therefore relevant to the subjective issue of whether the person as a matter of fact lost self-control (referred to as the "*factual issue*"). However, the "*accused's actual response is no more than a distraction*" in the objective assessment (referred to as the "*evaluation assessment*": citing ***R v Rongonui*** [2000] 2 NZLR 385 [**AB/Tab 54/EB 1816**] and ***R v Tomoti*** [2006] 1 NZLR 323 at [35]ff [**AB/Tab 55/EB 1908**].

vii. Para [107][**AB/Tab 50/EB 1545**]: The manner of the killing will be relevant to the subjective element as to whether the person was provoked to lose self-control: "*A disproportionately vicious retaliation may be evidence that self-control was in fact lost, although the possibility remains that such retaliation could have been carried out as a cool-headed and deliberately sadistic killing or as an attempt to camouflage the killing as one committed under a loss of self-control.*"

69. This led the HKCFA to conclude that [**AB/Tab 50/EB 1545-1546**]:

> "108. However, in respect of the objective question, the notion that the retaliation must bear a particular relationship to the provocation is one beset with conceptual difficulties. Where the person with ordinary powers of self-control has been provoked to the degree necessary to cause him to lose that self-control, there is an inherent contradiction in then going on to ask whether his actions in that state of loss of self-control bear some proportionate relationship to the provocation offered by the victim. As Elias CJ put it in *Rongonui*, this may seek to "invoke a rationality already lost." If a person has been provoked to such an extent that the ordinary person could equally have lost his self-control to the point of forming the intent to kill the provocateur and acting on that intent, it is difficult to see why the extent of the defendant's reaction should deprive him of the defence. To ask of the hypothetical "reasonable man" in section 4 whether the provocation might have been sufficient to make him lose his self-control to the extent of making a choice as to weapon (gun, knife or chapati pan) or to the extent of stabbing, say, once or twice in carrying out his intention to kill the victim rather than, say, 10 or 20 or even 200 times seems artificial and, more importantly, conceptually extremely difficult for a jury. The precise mode of retaliation may also be fortuitously dependent on the lethal instrument near at hand.
>
> 109. As a matter of underlying policy, where the jury have already reached the conclusion that the homicidal act was carried out intentionally by the defendant when he had lost his self-control, the real focus of the evaluative, objective, question is whether a person with the ordinary powers of self-control might have reacted to the retaliation by forming the intent to kill or cause really serious bodily harm to the victim and acting on that intent. To the extent that an extreme homicidal response negates a finding of a subjective loss of self-control, the defence will not apply. But save in that circumstance, there is no compelling reason of logic or policy to require the jury to consider whether the homicidal actions (which have already been established were in fact brought about a loss of self-control) bear a reasonable relationship to the provocation. On the contrary, the difficulties inherent in such a question strongly suggest a conclusion that no such question is necessary."

70. The HKCFA quashed the conviction and remitted it for retrial.

(viii) The decision in *Marcelline*

71. On 26 June 2023, the Court of Appeal of Trinidad and Tobago gave judgment in ***Marcelline v The State*** Crim App No S015 of 2014 [**AB/Tab 49/EB 1438**]. The Panel included two of the judges who had sat on the Appellant's appeal, Yorke-Soo-Hon and Mohammed JJA. In this case, the appellant killed the

deceased, his wife, while in a maxi-taxi, by stabbing her 19 times. An issue was whether the judge was correct to direct the jury to consider the reasonableness of the appellant's reaction to the provocation.

72. The Court of Appeal considered ***Liang Yaoqiang (No 2)*** in detail and noted that it had been applied in a number of subsequent cases in Hong Kong, including ***HKSAR v Tam Ho Nam*** [2017] HKCFA 58; ***HKSAR v Wong Fung*** [2017] HKCA 609; **HKSAR v Ho Po Kwong** [2019] HKCA 1069; and **HKSAR v Lee Wai Man** [2020] HKCA 485. The Court of Appeal concluded that [**AB/Tab 49/EB 1484**]:

> "103. In this regard, it has been the experience of this court, in particular, in cases which involve "frenzied attacks", that a frequently advanced submission to meet the objective or evaluative component of the requisite analysis is that the attack was not "proportionate" or "reasonable" when measured against the gravity of the provoking conduct or words. Such a submission can easily have the tendency to distort the proper analysis of the objective question by suggesting that by dint of the lack of a "reasonable response", the partial defence is conclusively disabled. There being no rule of law that there must be a "reasonable relationship" between the retaliation and the provocation, such a submission is misconceived. It is imperative that the jury receive a direction which inoculates them from reasoning along a premise that may appear to be very attractive from a common-sense perspective but which is jurisprudentially unsound, as the fulsome analysis in **Liang Yaoqiang**, with which we agree, demonstrates."

73. The Court of Appeal concluded at [109][**AB/Tab 49/EB 1487**] that on the issues of the interpretation of "do as he did" under section 4B OAPA, the decision of "***Uriah Woods*** *[i.e. this Appellant] should no longer be followed*".

(ix) The Appellant's submissions

74. The Appellant's position is the trial judge erred in directing the jury to consider whether the reasonable person "*would have been provoked to lose his control and do exactly as Uriah Woods did*". The trial judge was wrong to ask the jury the rhetorical question: "*Were the actions of the accused of chopping Sandra Miller 22 times, and chopping off the foot of his son, were these actions what are to be expected of a reasonable man placed in those circumstances?*" [**EB/287/4-7**]

75. First, the Appellant accepts that the response of the accused to the provoking act is relevant to the subjective inquiry; namely whether the accused lost his self-control as a matter of fact. As the HKCFA held ***Liang Yaoiqiang (No 2)*** at [107][**AB/Tab 50/EB 1545**] "*A disproportionately vicious retaliation may be evidence that self-control was in fact lost, although the possibility remains that such retaliation could have been carried out as a cool-headed and deliberately sadistic killing or as an attempt to camouflage the killing as one committed under a loss of self-control.*" It is assumed that this is not in dispute.

76. Second, the Appellant submits that the meaning of whether "*the provocation was enough to make a reasonable man do as he did*" ought to be interpreted as per the HKCFA in ***Liang Yaoiqiang (No 2)*** at [109] and [114][**AB/Tab 50/EB 1546 and 1547**]; namely, whether the reasonable or ordinary person might have reacted to the provoking act by forming the intent to kill or cause really serious bodily harm, and then killed. Lord Devlin endorsed the following in ***Lee Chun-Chueng v The Queen*** [1963] AC 220 at [**AB/Tab 14/EB 810**] (a case dealing with provocation at common law): "*The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation*." See also, ***R v Antoine*** [2001] 1 AC 340 per Lord Hutton [**AB/Tab 27/EB 1066**] and ***R v Grant*** [2002] QB 1030 at [43][**AB/Tab 38/EB 1242**].

77. Third, the Appellant accepts that this entails a rejection of the so-called "reasonable relationship rule" developed in the common law in cases such as ***Mancini v DPP*** [1942] AC 1 where Viscount Simon LC held at [**AB/Tab 41/EB 1288**] that that the "*mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter*". The primary reason for this rejection is that section 3 of the English Homicide Act abolished the requirement under the common law that words alone could not amount to provocation, which is indicative of a significant erosion, if not extinguishing, of the reasonable relationship rule. As the HKCFA held in ***Liang Yaoqiang (No 2)*** at [112][**AB/Tab 50/EB 1546**]:

> "112. … The idea that the mode of resentment must be proportionate in type to the provocation given is, at the very least, at odds with the abolition of the common law rule that words alone could not amount to provocation. Once it is accepted that words themselves could provoke the loss of self-control with an intention to kill, the reasonable relationship rule must (if it survives in any form) at least require some reformulation in order to operate in a case of provocative words."

78. Fourth, this conclusion finds support in the English jurisprudence, which states that the legislation has abolished an assessment of proportionality save as it relates to the **gravity of the provocation to the accused** (the first element of the objective inquiry by Lord Nicholls in ***Holley*** at [8][**AB/Tab 6/EB 636**] or element (c) in Lord Hobhouse's speech in ***Smith (Morgan)*** at [**AB/Tab 45/EB 1365**]).

79. Thus, in ***R v Camplin*** [1978] AC 705 Lord Diplock held that the introduction of section 3 of the English Homicide Act meant that the jury could take into account the characteristics of the defendant in assessing the gravity of the taunt to the defendant such as a taunt based on race, physical infirmity or incident in his past [**AB/Tab 33/EB 1118A-D**]:

> "A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day. When Hale was writing in the seventeenth century, pulling a man's nose was thought to justify retaliation with a sword; when *Mancini* … was decided by this House, a blow with a fist would not justify retaliation with a deadly weapon. But so long as words unaccompanied by violence could not in law amount to provocation the relevant proportionality between provocation and retaliation was primarily one of degrees of violence. But now that the law has been changed so as to permit of words being treated as provocation even though unaccompanied by any other acts, the gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom a taunt or insult is addressed"

80. While ***Camplin*** was concerned with whether it was legitimate under the objective inquiry to take into account the characteristics of the accused in assessing the gravity of the provocation to him, it illustrates a significant erosion of the proportionality principle at common law.[4]

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[4] The Appellant notes that the High Court of Australia concluded in ***Masciantonio v The Queen*** (1995) 129 ALR 575 that the common law defence of provocation was not concerned with the

81. Further, in ***R v Acott*** [1997] 1 WLR 306, Lord Steyn held at [**AB/Tab 25/EB 1018F**] that section 3 of the Homicide Act "*moderated the strict requirement of the common law defence of provocation*". Lord Steyn articulated the three parts of the test under section 3 as follows: (i) The provoking conduct, (ii) causatively relevant loss of self-control (subjective criterion), and (iii) whether the provocation was enough to make a reasonable man do as the defendant did (objective criterion). In relation to (iii), Lord Steyn continued at [**AB/Tab 25/EB 1019A-C**]:

> "After the adoption of the reasonable man test in the second half of the last century, judges withdrew cases were the defendant wished to rely on provocation on the basis of rules or supposed rules which were judicially developed. By converting common sense criteria into fixed rules of law judges empowered themselves to invoke those rules to withdraw cases from the jury. Thus the rule was laid down that disproportionate retaliation may bear the defence, or, as it was later put, that the retaliation must bear a reasonable relationship to the provocation received [citations omitted]. Plainly proportionality was a highly relevant matter to a defence of provocation. But the perceived mischief was that judges withdrew cases from the jury on the grounds of fixed rules of law. "

82. Lord Steyn concluded by stating at [**AB/Tab 25/EB 1020H-1021A**] that:

> "Moreover, **although there is no longer a rule of proportionality as between provocation and retaliation**, the concept of proportionality is nevertheless still an important factual element in the objective inquiry. It necessarily requires of the jury an assessment of the seriousness of the provocation. It necessarily requires of the jury an assessment of the seriousness of the provocation. …" (Emphasis added).

83. Thus, a careful consideration of the English caselaw is that the promulgation of the legislation means that while the reasonable relationship rule is relevant to what Lord Nicholls in ***Holley*** at [8] [**AB/Tab 6/EB 636**] referred to as the first

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manner of the loss of self-control [**AB/Tab 53/EB 1806**]: "*the question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it. … It is to be answered by reference to the conduct of the accused himself and to common experience of human affairs. It is the nature and extent — the kind and degree — of the reaction which could be caused in an ordinary person by the provocation which is significant, rather than the duration of the reaction or the precise physical form which that reaction might take. And in considering that matter, the question whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention.*"

element of the objective inquiry, which is element (c) of Lord Hobhouse's formulation in ***Smith (Morgan)***, it no longer applies to the second element of the objective inquiry, which is element (d) in Lord Hobhouse's formulation in ***Smith (Morgan)***.

84. Fifth, granted in ***Phillips v The Queen*** [1969] 2 AC 130 Lord Diplock at [**AB/Tab 19/EB 937G-938B**] rejected the proposition that "*once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible in law for them whatever he did*". Lord Diplock further stated that "*the average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon*". However, Lord Diplock expressly held at [**AB/Tab 19/EB 938C-D**] that the reasonable relationship rule as articulated in ***Mancini*** should be "*avoided*" unless it is made clear to the jury that it "*is not a rule of law which they are bound to follow, but merely a consideration which may or may not commend itself to them*".

85. For the reasons outlined above, the proportionality of the relationship between the provoking act and the retaliation, while relevant to the subjective inquiry, as well as to the first element of the objective inquiry, it is not relevant to the second element; namely, whether the provocation might have caused the reasonable man to do as the appellant did. This is not a distinction made in ***Phillips***, but it is one articulated in the later cases of ***Camplin*** and ***Acott***.

86. Sixth, regarding the Respondent's objections at [23] to [28] [**EB/489-491**] the Appellant submits that the decisions of the English courts in relation to the operation of section 54 of the Coroners and Justice Act 2009 **[AB/Tab 3/EB 620**] cannot assist with the interpretation of the meaning of "*do as he did*" within section 4B Offences Against the Person Act. As Lord Judge CJ stated in ***R v Clinton*** [2013] QB 1 at [**AB/Tab 35/EB 1138**]:

> "1. … With effect from 4 October 2010 section 3 of the 1957 Act ceased to have effect. The ancient common law defence of provocation, reducing murder to manslaughter, was abolished and consigned to legal history books.

> 2. It was replaced by sections 54 and 55 of the Coroners and Justice Act 2009 which created a new partial defence to murder, "loss of control". Just because loss of control was an essential ingredient of the old provocation defence, the name is evocative of it. It therefore needs to be emphasised at the outset that the new statutory defence is self-contained. **Its common law heritage is irrelevant**. …" (Emphasis added).

87. If the caselaw relating to section 3 of the English Homicide Act is irrelevant to the operation of the section 54 Coroners and Justice Act defence, so, too, the caselaw relating to section 54 Coroners and Justice Act must be irrelevant to the operation of section 3 English Homicide Act (and equivalent provisions in other jurisdictions). This is especially where section 54(1)(c) Coroners and Justice Act uses materially different wording: "*a person … might have reacted in the same or in a similar way to D*" rather than "*do as he did*" **[AB/Tab 3/EB 620**]. It could be argued that the fact that the Coroners and Justice Act uses different wording was because Parliament intended a different meaning to the previously enacted legislation[5].

E. The operation of the proviso in the context of the provocation ground

(i) The law

88. Section 44(1) of the Supreme Court of Judicature Act provides that [**AB/Tab 2/EB 617**]:

> "44. (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss

[5]. Given the Respondent's reliance on the Law Commission's report, the Appellant notes that Lord Judge CJ further stated at [3] [**AB/Tab 35/EB 1138**] that the Coroners and Justice Act "*does not sufficiently follow the recommendations of the Law Commission to enable us to discern any close link between the views and recommendations of the Law Commission and the legislation as enacted*".

the appeal if they consider that no substantial miscarriage of justice has actually occurred."

89. The application of the proviso can only occur where the Board is *"satisfied that the jury would inevitably have returned a verdict of guilty*": ***Lawrence v The Queen*** [2014] UKPC 2 at [30] [**AB/Tab 13/EB 801**] *per* Lord Hodge.

90. Further, "*It would not be appropriate to apply the proviso in a case where potentially significant evidence was never before the jury.*": ***Grant v The Queen*** [2007] 1 AC 1 at [27] [**AB/Tab 11/EB 781**] *per* Lord Bingham.

(ii) Submissions

91. This is obviously not a case for the operation of the proviso.

92. First, as Lord Steyn stated in ***Acott*** at [**AB/Tab 25/EB 1021**] that "*It follows that there can only be an issue of provocation to be considered by the jury if the judge considers that there is some evidence of a specific act or words of provocation resulting in a loss of self-control. It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury.*"

93. Second, in this case, the trial judge must have concluded that there was some evidence of a provoking act that may have caused the Appellant to lose his self-control, as he left the matter to the jury. In the light of the Appellant's evidence that he "tripped", that was the only correct response.

94. Third, while it is not known on what basis the jury rejected the defence of provocation:

    i. If it was on the basis that the Appellant was not in fact provoked, i.e. the **subjective inquiry**, the fresh evidence, if admitted, contains material evidence for the jury to consider. As the Board indicated in ***Lewis v The State (Trinidad and Tobago)*** [2011] UKPC 15 at [23] to [25][**AB/Tab 15/EB 828**] per Lord Brown, where fresh evidence is adduced on appeal going to the defendant's mental state, this ought to result in remission (in that case to the Court of Appeal to allow the State to test the fresh evidence, challenge its admissibility or to adduce contrary evidence).

The same approach ought to apply to the Appellant's case. It is noteworthy that Mr Liang Yaoqiang's subsequent conviction for murder was quashed on the basis that at the third trial, the trial judge failed to refer the jury to the psychiatric evidence in relation to the provocation defence: ***HSKAR v Liang Yaoqiang (No 3)*** [2021] 2 HKC 201 [**AB/Tab 51/EB 1600**][6].

ii. If it was on the basis that no reasonable person would have done as the Appellant did, i.e. the **objective element**, it was a material misdirection to direct the jury that they needed to assess whether the reasonable man would have done as the Appellant did; namely, chop the deceased 22 times as well as to sever the foot of the Appellant's son. Were it not for the fresh evidence, the Appellant would invite the Board to quash the conviction and direct that there be a retrial. However, in the light of the fresh evidence, the only proper disposal is remission. As Lord Hughes held in ***Daniel*** at [56][**AB/Tab 9/EB 727**]: "*It is of great importance that judges respect the clear principle that the question whether the second, objective, part of the provocation test is met is one for the jury. … It behoves every trial judge to be very cautious about withdrawing the issue from the jury. He clearly cannot do so simply because he would himself decide the issue against the defendant, nor even if he regards the answer as obvious.*"

95. For these reasons, the Board is invited not to apply the proviso.

IV. <u>DISPOSAL</u>

96. The Appellant submits that the only proper disposal is that the fresh evidence be admitted, the appeal be allowed, the conviction quashed, and the matter remitted to the Court of Appeal for it to determine whether to hear examination

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6. The order for a retrial was quashed by the HKCFA: ***HSKAR v Liang Yaoqiang (No 4)*** [2021] 6 HKC 13 [**AB/Tab 52/EB 1753**].

of the witnesses, or to order a retrial, per ***Williams (Cardinal) v The Queen*** (1998) 53 WIR 162 at [**AB/Tab 24/EB 1012D-E**].

15th December 2025

EDWARD FITZGERALD K.C.
GRAEME L. HALL
Doughty Street Chambers, London
Appearing pro bono