Trinity Term
[2021] UKPC 20
Privy Council Appeal No 0044 of 2019

JUDGMENT

Anderson (Appellant) *v* Her Majesty's Attorney General for the Isle of Man (Respondent) (Isle of Man)

From the High Court of Justice of the Isle of Man (Staff of Government Division)

before

Lord Hodge
Lord Hamblen
Lord Burrows
Lord Stephens
Sir Adrian Fulford

JUDGMENT GIVEN ON

19 July 2021

Heard on 17 May 2021

Appellant	*Respondent*
Adrian Waterman QC	Benjamin Aina QC
Farrhat Arshad	Linda Watts
(Instructed by Simons Muirhead & Burton LLP)	(Instructed by Attorney General's Chambers (Douglas, Isle of Man))

SIR ADRIAN FULFORD:

Introduction

1. This is an appeal to the Judicial Committee of the Privy Council ("JCPC") against Ian Anthony Anderson's conviction on 17 April 2015 for the murder of Neil Roberts, following a five-week trial before Deemster Montgomerie (the trial judge) and a jury, sitting at the Court of General Gaol Delivery, Douglas, Isle of Man. The appellant accepted he had killed Neil Roberts on 1 December 2013. At trial he relied unsuccessfully on the complete defence of self-defence and two partial defences, provocation and diminished responsibility. On 24 April 2015 he was sentenced to life imprisonment, with a minimum term of 15 years. On 25 October 2016, his appeal against conviction in the High Court of Justice of the Isle of Man, Staff of Government Division, Criminal Jurisdiction (the "Appeal Court") was dismissed.

2. On 9 January 2019, the appellant applied to the Appeal Court, for permission to appeal to the JCPC on four grounds. The Appeal Court refused permission on 28 February 2019. On 29 April 2019, the appellant applied directly to the JCPC for permission to appeal. On 6 November 2019, the JCPC granted permission to appeal on two grounds.

3. The first ground is whether his defence counsel at trial failed to discharge her professional duty in the way the partial defence of diminished responsibility was presented to the jury given, particularly, the defence psychiatrist and psychologist failed to testify as to their conclusions on the issue of "substantial impairment". The second ground is whether the Deemster erred in the way he summed up the defence of diminished responsibility to the jury.

The Facts

4. The appellant and his wife (Mrs Alison Anderson) moved to the Isle of Man in late 2011 or early 2012, the appellant having accepted a position at Ronaldsway Airport. They rented a cottage in Castletown and befriended a man called Neil Roberts, who ran a tree surgery business on the island. In February 2013, the appellant accepted new employment in London, where he lived during the week, returning to the Isle of Man each weekend. In May 2013, he saw a suggestive text message on Mrs Anderson's mobile telephone which alerted him to the possibility that his wife and Mr Roberts were having an affair. The appellant's relationship with his wife and Mr Roberts consequently became turbulent.

5. During the evening of 30 November 2013, the appellant went to help Mr Roberts who had been involved in a car accident. The two men visited a public house, after which they continued drinking at the Andersons' home. It is of note that expert analysis later revealed that Mr Roberts (who was a habitual drinker) had a blood alcohol level of 226 mg per 100ml. The appellant's blood alcohol level some hours after incident was recorded as 53 mg per 100 ml.

6. Once back at the Andersons' cottage, Mrs Anderson and Mr Roberts told the appellant that they loved each other. Although the appellant suggested they should go off together (he said "well then just get on with it"), in due course violence erupted between the two men. The appellant in his evidence at trial suggested that he had acted in self-defence when warding off an attack by Mr Roberts, who threatened to kill him, albeit he was unable to recall the details of the incident after the deceased hit him over the head and punched him in the face.

7. The beginning of the fatal altercation was witnessed by Robert Anderson, the appellant's son, via a Face Time video call which lasted over 16 minutes. He heard Mr Roberts, followed by his mother, start shouting. There was a smashing sound and the appellant exclaimed "Get off me. They've just hit me." Robert Anderson saw that his father's face was injured and he was bleeding. The video call was then interrupted.

8. The prosecution, whilst accepting that Mr Roberts initiated the violence, argued that the appellant's use of force significantly exceeded a proportionate response.

9. Mr Roberts's body was examined by Dr William Lawler, a forensic pathologist. The victim's scalp was bruised, his skull was fractured and there were four areas of traumatic damage to the brain. His face was extensively lacerated and bruised (internally and externally) and almost every bone was fractured. Considerable, repeated force would have been required to inflict these injuries. Punches alone would have been insufficient, and Dr Lawler suggested Mr Roberts had been jumped or stamped on. There was a fracture to the larynx and bruising to the neck, which had most likely been caused by stamping. There was evidence of direct, blunt-force traumatic damage to the deceased's abdominal system, including very extensive disruption and fragmentation to the pancreas, and there was an adjacent fracture to the lower part of the spine. There were many fractures to the deceased's ribs on both sides, and a fracture to his sternum. These injuries were, once again, the likely result of the appellant stamping and jumping on Mr Roberts, and they had been inflicted over "quite a short period of time" whilst Mr Roberts was alive. The cause of death was said to have been, "intraperitoneal haemorrhage...following blunt force disruption of the pancreas."

10. After the infliction of these injuries, the appellant took a telephone call lasting eight minutes from his brother, Dean Anderson, before he telephoned the emergency services. On arrest, the appellant stated "That guy's come into my house and attacked me, look at my head. So I hit him three times...He attacked me...I was fighting for my life." When interviewed by the police, he maintained he had been attacked by Mr Roberts and his wife and that he acted in self-defence as he believed he was "fighting for his life". He was dazed and could not recall inflicting the fatal injuries. He said that there were parts of the incident which were blank. He recalled Mrs Anderson saying "You're going to die." He went into the kitchen, picked up a knife and said to her "Go on, kill me then".

Representation

11. Mrs Dawn Jones acted for the appellant, having been his representative when he was interviewed by the police following his arrest. On 25 March 2014 (a year before the trial), Mrs Jones made an application, pursuant to section 17(2)(b)(iii) of the Advocates Act 1995, for a temporary advocate's licence for a Queen's Counsel from England and Wales to lead Mr Anderson's defence. The basis of the application was that "the proceedings required knowledge and experience of a nature not ordinarily available on the Isle of Man". The Board is unsurprised that Mrs Jones made this application given especially the appellant's reliance on the three defences set out above. Self-defence is an absolute defence, whilst provocation and diminished responsibility are only partial defences, and their individual elements are markedly different. Counsel would have been confronted with difficult legal and tactical decisions, most particularly as to the emphasis to be accorded to each defence. The case, furthermore, involved the defence advocate or advocates handling difficult psychiatric and psychological issues. It is of note that as the case progressed, critical differences emerged in the views of the three main experts (Dr Puri, Dr Bradley and Professor Shaw). To complicate matters still further, Professor Shaw (the psychiatrist instructed by the prosecution) changed her opinion twice on the central question of the availability of the defence of diminished responsibility. The Board has considered this change of position on the part of Professor Shaw in greater detail below (see paras 19 – 22).

12. This application was nonetheless opposed by the Crown, with the acting Attorney General arguing that there was nothing in the case that could not be handled by a Manx advocate and that a Queen's Counsel was unnecessary. The application was refused by Deemster Doyle on 3 April 2014. Mrs Jones appealed the decision to Judge of Appeal Tattersall QC on 15 April 2014. The defence had applied, in the alternative, for legal aid to be extended to two advocates. Deemster Doyle's refusal of the temporary licence for a Queen's Counsel was endorsed and legal aid was instead extended to cover two counsel, Mr Peter Russell being added as a defence advocate.

The Expert Psychiatric and Psychological Evidence

13. The position regarding the expert psychiatric and psychological evidence at the commencement of the trial can be shortly summarised.

14. Dr Ramneesh Puri, a consultant psychiatrist based at Rampton High Security hospital, prepared a report at Mrs Jones's invitation, dated 26 October 2014. He identified a clear tendency on the part of the appellant to act impulsively; Dr Puri observed that he is liable to outbursts of emotion and has a tendency to quarrelsome behaviour. These features were said to be compounded by the appellant's disturbance in self-image, and Dr Puri noted a proclivity to intense and unstable interpersonal relationships. He considered that the appellant fulfils, consequently, the diagnostic criteria for an emotionally unstable personality disorder.

15. Dr Puri focussed additionally on the disorder known as "morbid jealousy", which he described as "a range of irrational thoughts and emotions, together with unacceptable or extreme behaviour, in which the dominant theme is a preoccupation with a partner's sexual unfaithfulness based on unfounded evidence". He was of the view that this constituted a further abnormality of the appellant's mind. He observed that "while violence may occur in any relationship marred by jealousy, the risk is greater in morbid jealousy". Given the relevant history, he suggested it was "difficult not to conclude, that the morbid jealously is liable to have further impaired the emotionally unstable defendant's ability to exercise self-control, understand the nature of his conduct and is also liable to have impaired his ability to form rational judgement in respect of his conduct".

16. His central conclusions were:

> "15.2 [...] it is my opinion that Mr Anderson suffers with a recognised mental disorder namely Emotionally Unstable Personality Disorder (ICD 10 Code F60.3) which is a condition characterised by pervasive patterns of dysfunctional behaviours across life domain, and exhibited signs of Morbid Jealousy in the lead up to and at the time of the alleged index offence.
>
> 15.3 Emotionally Unstable Personality Disorder and Morbid Jealousy are both recognised as 'mental abnormality' by the courts, and in my opinion, there is a clear and robust medical basis for the jury reasonably to conclude that, in this case, <u>they substantially impaired Mr Anderson's mental responsibility for his acts and omissions at the material time</u>.

> 15.4 In coming to this conclusion I have taken into consideration, not only Mr Anderson's behaviours in the lead up to the alleged index offence, which are diagnostically significant […]; but also of the seemingly bizarre acts at the material time, for example cutting his wife's hair or being confused about the identity of his own brother when he called." (Emphasis added)

17. Dr Mark Bradley, also instructed by the defence, is a chartered clinical psychologist. He concluded that Mr Anderson in all probability satisfies the diagnosis of emotionally unstable personality disorder impulsive type (ICD-10 F60.3) and emotionally unstable personality disorder borderline type (ICD-10 F60.31). He identified four particular areas as pathological, namely that he acts unexpectedly, he is quarrelsome when thwarted or criticised, he has intense and unstable relationships and he expends excessive effort seeking to avoid abandonment. His principal conclusions (set out in his report of 18 December 2014) were:

> "4.1.2 The nature of his personality issues seems to meet the criteria for being problematic, persistent and pervasive. In some settings, such as work, issues have possibly been more suppressed and he seems to have developed strategies to cope. Coping is less evident in interpersonal relationships.
>
> 4.1.3 In terms of my opinion, <u>I feel that there is sufficient evidence of personality issues to argue for diminished responsibility in this case</u> [...] he endorsed the key criteria: acts unexpectedly, quarrelsome when thwarted or criticised, intense and unstable relationships and excessive efforts to avoid abandonment which appear to be significant areas when considering the circumstances of the alleged offence. These could be considered a mental abnormality and have 'substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing'." (Emphasis added)

18. On 23 January 2015 the defence were informed that the Isle of Man Constabulary were in possession of recordings of telephone conversations between the appellant in prison and various friends and relations, including Mrs Anderson. The Deemster ordered the disclosure of this material to the defence. Dr Bradley considered the recordings and re-interviewed the appellant. He produced an addendum to his report, dated 25 February 2015. In his view, the disclosed material provided a wealth of information regarding the appellant's personality which caused him to amend his original conclusions:

> "Whilst Mr Anderson still endorses a number of symptoms for ICD-10 Emotionally Unstable Impulsive type (F60.30) the scoring criteria would suggest he does not meet the diagnostic criteria. However, the additional evidence further endorses the probable diagnosis of ICD-10 Emotionally Unstable Borderline Type (F60.31). More importantly the summary formulation set out above highlights how such personality traits may have impacted significantly upon Mr Anderson in the events leading to the death of Mr Roberts which could constitute an argument for diminished responsibility in this case."

19. The prosecution obtained a report from Professor Jenny Shaw, a forensic psychiatrist. The Board need not consider her conclusions in any significant detail because, on 7 April 2015, Deemster Montgomerie – for reasons it is unnecessary to investigate for the purposes of this appeal – excluded her evidence. In summary only, she concluded in her first report, dated 5 January 2015, that although there were personality traits consistent with an emotionally unstable personality disorder, they were insufficient for the purposes of a diagnosis.

20. However, she listened thereafter to the prison telephone recordings and revised her conclusions as set out in a first addendum report dated 9 March 2015 (served on the defence on 10 March 2015), to the effect that the appellant had an emotionally unstable borderline personality disorder. She added:

> "However, in [the relevant] setting, disinhibited by alcohol, with the build up of an escalation in his feelings of abandonment, vacillating emotions and unstable mood, he may have responded impulsively and violently. His personality characteristics would therefore be directly linked to the violence. It is for the jury to decide on the issue of […] diminished responsibility. However, it would be my view that at the material time his responsibility would have been diminished."

21. The Deemster, perhaps unsurprisingly, concluded this was a clear statement from Professor Shaw that the appellant at the time of the killing was suffering, in her view, from diminished responsibility, as defined by section 22A of the Criminal Code 1872 (see para 24 below). Dr Puri sent an email on 5 March 2015 to Mrs Jones, having spoken with Professor Shaw, indicating:

> "You'd be please to know that [Professor Shaw] now agrees with my view (and Dr Bradley's) about personality disorder and Diminished in this case. She has given the prosecutor a heads up and will be completing an addendum next week. We might therefore not have to contest this in court after all."

At about the same time, Professor Shaw sent an email to Dr Bradley in the following terms:

> "I must say that reviewing the phone calls and your follow on interview has led me to move to your view. I have given the prosecutor the heads up about this and will send addendum next week."

22. Professor Shaw's conclusions, however, were to change again. Following a telephone conversation on 11 March 2015 between Professor Shaw and Mrs Linda Watts (prosecuting counsel), in a second amendment to her report (erroneously dated 9 March 2015, given it was written at a later date), she suggested that although the appellant's responsibility was diminished, she had reservations as to whether his responsibility was "significantly diminished". Her reasons were:

> "This is because initially, I thought that he did not fulfil criteria for borderline personality disorder but on consideration of further evidence, I concluded that he probably did fulfil the criteria. Similarly, Dr Bradley concluded from IPDE testing that the diagnosis was probable. Over the years, the impact of his personality disorder on his day to day activities has not been very significant. These factors would need to be taken into account by the jury when the issue of degree to which his responsibility is diminished is considered."

The Relevant Events during the Trial

23. By way of introduction to the relevant events at trial, given the extent of the injuries to Mr Roberts and the nature of the sustained attack on him by the appellant, the Board agrees with Mr Waterman QC and Ms Farrhat Arshad for the appellant (who did not appear in either court below) that there were undoubted difficulties with the defence of self-defence. Similarly, whilst the evidence clearly indicated the appellant had lost control – potentially because of things said and done to him – the requirement that a reasonable individual would have acted in the same way as the appellant significantly reduced the prospect that the partial defence of provocation would succeed.

24. In contrast, the partial defence of diminished responsibility had apparent merit, given the conclusions of Dr Puri and Dr Bradley. The relevant statutory provision is section 22A of the Criminal Code 1872, which is similar, but not identical, to section 2 of the Homicide Act 1957 as it applied in England and Wales before the latter provision was amended in 2010:

> “(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if at the time of his act he is suffering from such mental abnormality as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of the other party to it.
>
> (5) In this section, ‘mental abnormality’ means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind.”

25. There was no issue, in the event, between the prosecution and defence as to the appellant’s abnormality of mind. The sole live issue was whether the abnormality substantially impaired his responsibility for what he had done.

26. During the examination-in-chief of Dr Puri, once he had covered his diagnosis of the appellant’s emotionally unstable personality disorder, the significance of morbid jealousy and the relevance of alcohol, Mrs Jones asked the Deemster for the jury to leave court because she sought judicial guidance as to the way in which she should present the next “section” of his evidence. In the absence of the jury but with Dr Puri present, she indicated that it was her intention to read to the doctor the section of the Criminal Code relating to diminished responsibility and provocation “without making any other comment”. The Deemster indicated this proposed course was unobjectionable, particularly if limited to section 22A(1) and (5) of the Criminal Code 1872 (see para 24 above).

27. The Deemster observed there was nothing wrong with these two subsections being outlined to the jury “because that’s obviously, he has to point out that it is a mental abnormality and then he has to go into the impair and the substantial impair aspect”. The following exchange then occurred:

> Deemster: “It seems to me, Mrs Jones, that unless you were to put those two of the doctor (sic).”
>
> Mrs Jones: “We're in a bubble.”
>
> Deemster: “Yes, he in reality can't give his opinion on them.”
>
> Mrs Jones: “Okay. …”

28. When the jury returned, having asked Dr Puri about the relevance of his diagnosis to the defence of provocation, Mrs Jones turned to diminished responsibility. This included the following brief exchange:

> Mrs Jones: “Again, in relation to Mr Anderson, was that abnormality [viz emotionally unstable personality disorder] present at the time of the killing?”
>
> Dr Puri: “Personality disorder is a pervasive condition. It develops over a period of time and it is accepted that the personality is fully developed by mid-twenties and once a person has a personality disorder that is a pervasive illness or a pervasive disorder with no remissions or relapses. So, in answer to the question it is my opinion that at the time of the killing, Mr Anderson would have still been suffering from a personality disorder.”
>
> Mrs Jones: “The phrase then is ‘substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing’, so if we [can] concentrate [on] the words ‘substantially impaired his mental responsibility’, what are your conclusions in relation to that?”
>
> Dr Puri: “In my opinion, the personality disorder has a direct link to the violence and would have impaired his mental responsibility. Whether that impairment was substantial or not, I would not be able to comment on that. That would be for the respected jury.”

29. Mrs Jones did not take the issue of substantial impairment any further. Instead, she asked “in relation to the personality disorder, however, are you able to make comment on its degree?” to which he replied “Mr Anderson fulfils the criteria for

personality disorder and in my opinion, on a balance of probability, it could be classed as a severe personality disorder considering the impact it has had on his functioning and lifestyle over the years".

30. When Dr Bradley gave evidence, Mrs Jones entirely avoided the issue of substantial impairment. She did not direct him to his concluding opinions, as expressed in both of his reports namely, first, that the appellant's "personality issues" could be considered a mental abnormality which had "substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing" and, second, that his "personality traits may have impacted significantly upon Mr Anderson in the events leading to the death of Mr Roberts which could constitute an argument for diminished responsibility in this case".

31. At the conclusion of the evidence, the Deemster raised with counsel the directions that should be given in due course to the jury. Mrs Jones indicated she was considering submitting that the count of murder should be withdrawn because there was only "one way that [the] medical evidence can be interpreted" since there had been no expert psychiatric or psychological evidence called by the prosecution. The Deemster responded that a difficulty in advancing this submission was that neither of the defence experts had expressed a view on the issue of substantial impairment. During this discussion, which occurred in the absence of the jury and which spanned an overnight adjournment, Mrs Jones vacillated between suggesting that Dr Puri had testified that the appellant's responsibility was substantially diminished and accepting that he had not done so. At one stage, Mrs Jones stated that if she had let the appellant down by thinking Dr Puri had given an opinion on the issue of substantial impairment when that had not happened, she would "feel dreadful". Mrs Jones ultimately accepted that neither Dr Puri nor Dr Bradley had expressed an opinion on this issue.

32. Mrs Jones applied to recall Dr Puri. The Deemster refused the application on the grounds that Dr Puri had responded to Mrs Jones's question about substantial impairment and therefore he should not be recalled in the hope he would give a different response. Following this ruling, Mrs Jones expressed her continuing anxiety: "I think the only query I would raise, sir, and maybe it's just to put my mind at rest as you can appreciate I've worried about this issue as to whether I had done something or failed to do something in relation to it and I took the view sir that I could not specifically ask, it was a leading question...". The Deemster observed she had been fully entitled to ask the experts whether, in their view, the appellant's responsibility was substantially impaired, and that when she had posed this question to Dr Puri, he had answered that he would not be able to comment. The Deemster suggested that Dr Puri, therefore, had ducked the question, and that he had chosen not to answer ("you can ask the question, you can lead a horse to water but you weren't leading him, you were just asking him and he chose not to drink"). Throughout this exchange, notwithstanding the Deemster's reassurance that Mrs Jones could not have done more, she indicated that she did not consider that it had been open to her to ask the experts

whether they considered diminished responsibility was "made out" or whether "there was diminished responsibility here".

33. Mrs Jones invited the Deemster to withdraw the charge of murder from the jury, and on 13 April 2015 the Deemster provided his reserved reasons for refusing the application. He reiterated his conclusion that Dr Puri had been either unwilling or unable to express an opinion on the issue of substantial impairment.

34. During her closing speech to the jury, Mrs Watts conceded on behalf of the prosecution that the jury was likely to accept that the appellant suffered from a borderline emotionally unstable personality disorder. She then made the following critical observations:

> "Now members of the jury it is a matter for you whether you accept their diagnoses but the test that the defence have tried to satisfy you on the balance of probabilities is that it as a substantial impairment. Dr Bradley gave absolutely no evidence as to the degree of impairment and when Dr Puri was asked he said that he couldn't comment on it whether it was substantial or not. He was either unable or unwilling to express his opinion as to degree of impairment. There is therefore no expert evidence that Mr Anderson was substantially impaired by a mental abnormality at the time of the killing.
>
> The defence will no doubt ask you to infer the case of substantial impairment from all the circumstances, from all the evidence, from all the history but really members of the jury doesn't that just give him the diagnosis. All the background relied on by the experts in coming those conclusions that there was an emotionally unstable personality disorder of borderline type. The information gathered leads this diagnosis but neither said that it was a substantial impairment.
>
> If they can't say that members of the jury can you? The prosecution say no."

35. The prosecution therefore suggested to the jury that neither Dr Puri nor Dr Bradley supported the conclusion that the appellant's responsibility was substantially impaired, notwithstanding their considerable knowledge of the background. If the experts were not persuaded that substantial impairment was made out, there was no sustainable basis for the jury to decide otherwise.

36. Mrs Jones scarcely referred to the defence of diminished responsibility during her closing speech. At the outset, she reminded the jury of the definition of diminished responsibility and highlighted that the burden of proof for this defence rested on the appellant, to the standard of the balance of probabilities. Mrs Jones referred to Dr Puri and Dr Bradley's diagnosis that the appellant, at the material time, suffered from a substantial abnormality of mind. She emphasised that it was for the jury to decide whether this abnormality of the mind had substantially impaired his criminal responsibility. She addressed the impact of the consumption of alcohol on the defence of diminished responsibility. Later, she referred to the appellant's severe personality disorder and she reminded the jury that the issue was whether "it substantially impaired his responsibility at the time". At the end of her address, she simply suggested "his personality disorder kicked in and took away his responsibility for what he did". She did not highlight or focus on any discrete pieces of evidence that potentially supported this suggestion, given the absence of evidence on the point from Dr Puri and Dr Bradley.

37. During the summing up, the Deemster directed the jury as to diminished responsibility, setting out the three elements:

> "(i) at the time of the killing the defendant suffered from an abnormality of mind;
>
> (ii) the abnormality of mind must arise either from a condition of arrested or retarded development of mind or any inherent cause or it must be induced by disease or injury;
>
> (iii) the abnormality of mind must have substantially impaired the defendant's mental responsibility for what he did."

38. The Deemster correctly indicated that only the third element was in dispute between the prosecution and the defence and that the first two should not cause them any difficultly.

39. As regards substantial impairment, the Deemster stated:

> "The third element is this, the abnormality of mind must have substantially impaired the defendant's mental responsibility for what he did, in other words, members of the jury, his acts which caused the death of Neil Roberts. Substantially means just that, you must conclude that his abnormality of mind was a real cause of the defendant's conduct. The

defendant need not prove that this condition was the sole cause of it but he must show that it was more than a merely trivial one which did not make any real or appreciable difference to his ability to control himself."

40. He dealt with the interplay of voluntary intoxication and diminished responsibility before returning to substantial impairment:

> "As I've said both parties here are in agreement as to the real issue, 'was the defendant's mental responsibility for the killing substantially impaired?' I emphasise substantially because that's the crucial issue between the prosecution and defence. The defence stated that both Dr Puri and Dr Bradley had had considerable access both to all the material in this case and the defendant and Mrs Jones reminded you that Dr Puri had described the defendant's emotionally unstable personality disorder borderline type, had described that disorder as a severe disorder. She submitted that taking into account the medical evidence put forward by the defence and considering the evidence in this case as a whole the defence on a balance of probability that the defendant's impairment was substantial."
>
> The prosecution have stated that Dr Bradley gave no evidence as to the degree of impairment and that when asked Dr Puri was either unwilling or unable to do so. The prosecution submitted that the defendant's credibility was an issue not just in relation to the circumstances of this incident but also with regard to his account given to the defence experts. And Mrs Watts submitted that on the evidence that you'd heard in this case the defence had not proved on the balance of probabilities that the impairment was substantial, again members of the jury entirely a matter for you.
>
> Now members of the jury if you consider that the defence have satisfied you on the balance of probabilities that this was a case of diminished responsibility then the verdict in respect of this defendant must be not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility.
>
> If you consider that the defence have not satisfied you on the balance of probabilities then the verdict in respect of this defendant must be guilty of murder."

41. The Deemster highlighted that the appellant, "must prove by evidence that it is more likely than not that when he killed Neil Roberts his mental responsibility for his actions was substantially impaired." This direction was reflected in the written document provided to the jury entitled Route to Verdict: "Question 5, has the defendant satisfied on you on the balance of probabilities that this was a case of diminished responsibility".

42. As already set out at para 1 above, the jury convicted the appellant of murder on 17 April 2015.

The Appeal to the Staff of Government Division of the High Court ("the Appeal Court")

43. The relevant statutory provision is section 33 of the Criminal Jurisdiction Act 1993, which provides as follows:

> *"Determination of appeals*
>
> "(1) Subject to subsection (2), the Appeal Division on an appeal against conviction shall allow the appeal if it thinks –
>
> (a) that the conviction of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory, or
>
> (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or
>
> (c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal.
>
> (2) The Appeal Division, even though it thinks that the point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it considers that no miscarriage of justice has actually occurred.
>
> (3) The Appeal Division, if it allows an appeal against conviction, shall quash the conviction and either -

> (a) direct a verdict of acquittal to be entered, or
>
> (b) if it appears to that Division that the interests of justice so require, order the appellant to be retried and direct the Attorney General to prefer a fresh information for the purpose."

44. In the Appeal Court, the appellant relied on a number of grounds of appeal, but it is necessary only to refer to two aspects of the submissions that were then advanced. First, it was suggested that Mrs Jones had failed properly to question Dr Puri when he testified and, second, that the Deemster failed to direct Dr Puri to answer the question as to the degree of impairment suffered by the appellant.

45. On these two issues, the Appeal Court concluded that Dr Puri appreciated the significance of the question about substantial impairment (viz he was being asked whether the appellant's mental responsibility was substantially impaired) and that, notwithstanding the contents of his report, he was simply not prepared to testify that the impairment was substantial. The court observed that having declined to answer this question, Mrs Jones was not permitted to ask him leading questions or to cross-examine him (see the judgment at paras 109 and 110). Furthermore, it was stressed that if Mrs Jones pressed the issue, she risked Dr Puri reluctantly expressing the view that there was no substantial impairment. Had Dr Bradley been asked whether there was substantial impairment, this risked highlighting that the psychiatrist (Dr Puri) had not given similar evidence. In all the circumstances, it was concluded that Mrs Jones's conduct of the case was not to be faulted and that she took sustainable tactical decisions. The court upheld the Deemster's decision that Dr Puri had "ducked" Mrs Jones's invitation to say whether the impairment of the appellant's mental responsibility was substantial (see the judgment at para 116).

46. The court rejected the suggestion that the Deemster should have required the witness to answer the question, giving the following reasons:

> "121. On the facts of this case we are satisfied that Deemster Montgomerie was entitled to leave Mrs Jones to conduct the appellant's defence and that, not only was there no obligation on him to direct Dr Puri to answer the question as to substantial impairment, but that it would have been imprudent and inappropriate for him to do so. Dr Puri had already told Mrs Jones that he could not comment on whether the impairment was substantial or not and that such issue was for the jury to decide and for Deemster Montgomerie to have intervened in the way suggested could have proved fatal to the defence on this issue."

47. The Board notes that Mrs Jones and Mr Russell declined to respond to the invitation by the Appeal Court to address the criticisms that had been made concerning their handling of the case.

The Appeal to the Judicial Committee of the Privy Council

48. Thereafter, new representatives (those currently acting for the appellant) were instructed to pursue an application to the JCPC. A witness statement was taken from Dr Puri dated 2 March 2018. Dr Puri indicated that his opinion remained the same as that expressed in his written report, namely that Mr Anderson's responsibility was substantially impaired. On the critical issue as to why he did not give his opinion on substantial impairment in court, he stated:

> "In relation to my answer in examination in chief where I state 'whether that impairment was substantial or not, I would not be able to comment on that, that would be for the respective Jury.' I answered in this way as I was unclear as to whether or not I was allowed to comment on the level of impairment. The approach of the courts has changed over the years, and the Isle of Man was not a jurisdiction in which I had ever previously appeared. Generally, as an expert I am conscious of not overstepping the rules of the Court and of giving evidence. I was therefore reluctant to answer this question as I was unsure whether I was allowed to do so.
>
> If either Mrs Jones or the Deemster had indicated that I was permitted to express my opinion on whether or not Mr Anderson's responsibility was substantially impaired at the time of the killing, or to read out the relevant section of my report, I would have done so. It remained my view that, from a psychiatric point of view, there was a robust basis for a jury to conclude that it was indeed substantially impaired."

49. The Board notes at this stage that Mr Aina QC for the respondent does not submit this statement is inadmissible; instead, he suggests the court should accord it little weight. It is accepted, therefore, that the statement meets the criteria for receiving fresh evidence (see, for instance, *Lundy v The Queen* [2013] UKPC 28; [2014] 2 NZLR 273, per Lord Kerr of Tonaghmore at para 120).

50. As set out above at para 2, the Appeal Court refused permission to appeal to the JCPC on 28 February 2019 and on 6 November 2019, the JCPC granted permission to appeal, limited to two issues.

The Grounds of Appeal

51. The appellant submits that the psychiatric and psychological evidence was mishandled by trial counsel who failed to put before the jury the unambiguous opinion of the two defence experts to the effect that the appellant's responsibility for the killing was substantially impaired. Mr Waterman submits that not only did Mrs Jones fail to elicit Dr Puri's clear opinion on this issue but she had neglected to explain to him in advance that it was permissible for him to give this testimony. When he declined to answer the question, suggesting it was a matter for the jury, Mrs Jones failed to correct him and it appeared she was unaware of, or was unsure as to, the correct position in this regard. The error was compounded when Mrs Jones failed to ask Dr Bradley to give his opinion on the issue. In her closing speech, Mrs Jones did not attempt to highlight other evidence in the case that tended to demonstrate that the appellant's responsibility was substantially impaired, such as the bizarre features of his behaviour as outlined by Dr Puri and Dr Bradley (for example "cutting his wife's hair or being confused about the identity of his own brother when he called" (see para 16 above)).

52. It is contended, furthermore, that the Deemster should have intervened during Dr Puri's evidence, to inform him that he was entitled to express his opinion that the appellant's responsibility for the killing was substantially impaired. It is submitted the Deemster should have permitted Dr Puri to be recalled for further questioning on this issue. The appellant contends that the judge misdirected the jury in this context during the summing up. Finally, the appellant submits that the Appeal Court erred in the relevant conclusions it reached, as set out above at paras 45 and 46.

53. The respondent accepts that the issue of whether the appellant's responsibility was substantially impaired is at the core of this partial defence and that Mrs Jones was under a professional duty to make every realistic effort to bring Dr Puri and Dr Bradley's opinions in this regard to the attention of the jury. However, it is suggested that Mrs Jones did not err in her presentation of the defence case to the jury, given the reasonable inference to be drawn is that Dr Puri no longer wished to express an opinion about the degree of impairment. Further, it is argued that Mrs Jones would have engaged in impermissible cross-examination of her own witness if she had expressly invited Dr Puri to rehearse his opinion as set out in paragraph 15.3 of his report (see para 16 above). In the alternative, it is argued that even if there were failings in Mrs Jones's handling of the evidence, they did not render the conviction unsafe. The respondent contends that the Deemster's approach cannot be faulted, and particularly he would not have known why Dr Puri failed to testify as to his opinion on this issue.

The law on whether an expert is permitted to give an opinion on the ultimate issue

54. The respondent agrees, therefore, with the submission of the appellant that Dr Puri and Dr Bradley were entitled to express their opinion on whether the appellant's responsibility for the killing was substantially impaired. This concession reflects the clear guidance provided by the Supreme Court, the JCPC and the Court of Appeal on this issue. In *R v Matheson* [1958] 1 WLR 474, 478-479, Lord Goddard CJ noted that all the doctors in the case "were satisfied that [the defendant's] mind was so abnormal as substantially to impair his mental responsibility" and thereafter observed that the jury would have needed facts that would have entitled them to reject or differ from the "opinions of the medical men" on this issue. In *R v Byrne* [1960] 2 QB 396, 403, Lord Parker CJ described the position in this context as follows:

> "Assuming that the jury are satisfied on the balance of probabilities that the accused was suffering from 'abnormality of mind' […] the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called 'substantial,' a matter upon which juries may quite legitimately differ from doctors."

55. In *R v Gomez* (1964) 48 Cr App R 310, 312, it was uncontroversial that the defence doctor had given evidence at trial that the defendant's mental responsibility was substantially impaired and in *R v Lloyd* [1967] 1 QB 175, 178, the two doctors called were able to say that the defendant was suffering from a mental abnormality but neither would go so far as to say that this substantially impaired his mental responsibility. The Privy Council in *Walton v The Queen* [1978] AC 788, 793F, set out: "These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case". In *R v Dix* (1982) 74 Cr App R 306, 311, Shaw LJ suggested that medical evidence was a "practical necessity" to support a defence of diminished responsibility, including as regards whether there was substantial impairment. Davis LJ in *R v Brennan* [2014] EWCA Crim 2387; [2015] 1 WLR 2060 stated that it was appropriate for the expert to express an opinion on the "ultimate issue", namely whether there was substantial impairment without contravening any principle of deference to the jury as the ultimate decision makers (see para 51).

56. More recently, Lord Hughes (with whom the rest of the Supreme Court agreed) in *R v Golds* [2016] UKSC 61; [2016] 1 WLR 5231 explained that:

> "38. […] medical evidence (nearly always forensic psychiatric evidence) has always been a practical necessity where the issue is diminished responsibility. If anything, the 2009 changes to the law have emphasised this necessity by tying the partial defence more clearly to a recognised medical condition, although in practice this was always required. Although it is for the jury, and not for the doctors, to determine whether the partial defence is made out, and this important difference of function is well recognised by responsible forensic psychiatrists, it is inevitable that they may express an opinion as to whether the impairment was or was not substantial, and if they do not do so in their reports, as commonly many do, they may be asked about it in oral evidence. […]"

57. Lord Taylor of Gosforth CJ in *R v Stockwell* (1993) 97 Cr App R 260 in the context of an expert on facial mapping considered whether an expert can properly give an opinion on the "ultimate issue" (at pp 265-266):

> "Whether an expert can give his opinion on what has been called the ultimate issue, has long been a vexed question. There is a school of opinion supported by some authority doubting whether he can (see *Wright* (1821) Russ & Ry 456, 458). On the other hand, if there is such a prohibition, it has long been more honoured in the breach than the observance (see the passage at page 164 in the judgment of Parker LJ in *Director of Public Prosecutions v A and BC Chewing Gum Ltd* [1968] 1 QB 159 and the cases cited at page 501 of *Cross on Evidence* (7th ed.).
>
> Professor Cross at page 500 of that work said:
>
> > 'It is submitted that the better and simpler solution, largely implemented by English case law, and in civil cases recognised in explicit statutory provision, is to abandon any pretence of applying any such rule, and merely to accept opinion whenever it is helpful to the court to do so, irrespective of the status or nature of the issue to which it relates.'
>
> The same view is expressed by *Tristram and Hodkinson* (sic) in their work on *Expert Evidence: Law and Practice* at pages 152 to 153, where, after referring to the case of *Wright* they say that in that case the expert witness could not express an opinion as to whether the particular facts before the court constituted an act of insanity. He could, however, state what types of behaviour demonstrated insanity in persons generally,

from which the jury could draw inferences in the particular case. The learned authors went on as follows:

> 'There is little doubt however that such a distinction is not now rigorously observed, and given that expert evidence of this kind is to be put before a jury, it may be suspected that the often casuistic distinction between the general and the particular is either ignored by juries, or seen as a distinction of form rather than substance. It has been suggested too that some defences in criminal proceedings can in effect only be raised by adducing expert evidence, and that: "it would put an insuperable difficulty in the way of insanity" if such evidence were to be excluded by an ultimate issue or other analogous rule.'

The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be, as the authors of the last work referred to say, a matter of form rather than substance.

In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide."

58. Mr Waterman has additionally relied on section 16 of the Criminal Justice Act 1991 ("CJA") which provides the relevant legislative provision in the Isle of Man as regards expert reports (see section 30 of the Criminal Justice Act 1988 for the corresponding provision in England and Wales):

"Expert reports

(1) An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.

(2) If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.

(3) For the purpose of determining whether to give leave the court shall have regard-

(a) to the contents of the report;

(b) to the reasons why it is proposed that the person making the report shall not give oral evidence;

(c) to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(d) to any other circumstances that appear to the court to be relevant.

(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given in oral evidence.

(5) In this section 'expert report' means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert advice."

59. This provision has the effect that the expert witness's report is always admissible when the witness is called to give oral evidence and is admissible with the leave of the court when he or she is not called (subject to the witness being entitled to give evidence on the issue or issues).

The application of the law to this case

60. On the basis of the jurisprudence set out above, Dr Puri and Dr Bradley were undoubtedly entitled to express their opinion on whether the appellant's responsibility for the killing was substantially impaired. It would appear that Mrs Jones had failed to clarify with Dr Puri in advance of his testimony that he was able to give this evidence, and at the point at which she asked him the question before the jury, she was seemingly unclear in her own mind as to whether this was a permissible course. As Mrs Jones was to observe to the Deemster in due course, she had been of the view that it was not open to her to ask whether diminished responsibility was "made out", which she considered would in any event have constituted an impermissible leading question

(see para 32 above). Dr Puri, furthermore, had made it plain that he declined to comment on whether the impairment was substantial because "that would be for the respected jury". There was nothing to indicate, including in the way he expressed himself, that he had resiled from his conclusions at paragraph 15.3 of his report (see para 16 above). His recent statement has put this beyond doubt (see para 48 above). The Board attaches considerable weight to this later statement, given Dr Puri simply explained therein the reason for his answer before the jury.

61. The respondent has submitted without proper foundation, therefore, that it was open to the Deemster to conclude that Dr Puri had "got cold feet" (as Mr Aina put it in his written submissions). Instead, Dr Puri's misunderstanding could have been resolved without difficulty at the time. Either Mrs Jones or the Deemster should have reassured Dr Puri that although the decision was ultimately one for the jury, he was fully entitled to give evidence as to his opinion on this issue. Given particularly that his report was admissible pursuant to section 16 of the CJA, it would have been appropriate for Dr Puri to have been shown paragraph 15.3 and told that he was permitted to give evidence in accordance with its contents. Indeed, it could have been read to Dr Puri by Mrs Jones during the course of his evidence. Instead, the opportunity was lost when Dr Puri gave evidence; Dr Bradley was not asked this critical question; and the Deemster refused Mrs Jones's application for Dr Puri to be recalled for the error to be rectified. The Deemster based his decision on the application to recall Dr Puri on the erroneous basis that Dr Puri had "ducked" the question. The true position, as set above, was that Dr Puri did not consider that he was entitled to give this evidence and this misapprehension was not corrected.

62. The prosecution's closing speech on this issue was, in the event, significantly (if unintentionally) misleading. Mrs Watts suggested to the jury that neither Dr Puri nor Dr Bradley were able to say that there was a substantial impairment, and she then asked the powerful question "If they can't say that members of the jury can you? The prosecution say no." As rehearsed above, the true position was that Dr Puri believed he was not entitled to give this evidence and Dr Bradley was never asked the question. The Deemster summarised the submissions of counsel during the summing up, without correction.

63. Although the Appeal Court correctly suggested – at least as a general proposition – that Mrs Jones was not permitted to ask Dr Puri, as a witness she had called, leading questions or to cross-examine him, the court did not address the critical factor that Mrs Jones should have reassured him, either before or during his testimony, that he was permitted to give evidence on this issue and that it was open to her to draw his attention to the relevant part of his report. Furthermore, although the Appeal Court was also right to observe that the questioning of witnesses is usually best left to counsel, the Board notes that the Deemster failed to correct the clear misunderstanding on the part of Dr Puri that he could not comment on whether the impairment was substantial because that "would be" for the jury. This was a

straightforward misunderstanding about the role of an expert witness, and the trial judge was in the best position to explain to the witness the correct position in law. The Appeal Court, furthermore, erroneously advanced the suggestion, which was without proper foundation, that there was a risk that Dr Puri might have reluctantly expressed the view there was no substantial impairment, a suggestion which is directly contradicted by Dr Puri.

64. In his oral submissions, Mr Aina focussed extensively on the fact that there was, as he submitted, significant evidence that the appellant's personality disorder was "pervasive". He submitted that if the jury had been persuaded that it was a pervasive and serious illness, they would have concluded that the appellant had established that his responsibility for the killing was substantially impaired. In the view of the Board, this submission is unpersuasive. A conclusion that the appellant had a pervasive personality disorder is not the same as concluding that he was "suffering from such mental abnormality as substantially impaired his mental responsibility for his acts and omissions". It would have been open to the jury to conclude that the personality disorder was pervasive whilst also concluding that the defence had nonetheless failed to establish the defence of diminished responsibility. Indeed, although Dr Puri was prepared to express his conclusion that the appellant was suffering from a personality disorder that was a pervasive condition, he considered he was unable to express his conclusion on the "ultimate issue" as regards substantial impairment. He drew a clear and correct distinction between these two conclusions, which Mr Aina's submissions tend to blur.

65. The question for the Board is not a qualitative assessment of the conduct of counsel, or indeed the suggested errors in the summing up, but the effect of these factors on the safety of the conviction (whether it is "safe and satisfactory" pursuant to section 33(1) of the Criminal Jurisdiction Act 1993). Lord Carswell summarised the approach to be followed in *Teeluck v State of Trinidad and Tobago* [2005] UKPC 14; [2005] 1 WLR 2421:

> "39. […] There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude […]"

Conclusion

66. For the reasons set out above, the Board concludes that the errors in this case on the part of defence counsel, when viewed alongside the content of Mrs Watts' closing speech for the prosecution and the relevant part of the Deemster's summing up in which the errors were left uncorrected, render the verdict unsafe and unsatisfactory. There is no basis to conclude the jury would necessarily have reached the same conclusion on the charge of murder, in the absence of these errors (see Lord Hope of Craighead in *Stafford v The State (Note)* [1999] 1 WLR 2026, pp 2029-2030). Instead, if Dr Puri and Dr Bradley had testified on the issue of substantial impairment, there is a clear possibility that the appellant would have been acquitted of murder and convicted instead of manslaughter. The expert evidence of Dr Puri and Dr Bradley would have been uncontradicted, given the Deemster had excluded the testimony of Professor Shaw.

67. The Board considers the appellant should be retried, as it is uncertain whether a jury would determine this was a case of diminished responsibility (resulting in a verdict of manslaughter) or instead a situation in which, for instance, a jealous man had simply decided to end what had become an unacceptable situation (resulting in a verdict of murder).

68. The Board will accordingly humbly advise Her Majesty, first, that the appeal ought to be allowed and the conviction for murder quashed and, second, that the appellant ought to be retried.