

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

BETWEEN:

URIAH WOODS

Appellant

-and-

THE STATE

Respondent

CASE FOR THE RESPONDENT

A. Introduction & Summary

1. The background to the killing is set out in the SFI. The prosecution case (see the summing up at [242]) was that Ms Miller was killed by the appellant in a planned murder. There was a history of domestic violence against Ms Miller and their children. The appellant had said that if Ms Miller ever left him, he would kill her. Ms Miller eventually separated from the appellant and, after a time, started a new relationship with a man called Mr Stewart. On 14 July 2005, the appellant confronted Mr Stewart and told him to leave Ms Miller. Later that same day the appellant went to Ms Miller's new home. She was in bed with her partner, Mr Stewart. Using a cutlass, which, on the State's case the appellant had brought with him (and which, now, the appellant in fact seems to accept he brought with him), the appellant set about cutting Ms Miller some 22 times. The appellant also severed the foot of Darion, one of Ms Miller and the appellant's children. Darion survived. Ms Miller did not.
2. The appellant's defence at trial was provocation. The appellant said that he was provoked by seeing his partner, Ms Miller, in bed with another man. But, as indicated, the evidence showed that she had left the appellant and got engaged to someone else. At trial, the appellant denied having the cutlass when he went to the property (though he now accepts that he did), but not a single witness from the property recognised the

weapon. The two living witnesses to the attack gave evidence that the appellant came into the bedroom already brandishing the cutlass. The overwhelming evidence was that this was a planned attack by a man with a history of violence. The jury rejected provocation.

3. The Court of Appeal upheld the judge's directions on provocation. The appellant now challenges those directions on the basis that the judge erred in directing the jury that, when assessing whether a reasonable person in the position of the appellant might have done that which the appellant did, the jury should consider the nature and manner of the killing (in this case, chopping the victim 22 times). The appellant contends that, in accordance with the Court of Appeal decision in *Marcelline v The State* Crim. App. No. S015 of 2014 [AB 49/EB1438], the jury ought, instead, to have been directed simply to consider whether a reasonable person in the position of the appellant may have been provoked into *killing*. The nature and manner of the killing does not matter, submits the appellant.
4. In summary, the respondent submits that *Marcelline* was wrongly decided. The effect of that decision is to wrongly broaden the defence of provocation making it available to defendants who have engaged in sustained and disproportionate attacks on their victims. This has never been how the law of provocation has operated.
5. As for diminished responsibility, the appellant seeks to rely on fresh evidence suggesting that the appellant has mild to moderate (but more likely mild) intellectual disability (IQ assessed at 53) and that he suffered from a delusional disorder at the time of the killing, a mixed jealous and persecutory type. In summary, the respondent submits that the appellant's evidence and the experts' evidence is unreliable, incomplete and inconclusive. It cannot realistically establish a defence of diminished responsibility. The appellant has given shifting accounts of the killing over the years and now appears to accept (contrary to what he said at trial) that he *did* go to the apartment armed with the cutlass. No jury or court could accept the appellant's factual evidence, a point made by Mr Khan in his candid explanation as to why he did not run the point in the Court of Appeal. The expert opinion is built on these shaky foundations and therefore suffers the same fate.
6. Finally, the appellant seeks to rely on the fresh medical evidence as being relevant, too, to the defence of provocation as ran at trial. The primary (but not only) difficulty with

this, is that the fresh evidence now contains admissions by the appellant that he went to the property armed with the cutlass. Admission of that evidence before a jury would destroy any possible provocation defence.

B. Diminished Responsibility

B.1. The Legal Principles

7. Section 4A(1) of the Offences Against the Person Act 1925 (as amended) ('OAPA') [AB 1/EB613] provides:

"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."

8. There are two distinct aspects: (a) whether the accused was suffering from an abnormality of mind at the time of the killing and (b) whether that abnormality substantially impaired the accused's mental responsibility for the killing. Lord Parker CJ in *R v Byrne* [1960] 2 QB 396 at 403 [AB 30/EB1087] explained that an abnormality of mind covers perception, rational judgment, and the ability to exercise self-control. Evidence that an epileptic defendant could be "vulnerable to an impulsive tendency and therefore occasional impulsive acts" did not amount to evidence of diminished responsibility because the expert had not explained why or in what way the abnormality was "such as substantially to impair the mental responsibility of the appellant for his acts and omissions in doing the killing" (see *R v Campbell* (1986) 84 Cr App R 255 at 259) [AB 31/EB1094]. In other words, there is an important causal /operative element to the defence.
9. The onus of proof is on the defendant, on the balance of probabilities: *Robinson v The State* [2015] UKPC 34 at [2] [AB 23/EB989]. Importantly, it is for the defence to establish the facts on which the medical evidence is based (*Archbold*, para 19-94(e) [AB 57/EB1940], *Robinson v The State*, para 11(c)) [EB993]. *R v Ahmed Din* [1962] 1 WLR 680 [AB 26/EB1022] is a case in point. The defendant "got it into his head" that his wife was having an affair with a man called Ansari, who was lodging at the family

home. He stabbed Ansari seven times, killing him. Expert evidence was led opining to an abnormality of mind operative at the time of the killing. The diagnosis was a form of “paranoid state” based on a false belief of his wife’s infidelity.

10. The judge himself enquired of the expert whether: “the only indication of mental illness here is this, that this man believes in his wife's infidelity and that that belief is a false one?”. The expert agreed. He accepted, too, that if there were “grounds for believing” in the wife’s infidelity “[i]t would not be a paranoid state” (p 683) **[EB1025]**. It was part of the diagnosis in other words that “the[.] suspicions were delusions” (p 684) **[EB1026]**.

11. The trial judge directed the jury that it was for them to decide whether “on a balance of probability, because the burden of proof was on the defence ... the defendant's beliefs were delusional and that he had no reasonable grounds for suspecting his wife's infidelity” (p 684) **[EB1026]**. The jury returned a murder verdict. The defendant appealed on the basis that the medical evidence clearly diagnosed an abnormality of mind (paranoid /delusional state based on false beliefs) operative at the time of the killing.

12. The Court of Appeal dismissed the appeal. Judgment was given by Parker CJ:

“It is to be observed at once that that [expert] opinion depends entirely on what they have been told by those of whom they have inquired. In the present case they inquired of the defendant himself whose mental state is suspect... (p 684) **[EB1026]**

... The information that the doctors had obtained was, of course, purely hearsay. Nobody at all was called by the defence to lay a basis upon which the doctors could express their opinion. (p 685) **[EB1027]**

... any question of disease of the mind depended here on something of which the jury had to be satisfied namely, that the defendant had no solid grounds for believing in his wife's infidelity. That is not a matter for the doctors. They may have their own views about it, but that is no better evidence than any other... it is for the defence to prove the facts upon which the doctors can express their opinion as experts. Here they did not attempt to do so, but relied on hearsay evidence given by the doctors”. (p 686) **[EB1028]**

13. Accordingly, where a defendant seeks to adduce fresh medical evidence after a trial it must be for them to establish a cogent basis for the facts underlying that evidence. There is no point in admitting evidence if it is based on a narrative that cannot be believed or is otherwise objectionable (for example because it contradicts the factual case that the appellant was running at trial (see below)). Furthermore, medical evidence is important, but the tribunal of fact is not bound to accept the medical evidence if there is other material which, in their good judgment, conflicts with it and outweighs it (see *Byrne* at pp. 403-404 [EB1087-1088] and *R v Bunch* [2013] EWCA Crim 2498, paras 11-12 [AB 29/EB1078-1079]).

14. The respondent agrees with the appellant that the considerations for the admission of fresh evidence may, broadly at least, be summarised in the three points set out in *Lundy v The Queen* [2013] UKPC 28 at para 120 [AB 17/EB892]. However, an application to adduce fresh evidence “faces a particularly high hurdle where the new case, not merely was not advanced at trial, but is inconsistent with the case then advanced” (*Chandler v The State* [2018] UKPC 5, para 12 [AB 8/EB682]). At the second trial of Mr Chandler for murder, he denied having a weapon or stabbing the victim. On appeal to the Board, he sought to adduce evidence of diminished responsibility. That defence was plainly inconsistent with the case ran at trial. The majority in *Chandler* refused to admit the evidence and dismissed the appeal. The majority (at para 12) cited Lord Toulson’s judgment in *Brown v The Queen* [2016] UKPC 6 at para 33 [AB 7/EB672] (itself based, in turn, on the English Court of Appeal authority of *R v Erskine and Williams* [2010] 1 WLR 183) [AB 37/EB1198]:

“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.”

15. The respondent accepts that there is a difference between seeking, on appeal, to advance a defence that is inconsistent with the defence run at trial (not this case, as provocation

and diminished responsibility may be and quite often are run together as alternatives) and seeking, on appeal, to advance a defence that relies on facts that are inconsistent or different to things the defendant said at trial (arguably, this case – see further, below). But both must, it is submitted, be objectionable for similar reasons. Indeed, it is the facts that really matter (because the defences are based on the facts led by the accused).

16. The Board in *Chandler* considered the case of *Daniel v The State* [2014] AC 1290 [AB 9/EB699] (cited by the Appellant in his Case, para 37 (and elsewhere)). But, as the majority in *Chandler* accepted, *Daniel* was an unusual case (*Chandler*, para 28 [EB691]). There, the expert evidence suggested that Mr Daniel had a personality disorder and had killed in a psychotic state. The defence had not been run at trial, because the expert evidence then available had ruled out a relevant abnormality of mind, a point later challenged. Returning to the majority judgment in *Chandler* (para 28 [EB691]):

“[I]t is important that the proposed defence [in *Daniel*] 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.”

17. In this case, however, is that the appellant’s case at trial was that he “tripped” and had no recollection of the killing. This is inconsistent with the factual account he has since presented to his experts and inconsistent again with the factual case that he first relayed to his trial counsel in 2010/11. Unlike in *Daniel*, the fresh evidence provides no explanation for that shift or how it impacts on the expert opinion or indeed the defence. In *R v Criminal Cases Review Commission Ex p. Pearson* [2000] 1 Cr. App. R. 141 [AB 36/EB1166], Lord Bingham noted that features which would be likely “to weigh more or less heavily against the reception of fresh evidence” included (at p.164 [EB1189]): “expert evidence based on factual premises which are unsubstantiated, unreliable or false, or which is for any other reason unpersuasive”.

18. Finally, the appellant submits 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” (A’s Case, para 5). The quote is taken from *R v Campbell* [1997] 1 Cr App R 199 at 205E-F [AB 32/EB1102] per Lord Bingham CJ. But those words were used

by Lord Bingham in the context of his ruling that the conviction was unsafe and that there should be a retrial. In this case, the killing was over 20 years ago. Furthermore, there are several factual issues relevant to the reliability of the fresh evidence. These issues (including whether those issues can realistically be resolved at this late stage) need to be considered now as part of the question of whether it should be admitted at all.

B.2. Delusional Disorder

19. Dr Latham explains at [410/47] that delusional disorder, as a diagnosis, requires:

"the presence of one (or more) delusions. Delusions are also present in people with schizophrenia but in contrast to schizophrenia, people with delusional disorder do not tend to have prominent hallucinations (voices or visions) and their overall functioning is usually better. In other words, aside from the presence of the delusions, there is little to suggest that the person is mentally disordered."

20. Dr Latham defines delusions as "fixed, false beliefs that are not amenable to change in light of conflicting evidence" [410/47]. The Joint Statement elaborates: "A delusion is a fixed false belief based on an inaccurate interpretation of an external reality despite evidence to the contrary" [464].

21. Importantly, for a belief to qualify as a delusion, it must be false. As Dr Latham expressly acknowledges, if the appellant's beliefs were in fact true there is no diagnosis of delusional disorder [411/49]. This is because, as Dr Latham explains, the delusions aside "there is little to suggest the person is mentally disordered". This is consistent with the case of *Ahmed Din* (see above, Section B.1.), which concerned a similar diagnosis again dependent upon whether there was a reasonable basis for the belief held by the accused.

22. In *R v Stephenson (Owen George)*[2006] EWCA Crim 1890 [AB 46/EB1376] the defendant killed his wife. The jury accepted the partial defence of diminished responsibility, and he was convicted of manslaughter. On a sentence referral by the Attorney General, the Court of Appeal noted that the defendant had established at trial

“a fixed delusion over some period of time, that his wife was having or had had an affair with his brother-in-law” (para 2 [EB1377]). The police interviews made it clear “that the delusion was fixed and determined” notwithstanding “he had absolutely no justification for believing that there had been such an affair” (para 11 [EB1378]). There is no magic in this particular case, but it demonstrates the sort of evidence required to establish a delusional disorder.

23. Dr Attard does not indicate any disagreement with Dr Latham’s description of a delusional disorder. He explains that such is “characterised by the development of a delusion or set of related delusions, typically persisting for at least three months and often much longer, in the absence of a mood disorder” [450/93]. Like Dr Latham, he explains that other psychotic symptoms (hallucinations and so on) are not present (ibid). It follows (as Dr Latham emphasised) that much (if not everything) hinges on the beliefs being false (otherwise, there is not much else, if anything, in the clinical observations that would support a diagnosis). Dr Attard appears to accept the significance of establishing the falsity of the beliefs, though is markedly less explicit about this point than is Dr Latham. He tends, with respect, to dance around the issue, stating instead that there is “no evidence to suggest that the victim of the index offence did administer Mr Woods any poison” [452/100]. More on this point, below.

24. The Joint Statement identifies the diagnosis as "Delusional disorder...a mixed – jealous and persecutory – type" [461]. Dr Latham explains the jealous subtype as "when the central theme of the individual's delusion is that his or her spouse or lover is unfaithful" [410/fn2] and the persecutory subtype as "when the central theme of the delusion involves the individual's belief that he or she is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals" [411/fn3].

B.3. The facts upon which the medical evidence is based

B.3.1. Documents

25. Each of the reports contains a summary of the interviews with the appellant. The respondent has been keen to secure disclosure of the underlying notes of the interviews to assess for himself what was said. Dr Attard interviewed the Appellant on 10 January 2024. A copy of his handwritten notes has been provided but, true to tradition, the notes

are indecipherable.¹ On 10 November 2025, the solicitors acting for the appellant indicated that they had reached out to obtain the notes for Dr Latham and Ms LeeWah-Cooper’s assessments but had not yet received them.

26. For now, the respondent will rely on the short summaries provided by the experts. The desire remains, however, to secure the underlying material given its importance in this case (in particular, in respect of the diagnosis of delusional disorder).

B.3.2. The Delusions

27. The most significant basis for the diagnosis is the suggestion by the appellant that he was poisoned in 2005, as part of a plot to kill him. Dr Latham records, in his report (2020), that the appellant had told him that he was poisoned in 2005 by Ms Miller for “loving too strong” [403/16]. He was convinced that Mr Stewart and Ms Miller were trying to kill him, led by Ms Miller [405/24] [409/45].

28. Dr Latham observed as follows: “I did not find evidence of abnormal beliefs other than those around his wife and those described earlier in the report. He did not have any psychotic symptoms beyond beliefs about his wife when I saw him” [407/32]. These beliefs related to “a perception of her infidelity as well as believing that she wanted and had tried to kill him by poisoning” [409/46].

29. Dr Latham identified a “difficulty” which he described as twofold [409/46]:

“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.”

30. As to the latter difficulty (essentially, causative effect or impact),² the appellant (a) claimed not to recollect anything about the killing and (b) himself did not associate any link between his beliefs about Ms Miller and the killing [406/25] [409/46].

31. Dr Latham accepted that the diagnosis “hinges on the presence or absence of one kind of mental symptom: delusions” [410/47]. He continued [410/47]:

¹ (No offence intended; they are in shorthand or something like it).

² The *Campbell* point – see Section B.1. para 8 above.

“The problem with classifying these beliefs as delusions is that there are medical notes suggesting he may have been poisoned and also his ex-partner may have been having new relationships. In other words, if they are not *false* they are not delusions and there is evidence to suggest he was poisoned. I am not clear what evidence there is to suggest Sandra Miller was having several sexual relationships with other men.”

32. Dr Latham quite rightly accepted that it was not his place as a medical expert to assess the truth of the underlying facts. He suggested that “[e]ven if there was some basis for him developing the beliefs he had, their fixed nature, the associated behaviour and their continued prominence in his mental state, suggest that the diagnosis of delusional disorder **may** apply” [411/50] (emphasis added). It is not understood that the appellant seeks, however, to rely on this alternative “may” basis for the defence.
33. It is important to note that Dr Latham’s observations about the impact of the delusional disorder at the time of the offence (see his report, para 54 onwards) are prefaced by what he says in his report at para 53 [413/53]. In short: the facts matter and that if he is “wrong and these are not delusions, that other more ordinary explanations for the offences are likely to come into play”. Even in paragraph 59 of this report, where he stated that the appellant’s beliefs “are likely to be delusional”, in the following sentence he says that a diagnosis of delusional disorder follows “if they are delusions” [415/59].
34. The appellant repeated much of the same information to Dr Attard (2024), although there are some important differences (see below). The appellant said that he had been poisoned and ended up in hospital. He blamed Ms Miller [438/27]. As with his account to Dr Latham, the appellant explained that he suspected Ms Miller of cheating on him and that she smelt different during sex as she had been having sex with another man [437/22]. Dr Attard considered the same information as Dr Latham as regards the poisoning, which indicated that the appellant had been poisoned by an additive to a milkshake in the fridge at home [438/33] [442/49-52]. Both Dr Latham [409/42] and Dr Attard [438/33] noted contemporaneous medical evidence showing the appellant’s admission to hospital in February 2005 for consumption of “agricultural poisons” [87] and both experts noted Allan Porter’s evidence, which was that after the appellant left hospital he accused Ms Miller of poisoning him [408/36] [442/50]. The killing, of course, was months later in July 2005.

35. Dr Attard concluded that the appellant would “likely meet the diagnostic criteria for a delusional disorder” [450/93]. In terms of the beliefs, and in particular the poisoning, being fixed and false, Dr Attard said as follows [452/100-101]:

"Whilst it is not impossible that the victim of the index offence poisoned Mr Woods, it is outside of a psychiatric expert witness to make such conjecture. As I understand it, there is no evidence to suggest that the victim of the index offence did administer Mr Woods any poison, indeed I understand from the medical records available that Mr Woods was taken to accident and emergency in an unresponsive state after having been ‘found by wife at home frothing and unresponsive’. Despite Mr Woods having subsequently reported the matter to the local police, there is no evidence to suggest that the victim of the index offence was ever suspected of poisoning him and there was no investigation of the matter by police.

I have **therefore** considered 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." (emphasis added)

36. The difficulty with Dr Attard’s diagnosis will be obvious: on the one hand he accepts that it is not for him to decide the facts, yet on the other hand his diagnoses begs (if not simply answers) those important factual questions. As submitted earlier, Dr Latham was more equivocal [411/49]:

“Mr Woods’ beliefs are not clearly implausible. In fact, there is evidence that he is justified in holding these beliefs but it is obviously not a psychiatrist’s role to comment on the facts. If Mr Woods is correct that his partner had multiple relationships for many years and that she was indeed trying to kill him by poisoning and possibly other means then he is not delusional and there is no diagnosis.”

37. Though Dr Latham is more candid about the difficulty than is Dr Attard, it is plain from their reports that delusional disorder (given the absence of other psychiatric symptoms)

hinges on establishing that the beliefs are false. Or, as it was put in *Ahmed Din* that there are “no reasonable grounds” for the beliefs.

B.3.3. Other possible beliefs about being followed and so on

38. Dr Latham’s report contains no indication that the appellant had told him about any beliefs that he was being followed. The appellant only answered as a generality that seems to be more associated with public safety in Trinidad rather than any personal feeling of being followed [402/11].
39. By the time of the interview with Dr Attard, four years later, the appellant had shifted to an account of Mr Stewart “deliberately following him” prior to the index event [439/37-38]. This appears however to be part of the same belief that Mr Stewart and Ms Miller were seeking to kill him. Dr Attard recorded the appellant saying that Mr Stewart was following him “to do something” and then referred to him having “poisoned some juice” [439/38].
40. Dr Attard records that the appellant “described the belief that the local police force were aware of the attempt to poison him by the [deceased] however took no action” [441/45]. This complaint is included in the 2011 interview notes [105], however, the first time it is suggested that the police knew about the poisoning but failed to act because they were friends with Ms Miller is in Dr Attard’s report [441/45].
41. The respondent notes that after visiting the police to report his poisoning on 21 February 2005 [11], the appellant left the station 5 minutes after arriving. He appears to have returned to the station on 9 March 2005, where he was asked for a statement, but told the police he would provide one on 12 March 2005 [12]. On 17 March 2005, an officer attended the appellant’s home to take a statement, but the appellant said he would come to the “Moriah [police station]” [13]. It does not appear that the appellant followed up on this.
42. There is no indication that either of the experts placed much if any weight on these beliefs. As indicated above, the core point throughout has been the attempt to kill the appellant and his beliefs about Ms Miller’s infidelity (though, as noted, both were matters that arose several months prior to the killing).

B.4. Mild intellectual disability as comorbidity

43. Following an evaluation by Ms LeeWah-Cooper, the appellant was assessed as having “mild to moderate learning (intellectual disability)” with a Full-Scale IQ (FSIQ) of 53, although the “mild categorisation [was] more likely” [461].
44. Dr Latham suggests the following interaction between intellectual disability and delusional beliefs [414/56]:

"Mr Woods' low intellectual function is also likely to have contributed to undermining any opportunity for different decisions; he had fewer cognitive reserves by virtue of his intellectual disability so that the delusions were not met by an underlying ability or tendency towards reasoning and rationality."

45. It was concluded in the Joint Statement that the combination of “intellectual impairment and delusional beliefs” were likely to have had “an impact” on the appellant’s “ability to exercise rational thought” [461/1.1.2.2]

B.5. The evidence of diminished responsibility is unreliable and does not support a realistic defence.

46. The respondent respectfully submits that the evidence (both the appellant’s and the experts’³) on diminished responsibility is incomplete and unreliable and not realistically capable of establishing the partial defence.⁴

B.5.1. Appellant’s inconsistent accounts

47. As noted above, it is for the defence to prove the facts on which a diagnosis is based (Section B.1. para 9 above). Logically, this must include any facts going to causation (i.e. alleged operative impact of the disorder at the time of the killing). But the appellant has given materially inconsistent accounts of the events of 14 July 2005:

³ (Though the appellant’s evidence primarily consists of hearsay summaries in the experts’ reports).

⁴ Quite where this fits into the *Lundy* rubric (i.e. the credibility limb or the strength /interests of justice limb) is perhaps debatable (though the latter seems right); but these are well established grounds for resisting the admission or use of fresh evidence in these sorts of cases.

- a) 2010-2011 instructions to his attorney [100-106]: The appellant gave a detailed account of attending the house because he was expecting the children, but they had not come round to him. He saw his son Ryan who ran into the house; the appellant followed him into the bedroom. Ryan was slapping Mr Stewart to wake him up; Mr Stewart then pulled a cutlass from under the bed; Mr Stewart chopped Darion's foot off whilst he was asleep in the bed. He saw someone, who he believed was Ms Miller, in the corner with the sheet over her from head to toe. He said that he "did not kill Sandra Miller". In 2010, he went as far as saying that he saw Mr Stewart chopping Ms Miller. This was a detailed account pointing towards a complete legal defence to the charge of murder i.e. a factual denial (Mr Stewart was the killer) or, perhaps, self-defence. He refused to provide his attorney with the power to plea bargain with the State. The attorney's note was read to the appellant who signed it and stated it to be true.
- b) 2015 trial [218]: The appellant elected to give oral evidence, sworn on the bible. He said he "trip" when he saw Ms Miller in bed with Mr Stewart; he did not recollect anything after entering the door of the apartment; he did not remember chopping his son's foot. His evidence now was that, when he entered the apartment "I did not have anything in my hand". This was an amnesia account potentially consistent with provocation. It was, of course, totally different to the account initial told to his counsel.
- c) 2019 interview with Dr Latham [405/23]: The appellant appears largely to have repeated the account of not recollecting what occurred after he entered the apartment. As indicated, the respondent has not seen the underlying notes but it appears that the appellant by this stage may have admitted that he went with the cutlass (Dr Latham notes that "He did not recall why he went with the cutlass").
- d) 2024 interview with Dr Attard [436/20] [445/67-68]: The appellant told Dr Attard that he was "guilty of three chop, what they say 22 chop is false document. She poison me and I trip out" [436/20]. This time, the appellant accepted that the cutlass was his and that he had kept it in a separate apartment with his fishing equipment [445/67]. He said that when he saw the man in bed "I lash him with the cutlass and said get out of here". He added that he attacked Ms Miller after he saw that *she* had chopped off his son's foot.

48. The experts fail to address these inconsistencies in any meaningful way, which renders their evidence incomplete and inconclusive. Dr Latham briefly records the fact that, in the 2010-2011 notes, the appellant "gave an account of the incident, blaming Mr Stewart" [409/44] but provides no analysis of this. The inconsistencies are not even mentioned by the other experts. Yet the changing accounts must give rise to a host of problems including (a) lack of clarity as to the current proposed basis of the diminished responsibility defence, (b) how this fits with the case ran at trial and whether the appellant is caught by the cases of *Chandler* and *Pitman* and the like – addressed above in Section B.1. para 8 – noting that the appellant has not provided a “reasonable and persuasive explanation” (or indeed any explanation) for the changing accounts, (c) whether his (current or any) account is to be believed, (d) the diagnoses of the experts and so on.
49. The changes in the appellant's accounts also suggests tactical thinking. As indicated, in 2010/11, the appellant explained that he was attacked by Mr Stewart and that he saw Mr Stewart chopping Ms Miller and/or that he acted to defend himself. By the time of the trial, the appellant had ditched this defence in favour of a more plausible partial defence of provocation. The narrative changed completely, now fitting with this new line of defence – a claim of sudden loss of self-control, bolstered by an inability to remember what happened during the alleged loss of control. It is reasonable to infer that it must have dawned on the appellant (with the assistance of advice or otherwise) that the factual defence / self-defence argument was never going to work.
50. In 2019, Dr Latham interviewed the appellant. In 2020 he produced his report indicating possible delusional disorder, emphasising the need to show fixed and false beliefs maintained even in the face of objective evidence. The appellant is then interviewed by Dr Attard, at which stage the appellant started adding to the list of beliefs (delusions) (see above), including now saying (against the plain and incontrovertible medical evidence) that he only cut Ms Miller 3 times. Convenient, it might be thought.
51. This issue is touched upon in the Joint Statement but it is dismissed either as a result of the appellant being “influenced by the interviewer” or a "gradual recollection of the events" over time [463/3]. Neither of these explanations bears argument. A different interviewer cannot account for a totally different factual account of the killing. As for gradual recollection, the appellant had *detailed* recall in 2010-2011, then claimed *total*

amnesia in 2015, then provided *different detailed recall* in 2024. Rather than gradual recollection, the evidence points to fabrication. There is no analysis about the likelihood that the appellant, who appears capable of fabricating different (i.e. non-fixed) and detailed versions of events of the night of 14 July 2005, may also have been fabricating his reports of delusions or exaggerating or malingering with respect to his alleged mental impairment.

52. The respondent respectfully submits that the inconsistent accounts (and the experts' failure to deal with them) undermine the appellant's and the expert evidence in the following ways:

- (1) The diminished responsibility defence relies (at the moment) on the appellant saying that he went to the apartment and saw Ms Miller, whom he considered still to be his partner, in bed with Mr Stewart and that he "tripped". But the appellant's current version of events does not support this account. He does not say to Dr Attard that he tripped, lost it, and must have done the unthinkable in a state of mind that was not his own. His account to Dr Attard (in common with that given to his counsel in 2011) indicates that he was mentally present and aware throughout. This massively undermines his defence of diminished responsibility which, as noted, is predicated on the account he gave at trial (that he tripped and lost it). It is, of course, the appellant's case to prove (see Section B.1. above).
- (2) The appellant's changing accounts may, indeed, not only undermine the defence but suggest fabrication. They suggest that the appellant knew what he was doing at the time of the killing; that he had chopped Ms Miller and killed her, that he understood the moral relevance of his acts and was seeking to experiment with different ways of avoiding a conviction for murder. (The respondent does not need to establish fabrication, it being sufficient to say that the appellant's account could not realistically be accepted on the balance of probabilities).
- (3) The appellant's shifting accounts prevent him from establishing, on the balance of probabilities that the delusional disorder (even if it existed) was operative at the time of the killing. Having given three different accounts, no one could trust the appellant (even on the balance of probabilities) that the disorder had any relevance to the killing. Indeed, the appellant himself has never said it did. The appellant saw no correlation between the beliefs about Ms Miller and the killing (see para 30, above).

- (4) The experts appear to suggest a correlation between the delusional disorder and the killing, but none of them have actually explained it in any detail nor how the shifting accounts fit into it:
- (a) Dr Latham says that the disorder had an impact on the appellant's ability to exercise rational judgment and to exercise self-control [413/54]. But this is a very general statement. He does not say how either of these impairments (if accepted) are linked to the killing and the appellant's (different) factual explanations of it. At what stage is the appellant's inability to make a rational judgment relevant? As he threatened Mr Stewart earlier in the day? When he picked up the cutlass and made a conscious decision to go to the property to confront them? Or when he was standing in the bedroom with the cutlass apparently surprised to see his ex-partner in bed with someone else? Dr Latham skips over all of this. But without any proper opinion on these points, the evidence is incomplete and inconclusive.
 - (b) Dr Attard says that the disorder "had an impact on his functioning at the time of the index offence" [455/113]. He suggests that this "impaired his ability to form rationale judgement, and impaired his behaviour and consideration of consequences at that time" [455/113]. But he does not actually explain why and in what way.
 - (c) The important diagnosis here is the delusional disorder. The nature of that diagnosis makes it critical for there to be a proper explanation as to *how* and in *what ways* the delusions were relevant to the killing. It may be that both experts avoid causation because of an inability to pin down what, in fact, is the appellant's case. Be that as it may, without it the evidence takes the defence nowhere (see para 8, Section B.1., above).
- (5) The appellant's accounts to his counsel in 2011 and more recently to Dr Attard in 2024 both involve the appellant being mentally present during the killing. If this is right, then there is no evidence to establish or explain how the substantial impairment criterion is met. In other words, even if there is a delusional disorder and even if it was operable at the time of the killing, given the appellant's apparent acceptance that, in fact, he did not "trip" or lose it (but was mentally present and engaged at the time, weighing up what sort of response was justified and so on), where is the evidence that the disorder substantially impaired his responsibility for the killing?

- (6) The shifting accounts also call into question the diagnosis of delusional disorder itself because they call into question the evidence about fixed and false beliefs. Given the appellant tells different stories to different people at different times, can it really be said, on the balance of probabilities, that his account of his beliefs is reliable? It is noted, for example, that the appellant told Dr Attard that he was being followed by Mr Stewart but this did not feature as any part of the relevant narrative when he was interviewed by Dr Latham. The appellant's initial account to his attorney suggests a factual denial (Mr Stewart is responsible) or self-defence. The appellant said that Mr Stewart attacked him. There is no analysis of whether this is or could be a "delusion". On the face of it, the appellant was not saying that he attacked Ms Miller because of some delusional psychosis but because he was being attacked by Mr Stewart. None of this seems consistent with or even relevant to the diagnosis of delusional disorder as currently explained by the experts.
- (7) The appellant appears able to modify his account according to which defence he is running. This level of strategic and adaptive thinking is inconsistent with an IQ of 53 and cognitive functioning in the bottom 0.1% of the population. Alternatively, if someone of that level of intellectual disablement is nonetheless able to fabricate and change his account of fundamental events, the relevance of that disability in this case must be seriously diminished (because such a person remains able to rationalise events and decide how to act and how to present those acts to the outside world).

53. Many questions arise. If the appellant now accepts that he had the weapon and went to the scene with it in hand, how does this fit with a diagnosis of delusional disorder and how does it establish an impaired mind at the time of the killing? As opposed to (in line with the State's case) someone who knew full well that Ms Miller was in a relationship with Mr Stewart, was jealous (not because of some delusion but because she had left him), and, having already threatened Mr Stewart earlier in the day, went to the house with a machete to finish the job? The same can be said of the other factual variances (whether he tripped, whether he acted in self-defence, whether he chopped her but only 3 times and so on). As things stand therefore, the evidence does not come close to establishing a realistic case on diminished responsibility.

B.5.2. "Falsity" of the beliefs has not been established and cannot be so

54. The appellant must establish on the balance of probabilities that there was no reasonable basis for the beliefs. It is central to the diagnosis that the individual resists rational explanations or evidence pointing away from the beliefs; that they persist in their beliefs against the weight of the evidence (see Section B.1. para 9 above and the case of *Ahmed Din*). This has not currently been proven and there is no realistic prospect of it being so.
55. Furthermore, there is contemporaneous evidence that undermines the characterisation of the poisoning belief as "false":
- a) The appellant reported the poisoning to the police on 21 February 2005 [11];
 - b) There is evidence from Mr Porter (Ms Miller's former employer) that the appellant was taken to hospital and treated for suspected poisoning in 2005 [71];
 - c) There is contemporaneous medical evidence showing the Appellant's admission to hospital in February 2005 for consumption of "agricultural poisons" [87];
 - d) There was evidence from multiple witnesses that the appellant physically abused Ms Miller over a number of years [65][70][166][206], contrary to the appellant's account [221][403/15] (i.e. such that there would have been motive in Ms Miller to have harmed the appellant, which fits with the narrative);
 - e) The poisoning occurred just over a week after Ms Miller reported the appellant to the police for allegedly beating two of her sons [9], providing further motive.
56. Given that appellant was in fact treated for suspected poisoning, and Ms Miller appears to have had a motive (the history of domestic abuse), the belief that Ms Miller had poisoned him cannot be categorised simplistically as a delusion. Dr Attard's conclusion that there was "no evidence" of poisoning [452/100] is unsustainable (even if it was for him to say, which it isn't).
57. As for the beliefs about infidelity, the evidence was all the other way: Ms Miller left the appellant and started a relationship with Mr Stewart. The appellant disputed that he knew Ms Miller was in a relationship with Mr Stewart – however, there is a contemporaneous police complaint by Mr Stewart from earlier in the day of 14 July 2005, which included a report that the appellant "made threats to kill [him and the deceased]" [14].

58. The appellant's belief that the deceased was with another man was not "false" – it was true. The experts fail to distinguish between the appellant's earlier suspicions during the relationship (which might have been delusional) and his knowledge at the time of the killing (which was fact-based). The jealousy at the time of the killing was reality-based, not delusional.

B.5.3. Evolving Delusional Beliefs Undermine the "Fixed" Requirement

59. As noted above, a delusion must be a "fixed" belief. If the appellant's alleged delusional beliefs have evolved over time, this undermines the characterisation of them as fixed delusions. There is no analysis of this in expert reports. For example:

- a) Being followed: Dr Latham's report contains no indication that the appellant believed that he was being followed prior to the killing [402/11]. By 2024, he told Dr Attard that Mr Stewart had been "deliberately following him" for years [439/37-38].
- b) Poisoning perpetrators: In 2019, the appellant told Dr Latham that the deceased had poisoned him [403/16]. By 2024, he told Dr Attard that "they" – the deceased and Mr Stewart – had tried to poison him [439/38][440/42].
- c) Police complicity: The suggestion that the police knew about the poisoning but failed to act because they were friends with the deceased first appears in Dr Attard's report [441/45], not in the 2011 interview notes [105].

60. The changes in the appellant's alleged persecutory beliefs over time – from the deceased alone to include Mr Stewart and the police – is inconsistent with "fixed" delusions and more consistent with embellishment or construction of a narrative to support a diagnosis.

B.5.4. Functional abilities inconsistent with claimed intellectual disability

61. The claimed IQ of 53 places the appellant in the moderate intellectual disability range. Ms Lee Wah-Cooper concluded that his "overall thinking and reasoning abilities exceed those of only approximately 0.1% of individuals his age" [419]. This is said to reduce his "cognitive reserves" and make him more susceptible to delusions [414/56]. However, evidence of the appellant's functional abilities is difficult to reconcile with such severe impairment:

- a) The appellant built his own house: "whilst working on construction sites he had 'watched how to build a house and so I did it by myself" [435/14];
- b) He worked independently as a fisherman "both making commercial catches and taking tourists from local hotels on fishing trips" [435/14];
- c) He managed his own finances, "never having been in debt" and had "a bank account and savings" [435];
- d) In 2011, he was able to sign his attorney's note with his name [106], and by 2017, he appears to have been able to write a reasonably sophisticated letter to his attorney [481], contradicting his assertion that he never learned to read or write [436/17];
- e) The 2010-2011 handwritten notes demonstrate detailed and cogent narrative communication [475].

62. The experts do not consider the above and although they acknowledge the "mixed picture" they do not adequately explain it. The Joint Statement concludes only that "mild" intellectual disability is "more likely" than moderate [461]. Even mild disability may sit uneasily with the appellant's demonstrated functional abilities and, as noted above, the changes in his account of what happened on 14 July 2005. The experts have not considered the possibility of exaggeration or malingering in light of the obvious inconsistencies in the appellant's account both of his abilities and of the killing.

B.6. Evidence could have been obtained at trial

63. The appellant was represented at trial, by Mr Wright. There is no suggestion that his legal representatives were unaware of the possibility of a diminished responsibility defence.

64. Mr Khan (who represented the appellant in the Court of Appeal) explained that he did not raise diminished responsibility on appeal because he felt there was insufficient evidence of a long-standing condition and that any such defence would rely on the appellant's account: "any such evidence would be coming from the Appellant himself and not independently supported by any other source" [477/23]. He went on to explain that, in Trinidad and Tobago, juries do not tend easily to accept such defences. In other words, Mr Khan, a very experienced trial attorney, made an assessment that the defence would fail because of a lack of cogent evidence of a longstanding condition and because

of concerns about the believability of his own client's evidence. Respectfully, both of those assessments are plainly correct. Furthermore, absent any other evidence, the appellant's trial counsel probably thought the same thing.

65. Bearing in mind, too, that trial counsel and Mr Khan would have been aware that the appellant had changed his account of the killing. In 2010/11, it was a factual defence or self-defence. By the time of the trial, it was amnesia consistent with a loss of self-control. The client was not a reliable historian. This would be bound to come out if he was referred to experts. In the circumstances, the likely assessment was that the appellant was best of running provocation. The respondent agrees. Diminished responsibility was a bad defence then and remains so. The appellant's best line of defence, surely, was provocation. If the appellant stuck to the script, the best prospect was to persuade the jury that just maybe he had found the weapon at the house and had flipped or "tripped" when he saw them in bed together. That was, frankly, his best hope.
66. It is not as if the appellant's mental health was not considered. It was. This can be inferred from the 2010 interview note recording "No mental health issues" [100]. The 2011 interview note records "I was never sent [for] psychiatric evaluation" [103] but the appellant does not say that the issue was not considered with his trial attorney.
67. In answer to the question, therefore: could the evidence have been acquired at the time? The respondent would answer: yes, it could have been; but he would add that there would have been no cause to do so. Strategically, given the appellant's shifting accounts, the best option was the one taken, provocation. No experts, just run the case thus: we were still in a relationship, she was sleeping around, I flipped out. The fact that the jury did not buy this does not give rise to any miscarriage of justice but is simply the result of running what must have appeared at the time to have been the best hope.

B.7. No risk of a miscarriage of justice

68. For all the foregoing reasons, the respondent submits that the fresh evidence is not reliable or conclusive and does not establish a realistic defence of diminished responsibility. The decision not to run the defence at trial is likely to have been a strategic one based on the appellant being a poor historian and the fact that these sorts of defences do not fair well in Trinidad in the absence of more compelling evidence of a long-term and clear condition impacting on the accused at the time of the killing.

69. Not only is the fresh evidence weak and lacking in substance, the tribunal of fact would not be bound to accept it anyway if there is other material that conflicts with and outweighs it (see Section B.1. para 13 above). Here, there is substantial material that conflicts with the medical evidence:

- a) The appellant's multiple inconsistent accounts, demonstrating unreliability as a historian;
- b) His functional abilities, inconsistent with the claimed severity of intellectual impairment;
- c) Dr Latham's acknowledgment that the appellant does not associate the killing with the alleged delusion;
- d) The unresolved factual question of whether the beliefs were delusional or reality-based;
- e) The prosecution's evidence of premeditation (arriving at the apartment with a cutlass as well as threats to kill earlier that day [14]), a history of domestic abuse [65], [70], [166].

70. Furthermore (and continuing the point made in paragraph 18 above), the late introduction of this defence creates insurmountable difficulties. The diagnosis of delusional disorder depends on determining whether the deceased actually attempted to poison the appellant. This factual issue cannot now be resolved on a balance of probability in the appellant's favour. The events occurred 20 years ago. The trial proceeded on the basis of a provocation defence, not diminished responsibility, and the relevant factual inquiries were never made.

71. Counsel in the Court of Appeal, Mr Khan, noted at [477/24] that "juries have consistently rejected the issue of diminished responsibility, even in cases where there is significantly strong evidence pointing in that direction". Here, the disorder evidence is far from "significantly strong". It is equivocal at best and contradicted at worst. And it would be more than uphill task to convince a tribunal of fact that a 'mild' [461] intellectual impairment created a substantial impairment to the appellant's judgment (see *Pitman* at para 49 [AB 21/EB977]).

72. Finally, whilst it is accepted that diminished responsibility *per se* is not inconsistent with provocation as a defence, the appellant appears to be attempting to advance a case of diminished responsibility relying on a narrative that is inconsistent with an earlier narrative. In that respect, it is submitted the appellant falls into the especially tricky category of cases addressed in *Chandler* and *Pitman* (Section B.1. para 14 above). This is a further reason militating against admission or reliance on the evidence.

B.8 Conclusion on diminished responsibility

73. The Board is invited to refuse to admit the fresh evidence as (a) it is not reliable or of sufficient quality to be capable of realistically establishing the defence of diminished responsibility and (b) there is now no realistic means or possibility of testing or (from the appellant's perspective) improving that evidence during (for example) a remitted factual enquiry before the Court of Appeal.

C. Provocation Part 1: The Law

C.1. Introduction

74. In this section, the respondent advances submissions on the correct test for provocation. In Provocation: Part 2 (below), the respondent evaluates the directions given by the trial judge in this case and makes submissions on whether those directions were correct and what difference it would make under the law before and after the decision in *Marcelline*.

C.2. Background & Summary

75. The jury was directed, in the usual way, that the appellant was to be found guilty of manslaughter, not murder, if the jury considered that he may have been provoked so as to cause a "sudden and temporary loss of self-control" at the time of the killing. The jury was told to "weigh how serious the provocation was for this accused". Finally, the judge explained that they must ask themselves:

"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..." (emphasis added)

76. The words in emphasis are the subject of the appellant's challenge before the Board; the "objective element" of the test of provocation.

77. Section 4B of the OAPA [**AB 1/EB615**] provides as follows:

"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."

78. The essential question in this appeal is whether the words "do as he did" in section 4 means, as the respondent contends (and as the trial judge directed), to effect the killing in the manner the appellant did (which was to chop the victim some 22 times), or, as the appellant contends and as the Court of Appeal held in *Marcelline v The State* Crim. App. No. S015 of 2014 [**AB 49/EB1438**], simply to kill. The distinction is important because if "do as he did" means simply to kill then the jury's reasonable man assessment is limited to asking whether an ordinary person of the appellant's age and sex might have been provoked into killing the victim. Whereas if "do as he did" means to kill in the way the appellant in fact killed, the jury's reasonable man assessment is broader, including weighing in the balance the fact that the appellant launched a sustained and vicious attack on the victim inflicting many wounds.

79. The respondent's submission is that "do as he did" must mean to kill in the manner the accused in fact did. This has always been how this provision (or its statutory equivalent) has been understood and applied in England and Wales and, so far as counsel is aware, in every other territory that appeals to the Board. In any event, in Trinidad and Tobago, Section 4B of the OAPA [**AB 1/EB615**] was interpreted and applied in that way by the Privy Council in the case of *Rampharry v The State* [1999] UKPC 1 [**AB 22/EB980**]. *Marcelline* was decided without reference to *Rampharry* and is not good law.

80. The State did not appeal the Court of Appeal's decision in *Marcelline*. The judgment was given some time ago such that instructions as to the precise thinking at the time are not available, but the Court of Appeal in that case substituted the conviction of murder

for that of manslaughter. The appeal court was persuaded not only on the ground of provocation but also diminished responsibility including on the basis of fresh evidence admitted on appeal. It seems likely therefore that, in the end, the State did not see any merit in appealing the *result* in that case.

C.3. The objective element

81. Section 4B of the OAPA [AB 1/EB615] is in the same words as was s. 3 of the Homicide Act 1957 (E&W) [AB 4/EB622]. The position in England and Wales changed with the abolition of the common law defence of provocation and its substitution with a statutory defence of “loss of control” (ss. 54-56 of the Coroners and Justice Act 2009 [AB 3/EB620-621]). Nonetheless, there are a significant number of English decisions on aspects of the objective test (and even the new test of loss of control has an objective element to it – see further below).
82. There have also been several Privy Council decisions, including from Trinidad and Tobago, concerning provocation and the objective test. The position was summarised by Lord Hughes in *Richard Daniel v The State (Trinidad and Tobago)* [2014] AC 1290 [AB 9/EB699]:

“[11]. It is trite law that at common law provocation has for decades involved a two stage enquiry. First, may the accused have killed when he had lost control of himself as a result of provocative behaviour by someone else? That is an enquiry about this accused on this occasion; it is sometimes described as a subjective enquiry. 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. In the past difficult questions have arisen over the qualities to be attributed to the hypothetical reasonable person; those do not arise in this case and are in any event largely answered by the decision of the Board in *Attorney General for Jersey v Holley* [2005] 2 AC 580. In some parts of the common law world, codification of the criminal law has significantly modified one or other of the two core elements of provocation, which fact may need to be remembered when one is considering decisions from other

jurisdictions, but for the present the conventional two-stage enquiry is the one with which the Board is concerned. **[EB708-709]**

83. *Attorney General for Jersey v Holley* [2005] 2 AC 580 **[AB 6/EB627]** was decided by an enlarged Board of nine members to resolve an apparent conflict between the decision of the House of Lords in *R v Smith* [2001] 1 AC 146 **[AB 45/EB1306]** and a case from Hong Kong, *Luc Thiet Thuan v The Queen* [1997] AC 131 **[AB 16/EB830]**. Lord Nichols, speaking for the majority in *Holley*, described the objective element thus:

“[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’.” **[EB636]**

84. As Lord Nichols explained in *Holley*, the “well-established” interpretation of the statutory provision was that the legislature intended, by “reasonable man”, to refer to “an ordinary person, that is, a person of ordinary self-control” (Para 7 **[EB636]**). Lord Nichols spoke, too, of this long established and “essential element” of the defence (para 9 **[EB636]**). It follows that “an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did”.

85. The case law began to recognise, however, that the objective test was not entirely objective. In respect of the first element of the test (the gravity of the provocation), this might depend on “the particular characteristics or circumstances of the person to whom a taunt or insult is addressed” (para 10 **[EB637]**). Lord Diplock summarised how all of this ought to be explained to the jury, in *R v Camplin* [1978] AC 705 **[AB 33/EB1106]**:

“[the judge] should ... explain to them that 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.” **[EB1107]**

86. The jury can therefore consider most characteristics of the accused when assessing the gravity of the provocation to the particular accused, but then the objective standard still applies as to whether a person of ordinary powers of self-control may have acted as the defendant did given the gravity of provocation as endured and understood by the accused. The Board will observe that this softening of the test injects a significant element of subjectivity into the analysis (see further below).

87. When considering the first element of the objective test, it is not only immutable features such as age and sex that can be considered but also religion, sexual preference and even habits such as “glue sniffing” (para 11 **[EB637]**).⁵ These characteristics or behaviours are not relevant, however, when applying the second stage of the objective test. Lord Nichols explained the logical distinction between characteristics that could and could not be taken into account at the second stage:

“[13]. Taking into account the age and sex of a defendant, as mentioned in *Camplin*, is not an exception to this uniform approach. The powers of self-control possessed by *ordinary* people vary according to their age and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not.” **[EB638]**

88. The particular concern with which the Board was grappling in *Holley* was how to deal with cases where the accused suffered from a mental abnormality. This could be taken into account at the gravity stage, but quare whether it was appropriate in such cases to test the accused’s behaviour against the standard of an ordinary person with ordinary powers of self-control (given by definition they may not enjoy such). In *R v Smith* [2001] 1 AC 146 **[AB 45/EB1306]**, the majority held that the objective standard could

⁵ (Avoiding for the moment, arguments about whether these truly are “immutable”).

not uniformly and inflexibly be applied in such cases. The jury instead should be asked to consider whether the accused exercised self-control “to be expected of someone in his situation” (see *Holley* para 20 [EB639-640]).

89. In *Holley*, Lord Nichols (in the majority with Lord Hope, Lord Scott, Lord Rodger, Lord Walker and Baroness Hale) rejected the approach of the majority in *R v Smith*. Whilst recognising that that approach might be an entirely rational way of shaping the law of provocation, it was an approach that was inconsistent with the words of the statute. Section 3 of the Homicide Act [AB 4/EB622] recognised and in effect entrenched the objective element. This could not be removed under the guise of interpretation:

“[22]. ...The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be. In these circumstances it is not open to judges now to change (“develop”) the common law and thereby depart from the law as declared by Parliament. However much the contrary is asserted, the majority view does represent a departure from the law as declared in section 3 of the Homicide Act 1957. It involves a significant relaxation of the uniform, objective standard adopted by Parliament.

... Whether the provocative act or words and the defendant's response met the “ordinary person” standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable.” [EB640]

90. The position, clarified by the decision of the majority in *Holley*, was as described by Lord Diplock in *R v Camplin* (see para 85 above). One may take into account various characteristics of the accused when assessing the gravity and impact of the provocation on him or her; the final stage remains objective in the sense that the question is whether an ordinary person with ordinary powers of self-control might have acted as the accused did, given the nature and gravity of the provocation as experienced, subjectively, by the accused. (Quaere however how much difference this makes in practice – see below).

91. The effect of these rulings (whether or not one goes as far as the House of Lords did in *R v Smith*) was to soften the otherwise strict objective assessment of what a reasonable person in the situation of the defendant might have done by allowing the jury to take into account a full range of characteristics when assessing the gravity of the provocation whilst at the same time giving effect to Parliament's insistence upon a final check against an objective standard.⁶

C.4. "Do as he did"

92. The respondent accepts that the issue considered above (the nature of the objective element; what personal characteristic or traits the jury may take into account when applying the test) is not the same as the "do as he did" question. If "do as he did" means "to kill", the jury continues to apply the reasonable man assessment. But, it is submitted, the appellant's construction leads to a very narrow assessment as the jury must exclude from the assessment important aspects of the offence and how it was committed. The jury considers only whether a reasonable man, faced with the provocation in question, might have killed with the requisite intention.

93. The "do as he did" question is bound up, therefore, with consideration of the objective element of the test for provocation. Indeed, the Court of Appeal in *Marcelline* considered that certain perceived difficulties with the objective element of the test provided a good reason to construe the words in the way it did. The respondent addresses this reason and several others, below. Suffice to say, for now, that there has never been any suggestion (to counsel's knowledge) in the English cases concerning provocation that a significant part of the debate on the nature and requirements of the objective element (see above, *R v Campbell*, etc) could be avoided because "do as he did" only ever meant to kill. At least in those cases where excessive or disproportionate force was deployed, the difficulties could be avoided by simply excluding from the jury's consideration all facts concerning how the killing was done. No one seems ever to have thought this was a way out of these difficulties.

⁶ The Court of Appeal in England and Wales held that juries ought to be directed in accordance with the majority decision in *Jersey v Holley* and not the majority decision in *R v Smith*: see *R v James (Leslie)* [2006] QB 588 [AB 40/EB1262] and *R v Moses (Barrington)* [2006] EWCA Crim 1721 [AB 43/EB1299]. The Board in *Richard Daniel* appear to have proceeded on the basis that *Holley* applies.

C.4. The reasonable relationship “rule”

94. *Mancini v DPP* [1942] AC 1 [AB 41/EB1280] concerned an attack on the victim with a dagger. The appellant said that he had pulled it from his pocket and used it on the deceased during the course of a fight with him and others. At trial, he ran self-defence on the basis that the deceased had pulled a knife on him and threatened him. The jury rejected that and he was convicted. On appeal, the House of Lords considered the possibility that the trial judge ought to have directed the jury on provocation as a partial defence. This was discounted on the basis that, the jury having rejected the case of self-defence, there was insufficient evidence to put provocation in play. Viscount Simon provided nonetheless an important summary of the law and in particular the objective element of the test as it was understood at that time (page 9 of the report [EB1288]):

“...The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v. Lesbini*, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.”⁷

95. The concluding words (reasonable relationship to the provocation etc), whilst plainly intended as no more than a summary of the law, were at times described (as sometimes happens) as a “rule” to the effect that, in order for the defence to apply, the actions of the accused must bear some proportionality to the acts of provocation. Possibly in practice it did operate something in the order of a general rule, but it was properly

⁷ See, too, *Holmes v DPP* [1946] AC 588 [AB 39/EB1247], in which the House of Lords considered the availability of the defence of provocation where the provoking acts were limited to words spoken. It was held that save perhaps in the most extreme and exceptional cases, words were not sufficient to engage the defence (in that case admission of adultery). Reference was made to *Mancini* and “the importance of considering the nature of the weapon used in retort” (p 598 [EB1257]). No doubt was expressed as to this nor the reasons given in that case.

emphasised in several cases that it was not a legal rule but merely a means of explaining how the objective element of the test works. The important point for present purposes is that application of the objective element at common law included consideration of the means by which the killing was effected.⁸ This was for the entirely logical and commonsense reasons explained by Viscount Simon.

96. Those cases preceded the Homicide Act 1957. But section 3 of that Act [AB 4/EB622] did not make any substantive change to the requirements of the objective element of the test. In *R v Brown (Egbert Nathaniel)* [1972] 2 QB 229 [AB 28/EB1067], the Court of Appeal emphasised the importance of applying the statutory test but accepted that it accommodated the dicta in *Mancini*. The accused had killed his wife with a razor, inflicting a large seven inch long wound to her throat which severed the muscles of her neck, the carotid arteries, the jugular veins, the windpipe and gullet (p 231 [EB1069]). The accused appealed in respect of the judge's directions "on what has been called the 'reasonable relationship' rule, that is, that the mode of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter" (p 232 [EB1070]).

97. Talbot J, giving judgment for the Court, expressed the view that it was not the intention in the *Mancini* case to lay down any rule of law: "it was intended as a guide to one of the considerations which a jury has to take into account on the element of provocation, namely, whether a reasonable man would have lost his self-control and acted as the accused did" (ibid). As for the impact of the Homicide Act, the Court of Appeal held as follows (p 234 [EB1072]):

"[W]hen considering whether the provocation was enough to make a reasonable man do as the accused did it is relevant for a jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act committed by the accused. It may be for instance that a jury might find that the accused's act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think therefore that a jury should be instructed to consider the relationship of the accused's acts to the provocation when asking themselves the question 'Was it enough to make a reasonable man

⁸ See, too, *R v McCarthy* [1954] 2 QB 105 [Supp Bundle EB1983] and the dicta of Lord Goddard at pp 109-110 [EB1988-1989].

do as he did?’ We feel that Lord Diplock's warning [in *Phillips v The Queen* [1969] 2 AC 130] should be followed and that it would be better not to use the precise words of Viscount Simon unless it is made quite clear that it is not a rule of law which the jury have to follow.” (emphases added).

98. The Board’s decision in *Phillips v the Queen* [1969] 2 AC 130 [AB 19/EB930] concerned section 3C of the against the Person (Amendment) Law (Jamaica), No. 43 of 1958, a provision identical to section 3 of the Homicide Act [AB 4/EB622] and section 4B of the OAPA in Trinidad and Tobago [AB 1/EB615]. Lord Diplock said as follows (p 137 [EB937]):

“In their Lordships' view the only changes in the common law doctrine of provocation which were effected by section 3c of the Offences against the Person (Amendment) Law (Jamaica), No. 43 of 1958 were (1) to abolish the common law rule that words unaccompanied by acts could not amount to provocation and (2) to leave exclusively to the jury the function of deciding whether or not a reasonable man would have reacted to the provocation in the way in which the defendant did. These two changes are inter-related ... In their Lordships' view section 3c of Law No. 43 of 1958, in referring to the question to be left to be determined by the jury as being 'whether the provocation was enough to make a reasonable man do as he [sc. the person charged] did' explicitly recognises that what the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did” (emphasis added).

99. Lord Diplock warned that, since the passing of the Homicide Act “it may be prudent to avoid the use of the precise words of Viscount Simon in *Mancini v DPP* ... 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” (p 138 [EB938]).

100. In the House of Lords decision in *R v Acott (Brian Gordon)* [1997] 1 WLR 306 [AB 25/EB1014], the appellant was convicted of murdering his mother. Though he had not run the defence at trial, he contended on appeal that there was evidence of provocation in the form of suggestions put to him during cross-examination that he was mistreated by his mother. The House of Lords dismissed the appeal holding that there was insufficient evidence of specific acts of provocation. Lord Steyn explained the impact of section 3 of the Homicide Act [AB 4/EB622] on the objective element of the test (p 311 [EB1019]) as being to place the issue as one “of fact, or, more realistically as a matter of opinion, within the sole province of the jury.” But there was no suggestion that the circumstances of the killing were to be excluded from the enquiry.

101. Finally, the respondent would refer the Board to its earlier decision in *Rampharry v The State* [1999] UKPC 1 [AB 22/EB980], delivered by Sir Andrew Leggatt. The appellant was convicted for murdering Meera, the mother of his three children. Although the appellant’s case at trial was that Meera had been stabbed by a third party, he had provided a statement under caution to the effect that Meera had got hold of a knife and “kept pushing the knife in my face”. Although the Board considered the judge had misdirected the jury on provocation by stating that “the retaliation of the accused must be proportionate to the provocative acts” (emphasis added), it concluded that ‘proportionality’ remained a part of the test under section 4B of the OAPA [AB 1/EB615] and that “disproportionate retaliation may bar the defence” (paragraph 19 [EB985]).

102. In the premises, at this stage, the respondent makes the following submissions:

- (1) The “reasonable relationship” rule was never a rule as such but was simply a summary of the objective element of the test of provocation at common law.
- (2) It was always a requirement at common law that the jury consider the nature and circumstances of the killing, including the weapon used and the duration and means of force used and so on, as part of their assessment of the objective element of the test of provocation.
- (3) Section 3 of the Homicide Act, and therefore also the copy provision of section 4B of the OAPA, did not change the common law in a way that renders consideration of the factors summarised in *Mancini* unnecessary or wrong; but the legislation *did*

serve to emphasise that consideration of the relationship between the means deployed and the gravity of the provocation was but one aspect (albeit an important aspect) of the overarching reasonable person test. Proportionality or the “reasonable relationship” principle is not a “separate and distinct third requirement” of the defence of provocation (p 236 [EB1074]).

- (4) There appears never to have been any doubt in these cases, at the highest level, that “do as he did” was a reference to all of the circumstances of the killing. There is no suggestion that the facts concerning the means and mode of the killing were to be discounted from the reasonable person assessment. In fact, *Rampharry* explicitly accepted that the means by which the accused killed his wife, by “pounding” her with a knife, must have been “too disproportionate a reaction to such provocation as he said she had offered him for the jury to attribute it to the reasonable man.” (paragraph 20 [EB985-986]).

C.5. All the circumstances of the killing remain central under the Coroners and Justice Act 2009

103. In his notice of objection, the respondent referred to the statutory defence of “loss of self control” introduced in England and Wales by ss. 52-54 of the Coroners’ and Justice Act 2009 [AB 3/EB618-620]. Some of the case law was cited, too. The point being made was that the new defence, introduced in 2009 in England and Wales, (a) maintained an objective element in the test and (b) expressed that test in a similar way to the case law that had developed at common law and under section 3 of the Homicide Act [AB 4/EB622]. The question remains whether the accused behaved in a way that a reasonable person of the accused’s age and sex might have behaved, in the circumstances in which he personally found himself.
104. The appellant submits that the respondent is wrong to seek to use the Coroners Act 2009 as an aide to construction of section 4 of the OAPA [AB 1/EB613-615]. But the appellant’s reliance on the developments in England and Wales is (counsel hopes) a little more sophisticated than that.
105. The first point is continuity. At no stage in any of the English authorities, either on the common law or after the passage of the Homicide Act, was there any suggestion that the objective test was intended to be restricted to the fact of the killing as opposed

to how it was effected. There were various perceived problems with the provocation test (slow burn and so on), such that Parliament intervened. But having done so, Parliament decided to continue to apply an objective test that expressly requires consideration of the means used to effect the killing. No one at any stage appears ever to have thought that, actually, the law meant something entirely different.

106. The second point is that the Law Commission undertook a detailed analysis of the law and its various alleged problems.⁹ There was considerable interest and debate about the test of provocation and how it could be improved, but one interesting point is that the policy grounds for retention of the objective test (including consideration of the means used to kill) was found to remain as relevant and persuasive today as ever (*cf.* the Court of Appeal's approach, enacted with much less if any research, in *Marcelline*).

107. The Law Commission recognised “much controversy about the supposed objective test” (Final Report, para 3.20). Nonetheless, it recommended to retain an objective element in part as a response to “floodgates” arguments stemming from the proposed broadening of the defence to cases of long-term abuse without a sudden loss of control (Final Report, para 3.92). It is clear, moreover, that the Law Commission, more broadly, recognised the important policy behind this part of the test:

“...The defence should only be available if a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.”¹⁰

108. Following the Final Report, the UK Parliament enacted the Coroners and Justice Act 2009. The partial defence is engaged where the accused loses self-control as a result of a “qualifying trigger”, fear of serious violence or grave things said that give rise to a justifiable sense of being seriously wronged. Importantly the defence retains the objective element and it remains concerned not simply with killing but with the nature and means of the killing (s.54(1)(c) [**AB 3/EB620**]):

“a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.”

⁹ “Partial Defences to Murder”, with the Final Report produced on 6 August 2004.

¹⁰ Final Report, para 3.109.

109. So, at common law (since the 1800s if not before¹¹), through 60 odd years of case law under the Homicide Act, and continuing today under the 2009 Act in England and Wales, provocation (or loss of control) has been operating as a partial defence to murder with juries considering the means of the killing as part of the objective backstop of the defence. The burning need to change the law, less still through judicial intervention, requires some justification.

C.6. *Marcelline v The State Crim. App. No. S015 of 2014*

110. *Marcelline* was handed down on 26 June 2023. It concerned an appeal by Mr Marcelline from a conviction for the murder of Juliet Cummings, his common-law wife. The appellant had inflicted 37 stab wounds and 26 incised wounds on the deceased. At trial, provocation was left to the jury on the basis of the appellant's account that he discovered the deceased in bed with another man. The Court of Appeal allowed the appeal on grounds including provocation, holding that the words "do as he did" in section 4B of the OAPA [AB 1/EB615] meant simply "to kill" rather than to kill in the manner the appellant in fact did.

111. The respondent respectfully submits that *Marcelline* was wrongly decided. This is for the following core reasons.

112. First, had the Court of Appeal's attention been drawn to *Rampharry*, it is submitted that it could not have held that "do as he did" meant "to kill". As set out above, *Rampharry* proceeded on the basis that the question posed to the jury by section 4B of the OAPA encompasses the proportionality of the accused's conduct, including the manner in which he said to have killed. To construe "do as he did" in such a narrow way was contrary to authority binding on that court.

113. In any event, the Court of Appeal in *Marcelline* was bound to follow its own decision in *Uriah Woods v The State Cr. App. No. T31 of 2015* according to the doctrine of precedent. The decision in *Uriah Woods* did not conflict with a later decision of the Privy Council; there were not two earlier conflicting decisions from which the Court of

¹¹ See *R v Palmer* [1913] 2 KB 29 [AB 44/EB1303] and the older cases cited therein (though the point of principle in that case, namely whether words could constitute relevant provocation, was overruled in *Holmes* and the reintroduced in the Homicide Act, s. 3 [AB 4/EB622]).

Appeal had to choose, and *Uriah Woods* was not decided *in curiam*. Therefore, the principles for the Court of Appeal departing from its own earlier decisions, as set out in *Young v Bristol Aeroplane Co* [1944] KB 718 [AB 47/EB1383] and *Devant Maharaj v National Energy Corporation of Trinidad and Tobago*, CV2010-00242, 26 April 2017 [AB 48/EB1396], were not applied or made out. The Court of Appeal simply declared that there was no “sound jurisprudential basis” for rejecting the analysis of the Hong Kong Final Court of Appeal (COA judgment para 102 and para 109 [EB1484 and EB1487]). Respectfully, a decision of the Court of Appeal (*Uriah Woods*) is not decided *per incuriam* because a decision from Hong Kong proposing an obscure interpretation of words in a statute was not brought to the court’s attention.

114. Secondly, applying the usual (and uncontroversial) principles of statutory interpretation, the Court of Appeal’s construction of section 4B is wrong. The Board will be very familiar with these principles such that counsel hopes they will be forgiven for stating simply that the courts should seek to ascertain the meaning of the words used in the light of their context and the purpose of the statutory provision. “Words, context and purpose” being the focus, if not the “Holy Trinity”.¹²

115. The question is “whether the provocation was enough to make a reasonable man do as he did”. There is no dispute that “he” is the accused. The natural reading of the words “do as he did” in the context of a provision dealing with a partial defence to unlawful killing, is an invitation to consider all the circumstances of the killing. If Parliament had intended to limit the reasonable person test to the act of killing it would have said so.

116. Once one considers the words in their broader context, the answer becomes clearer still. The common law always contained an objective element in the form of a reasonable person test which required consideration of all the circumstances of the killing (see Section C.3. above). Section 4B did not do away with the common law defence of provocation; absent the two known purposes of the provision (extending the defence to things said and clarifying the distinct roles of judge and jury), the natural inference to draw is that Parliament otherwise intended for the defence to continue to operate as it always had.

¹² *Some Issues on Statutory Interpretation*, Lord Burrows, 6 June 2025, Statute Law Society Conference 2025. [AB 62/EB1973]

117. Indeed, one might go further. The words “the question whether the provocation was enough to make a reasonable man do as he did” are followed, in section 4B [AB 1/EB615], by a direction to judges that that question “shall be left to be determined by the jury”. It is reasonable to infer that Parliament was simply *describing* (or summarising) the objective test in the context of a direction it was giving to judges that its application be always treated as a question of fact for the jury. This makes sense when one views section 4B as a whole; it is couched in terms that necessarily recognise the prior existence of the defence of provocation and the various “questions” that must be answered when it is engaged in a particular case. Parliament was simply referring to (as opposed to seeking to define or change) the reasonable man test, so that it could get on with the true business of section 4B which was to direct judges to make sure that that question was left to the jury and not decided by them.
118. The purpose or mischief at which section 3 of the Homicide Act [AB 4/EB622] was aimed is known. It was summarised by Lord Diplock in *Phillips v The Queen*, p 137 [EB937] (see para 115 above). Extension of the defence to things said as well as things done is self-explanatory. As to the clarification of the role of the judge and jury, there were concerns at the time that judges were too frequently taking the question of provocation away from the jury. There is no suggestion of an intention on the part of Parliament to do away with a core and important part of the law of provocation.
119. The Court of Appeal appears to have been taken with the idea, developed in the *Liang Yaoqiang* case, that the words in question are “ambiguous” there being at least 4 different possible interpretations (COA judgment, para 92 [EB1477]).
120. Respectfully, the words are not ambiguous or at least not in any relevant sense. Legislative ambiguity is not identified by setting out a list of potentially different meanings that could, in the abstract, be attributed to individual words if they were considered in isolation. If this was the test for ambiguity, almost every statute on the books would be ambiguous. One must first apply the ordinary rules of construction (the judgment is notable for its absence of any consideration of such rules); and only where the application of those ordinary rules fails to deliver a clear answer can one begin to suggest any relevant ambiguity. For the reasons already given, when one applies those rules of construction the answer is clear. There is no ambiguity.

121. This point was properly made by counsel for the State in the *Marcelline* case. He submitted against applying in Trinidad and Tobago the ratio of the decision in *Liang Yaoqiang* which, counsel submitted, would have the effect of rewriting section 4B of the OAPA (COA judgment, para 75 [EB1469]). The respondent maintains that submission, this time before the Board.

122. Thirdly, the rationale behind the approach adopted *Liang Yaoqiang* includes concerns about “conceptual difficulties” inherent in the way the objective test applies insofar as it invites consideration of the means of the killing (para 108 of *Liang Yaoqiang* [AB 50/EB1591]; para 94ff of *Marcelline* [EB1477]). The core problem, it is said, is the inherent contradiction involved in asking, on the one hand, whether a person has been so provoked as to lose control, only to go on to ask, on the other hand, whether the acts of that same person are those of a reasonable man. The respondent would make the following points:

- (a) The concern proceeds on a false premise, namely that the jury ignores the fact that the accused has lost self-control. Killing someone is not generally a reasonable thing to do. Everyone understands that. The whole point of the partial defence is to accept that, even reasonable people with ordinary powers of self-control, might lose it when faced with grave provocation. They might, in a moment of passion, inflict really serious harm that causes death. The question for the jury is whether a reasonable person, who has been provoked and who has lost self-control, might have acted as the accused did. The jury is not required, so far as counsel is aware, to ignore the fact that the accused has lost control. In real terms, the question is whether the accused, who has lost self-control, nonetheless managed to maintain at least some semblance of proportionality to his response to be expected of all of us, or whether he went totally berserk and savaged the victim in a way that no reasonable person, even if provoked in the grave way the accused was, could imagine doing.
- (b) There is no real contradiction so long as we all accept that ordinary people with normal levels of self-control can nonetheless be provoked into a situation where they suddenly and temporarily lose self-control and commit a grave act they would not otherwise commit. The test must also be seen in context with the relevant burdens in play. The question becomes whether the prosecution has disproved the

reasonable possibility that the accused was provoked to do as he did and that a reasonable person in his shoes may well have done the same.¹³

123. It may well be correct to say that an accused who has truly lost all self-control is not in a position to check their response to the provocation. This appears, actually, to have been the real concern of the court in *Liang Yaoqiang*: “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... it is difficult to see why the extent of the defendant’s reaction **should** deprive him of the defence” (emphasis added) (para 108 [EB1545]). But the “should” questions are not for us lawyers. They are for the policymakers.

124. There may well be a point here about moral blameworthiness. Is it fair that two defendants, both of whom lost control in the face of the same sort of provocation, face different punishments based purely on the extent to which they reacted to that provocation even if both defendants had no real control over their actions? But this is again a policy question, and one that, in terms of the statute (and the common law before that), has already been answered: the defendant who goes totally over-the-top savaging the victim in a way that no reasonable person ever could, goes down for murder irrespective of any lack of agency. This is to keep a lid on the scope of the defence. To deal with “floodgate” type arguments and the like (see below, in the context of consideration of the Law Commission’s work in this area).

125. The defence of provocation has never operated or been shaped entirely consistently with the putative defendant’s conscious ability to check or limit their behaviour. Take for example the requirement that the loss of self-control be sudden and temporary. No doubt there are cases where the loss of self-control is not sudden and temporary but where, morally, a case could be made out that the defence ought nonetheless to apply (slow burn cases for example). But these are the defining words

¹³ Counsel accepts that one could imagine a sort of conceptual difficulty in the sense that a “reasonable man”, if provoked, might do unreasonable things. Those unreasonable things become the acts of a reasonable man (i.e. doing the unreasonable things do not make the reasonable man unreasonable, because he did them having been provoked into losing self-control). But this is not the conceptual difficulty suggested in *Liang Yaoqiang* and is really one that comes from thinking about the point too much (imagine that). We all understand what the statute is getting at: did the defendant react in a way that is just so over the top that the jury could not imagine any normal person reacting like that (either because the provocation was not so grave or because the reaction was extreme).

of the defence; defendants who lose control in a more sustained manner or where the trigger is not sudden do not enjoy the benefits of the defence.

126. And it is not the only hard-edged limit imposed in the context of criminal defences. Take for example self-defence. It might be said that, once an accused finds themselves under attack, it is unfair or arbitrary to then expect that person to exercise restraint to ensure their response is not out of all proportion to the need to defend themselves. But this latter requirement, like the objective element in the context of provocation, is not based on the real-world ability of every defendant to exercise that degree of self-restraint. The law recognises that some defendants will not act proportionally and as a result will not be able to avail themselves of the defence; this is the case even though for all practical purposes the individual may not have been able to measure or check their response in the moment. The fact that some individuals may genuinely be unable to moderate their response does not render the legal requirement contradictory; it simply means those individuals cannot avail themselves of the defence. This reflects a considered policy choice, not an internal inconsistency in the law.
127. The defence is there to provide a partial defence to persons who temporarily lose control and succumb to a violent impulse. It is there for the accused who, in the moment, pulls the trigger or picks up the knife before thinking “oh my, what have I done?”. It is just not designed for those like the defendant in *Liang Yaoqiang* who stabbed the victim 213 times. The reasonable person test keeps the lid on the defence ensuring that, whilst providing a partial defence in some cases, it does not become a charter for excusing (even partially) extreme and sustained attacks.
128. The conceptual difficulty, therefore, is largely self-induced and flows from adopting an inappropriate assumption / false starting point viz. that the defence must be available to everyone who kills having lost self-control as a result of being provoked. The defence does not work like that, never has worked like that, and it is not appropriate to rewrite the legislation, under the guise of interpretation, to make it work like that.
129. Fourthly, the reasoning in *Liang Yaoqiang* (and therefore *Marcelline*) is no doubt also supported, in general terms, by concerns about limiting the defence on objective grounds when the very nature of the defence is concerned with a subjective loss of self-control. But these concerns have already been addressed, best they can be

whilst staying true to the words of the statute, in the series of decisions referred to in Section C.3. above (*Camplin, Smith (Morgan)* and so on). Learned leading counsel for the appellant will, naturally, be very familiar with those cases (having acted in many of them); and of the great advances he helped achieve in those cases effectively to soften the effect and application of the objective test:

- a) The reasonable person is one of the same sex and age of the accused but is otherwise an ordinary person with ordinary powers of self-control.
- b) However, the individual circumstances and characteristics of the accused are taken into account when considering the gravity of the provocation as experienced by the accused.
- c) The question becomes whether a reasonable person with ordinary powers of self-control might have been provoked into doing what the accused did, if faced with the provocation they faced, taking into account how, in the light of any peculiarities or sensitivities of the accused, the particular provocation might have been received and experienced by the accused.
- d) The reasonable person assessment effectively requires weighing up, on the one hand, the gravity of the provocation, against, on the other hand, the acts of the accused. There are two sides of the “scale”: nature and gravity of the provocation on the one side and the killing, including how it was done, on the other.
- e) But as soon as the jury is entitled to consider, when analysing the gravity of the provocation, the individual characteristics of the accused, the impact of the inability to attribute to the objective person any of the accused’s personal characteristics is materially limited.
- f) Suppose the accused, a sensitive and emotional man, is gay and has experienced a lifetime of teasing and verbal abuse from his family and friends about this. One day, a man shouts foul abuse at him for having sex with his boyfriend, accusing him of vile and ungodly acts that make everyone sick (etc). He flips and stabs the man. What is the practical difference between the following two questions?:
 - (i) Ladies and gentlemen of the jury, might a reasonable man have done as the defendant did, given just how grave the provocation would have been received and understood by the

accused who, as we know, is a sensitive man who has suffered some years of abuse or taunts of this nature?

- (ii) Ladies and gentlemen of the jury, might a reasonable man with the sensitivities of the accused and given the years of abuse he suffered, have done as the accused did in this case?

130. The short point the respondent makes is this: given the softening of the approach taken to the objective element, an accused can already bring into play personal characteristics and circumstances in a way and to a degree that is significant and appropriate. This lessens the justification to adopt the blunt approach taken in *Marcelline*, where the jury simply ignores entirely the means used to effect the killing.

131. Finally, it is noted that the Court of Appeal appears to have persuaded itself that adopting the approach in *Liang Yaoqiang* has no impact on the two-stage test in provocation cases (COA judgment para 105 [1485]). It simply seeks to establish a working formula “by which a jury may be properly guided away from the dangers of reasoning in an impermissible fashion, by reference to a principle of law of doubtful continued application in the law of provocation (the reasonable relationship rule)” (ibid).

132. Insofar as the Court of Appeal sought only to emphasise the need to follow the statutory wording, as opposed to having resort to some of the formulations used in the past (reasonable relationship, proportionate response and so on), the respondent has no argument against this. As submitted in Section C.3. above, it was never intended for there to be a “rule” of that nature even at common law. But the Court of Appeal’s judgment goes much further than this, as it removes from the jury’s consideration when applying the objective element any of the facts concerning the nature and means of the killing.

133. It is true that the Hong Kong Final Court of Appeal identified as an “impermissible line of reasoning” the false syllogism deployed by prosecuting counsel in that case (see para 115 of *Liang Yaoqiang* [EB1593] extracted in *Marcelline* at para 97 [EB1480]). However, the objection (and the Hong Kong court’s proposed cure) went well beyond counsel’s leap from proportionality to a necessary failure to meet the

objective test; it comprised a re-reading of the statutory words to limit that test to the question simply of whether a reasonable person may have been left to form “the intention to kill or cause grievous bodily harm” (para 114 of *Liang Yaoqiang* [EB1592] extracted in *Marcelline* at para 97 [EB1480]). This is reflected in the model direction proposed by the Hong Kong court in *Liang Yaoqiang* at para 124 [EB1595] (accepted as appropriate by the Court of Appeal in *Marcelline*- COA judgment para 104 [EB1484]).

134. What the Hong Kong court considered to be impermissible was any consideration at all, when applying the objective test, of the means by which the killing was effected. That comprised a fundamental change in the law.

135. In *Masciantonio v R* (1995) 129 ALR 575 [AB 53/EB1798], one of the Australian authorities cited by the Hong Kong court, the majority did not go so far as to exclude the particular acts of the accused from the objective test. Rather, the High Court concluded that, in its view, “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” (para 24 [EB1806]). That is not to say that means of killing may not form part of the objective test, but that one issue has more prominence than another. It is submitted that the Federal Decision of *R v Barrett*, which accepted the learning in *Johnson v R* and *Masciantonio v R*, wrongly excluded proportionality entirely from the suggested jury direction; this error was then adopted by the FCA in *Lian Yaoqiang*.

136. For these core reasons, it is submitted that the Court of Appeal in *Marcelline* was wrongly decided. Furthermore, there is no good reason for the Board itself to change the law (assuming this is permissible given the words of the statute). The law on provocation is constrained by certain well-established and justifiable policy considerations.

D. Provocation Part 2: Law applied to the facts of this case

D.1. If *Marcelline* is bad law

137. The respondent submits that the trial judge's directions on provocation were appropriate, orthodox, and accorded with the law as it was understood before the decision in *Marcelline*. The trial judge directed the jury in accordance with the well-

established authorities on provocation. The key passages of the direction are set out in the SFI at paragraph [16]. The judge:

- a) Correctly identified the subjective element: whether the Appellant "was provoked in the legal sense" such that he was "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" [284/17-29];
- b) Correctly identified the gravity assessment: the jury was to "weigh how serious the provocation was for this accused" [284/35-36];
- c) Correctly applied the objective element: "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" [284/41-48].

138. To do "exactly as Uriah Woods did" was perhaps not the best way of expressing the test (though there is support in the cases for that kind of direction, e.g. Lord Diplock in *Camplin* "whether he would react to the provocation as the accused did"). But there is no doubt, given the surrounding directions and explanation of the law, that the jury would have well understood that they were being asked to decide if an ordinary person with normal powers of self-control might well have reacted in the way the accused did, given the provocation endured and understood by him. In the premises, and assuming the law is as it was prior to *Marcelline*, there was no misdirection.

D.2. If *Marcelline* does properly represent the law of Trinidad and Tobago

139. It is respectfully submitted, that, even if the judge ought to have directed the jury to consider simply whether the appellant may have been driven to kill as a result of provocation (ignoring the brutal and sustained nature of the killing), the defence would have failed anyway. The evidence against provocation was overwhelming, and it suggested the following:

- a) The relationship had ended months before. The deceased left the appellant in February 2005, some five months before the killing. This was not a case of an accused walking in unexpectedly on a partner. The deceased had moved out and was living separately at Leeward Croft. On the evidence, the jury must have

rejected the appellant's contention that they were still together and that he believed the same as implausible.

- b) On the morning of 14 July 2005, the Appellant saw Mr Stewart in the street, told him to leave the deceased, and threw bottles at him. This is obviously inconsistent with a continuing relationship and a surprised encounter at the house.
- c) Mr Stewart made a contemporaneous complaint to the police on 14 July 2005 reporting that the Appellant "made threats to kill [him and the deceased]" [14]. This is direct evidence of premeditation, wholly inconsistent with a sudden loss of self-control hours later.
- d) The appellant armed himself before arriving. The prosecution case, which the evidence overwhelmingly supported, was that the appellant brought the cutlass into the apartment. Not a single witness from the property recognised the weapon.¹⁴
- e) Post-offence conduct. Ricky Guy gave evidence that the appellant told him that night that "he ain't done yet, he coming back to finish the job" [286/30-33]. This is not the language of a man suddenly overwhelmed by passion and immediately remorseful. It is the language of a person with unfinished murderous business.

140. The judge properly drew the jury's attention to these matters as "searching questions" they should ask themselves about the appellant's evidence [286/14-37]. The jury, it is submitted, must have rejected the defence on the facts well before they got to the objective test.

141. In the alternative, to the extent the appellant was provoked, killing (by any means) the victim was a wholly disproportionate act given he knew about their relationship ending and so on.

D.3. Impact of the fresh evidence

142. The appellant submits that the fresh evidence, if admitted, would advance his case on the subjective inquiry as to whether the appellant in fact was provoked (A's Case, para 43). This is because "evidence of any mental or other abnormality which

¹⁴ Ryan's evidence was that his father came in with the cutlass and he had never seen it before [257] – Mr Stewart said the same thing [258]; Ricky also said he had not seen the cutlass before. [260].

makes it more or less likely that the defendant lost his self-control is relevant and admissible” (A’s Case para 44, by reference to *R v Smith (Morgan)*). It is said that the diagnoses ought to be explained to the jury so they could consider these when deciding if the appellant may have lost self-control as a result of provocation (A’s Case, paras 52 – 53).

143. But if the expert evidence was admitted, the jury would immediately see that the appellant now accepts that he went to the property with the cutlass. That being the case, the defence of provocation becomes hopeless. Whether the judge ought to have directed the jury in accordance with the law as it was understood in *Marcelline* or as it was understood in *Rampharry* becomes a moot point. The appellant came to the property armed with a cutlass intending to use it. That is impossible to square with a provocation defence, however the law is understood.

144. Furthermore, the fresh evidence reveals the appellant changing his story at least twice (three times if one includes the notes from counsel, though these may not be admissible). The prosecution would no doubt seek to introduce the underlying interview notes with the experts, too.

145. Bearing in mind, the prosecution case was one of fabrication. The State alleged that “the loss of memory of the accused at that point [was] convenient. So that he would not be able to answer questions about the death of Sandra Miller”. That the suggestion that he was “shocked when he pushed open the door” was “incapable of belief”. That he “was aware” that the relationship had finished months prior, and that she had got engaged to someone else. The appellant was prone to violence and had said that if Ms Miller left him, he would kill her. The jury was asked to “reject the partial defence of provocation, as it was based on a lie”. Everything rested, therefore, on the jury accepting the appellant’s evidence as possibly true, that he had tripped; that “I see my son and common-law wife there, and I don’t know what go on after that” and that his “head wasn’t there at the time” (summing up [273]).

146. As soon as the jury gets wind of the fact that the appellant has been giving different accounts of the killing, the defence of provocation would be rejected. It is virtually impossible to argue anyway, but once an unreliable historian is thrown into the mix, that would spell the end of the partial defence.

147. Even if the jury were to accept the appellant's most recent account (this placed the appellant at the killing, inflicting 3 of the wounds out of the 22), this account involves the appellant being mentally present and engaged during the killing. Any suggestion that he flipped or lost it, suddenly, as a result of seeing Ms Miller in bed with another man becomes impossible.

148. In any event, assuming the law is as it was understood before *Marcelline*, the expert evidence can only speak to the question of the gravity of the provocation as understood by the appellant. It cannot speak to his powers of self-control. But it is to this latter point that the evidence is primarily directed; the question of self-control.

C.4. Conclusion

149. For all the foregoing reasons, the respondent submits that the partial defence of provocation cannot work, either in law or on the facts, and should be rejected.

D. Overall Conclusion and Proviso

150. To the extent necessary the respondent will rely on the proviso; i.e. if, contrary to the above, there was any error of law or erroneous directions, the respondent would rely on the facts and reasons already submitted to conclude that there was, overall, no miscarriage of justice as this was plainly and obviously a premeditated, planned, violent attack on an ex-partner and long-term sufferer of domestic abuse.

ROWAN PENNINGTON-BENTON

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