REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App Nos. 50 & 51 of 2006

BETWEEN

DEENISH BENJAMIN and DEOCHAN GANGA

Appellants

AND

THE STATE

Respondent

PANEL: I. ARCHIE, CJ
R. NARINE, JA
P. MOOSAI, JA

APPEARANCES:

Mr K. Scotland, Mr D. Khan & Mrs A. Watkins-Monsterin for the Appellants

Ms D. Seetahal SC and Mrs K. Waterman-Latchoo for the Respondent

DATE DELIVERED: 28th July, 2017.

I have read the judgment of Moosai JA and agree with it.

I. Archie
Chief Justice

I too, agree.

R. Narine
Justice of Appeal

I. Introduction

[1] On 4 December 2006 following a jury trial before Lalla J, Deenish Benjamin (Benjamin) and Deochan Ganga (Ganga) were convicted of the murder of Sunil Ganga (Sunil), which occurred on 12 July 2003. The judge imposed the mandatory death sentence on both convicted men. Both appellants appealed against conviction some eighteen months later; on 3 July 2008 the Court of Appeal dismissed their appeals against conviction in consequence whereof both sentences were affirmed.

[2] Thereafter, their appeals to the Privy Council against both conviction and sentence were determined on 13 March 2012, some forty-four months later. Their Lordships remitted the appeals to the Court of Appeal to determine:

1. The safety of the convictions for murder in light of the fresh medical evidence of Dr Richard Latham ("Dr Latham") and Dr Tim Green ("Dr Green"), a Consultant in forensic psychiatry and a Chartered Clinical Psychologist respectively, together with any rebutting evidence the Court of Appeal may decide to admit. Furthermore, without limiting the issues arising for consideration on the fresh evidence, their Lordships were of the view that the evidence of the two experts, as it currently stands, would appear to warrant consideration specific to:
    i. Fitness to plead;
    ii. The reliability of the appellants' confessions;
    iii. The availability of a defence of diminished responsibility.
2. Whether a sentence of death, if passed upon a person who is mentally impaired, would constitute cruel and unusual punishment whether as contrary to a constitutional provision or in breach of a common law rule.

[3] Having considered the issues and in the light of the fresh evidence before us as to the degree of mental impairment of the appellants, we are of the view that the convictions are safe. Accordingly, the appeals against the convictions are dismissed. With respect to the issue of sentencing, we are bound by the decision in ***Matthew v The State***,[1] which held the death sentence to be both lawful and mandatory. However, since the appellants have remained in custody under sentence of death for a period in excess of five years, without the delay being attributable to any frivolous or time-wasting resort to legal proceedings such as would amount to an abuse of process, the decision in ***Pratt v Attorney General of Jamaica***,[2] would preclude the imposition of the death penalty.

II. Evidence at trial

[4] The following summary is taken mainly from the judgments of both the Court of Appeal and the Privy Council.

[5] Benjamin and Ganga are related to the deceased Sunil, being the step-cousin and cousin respectively. Sunil lived at Penal with his wife Roseanne George (Roseanne) and child. Benjamin and Ganga lived next door.

[6] Roseanne testified that she and her husband had returned home at about 10:30 pm on 12 July 2003. She was in the bedroom while Sunil was in a shed to the side of the house relaxing. She heard a bottle break and Sunil cry out, "Deenish boy, what you doing meh?" and then, "Roseanne, run."

[7] Through creases in the front door, Roseanne saw and recognized the appellants, as she had known and regularly seen them for the past seven years. Both appellants were striking Sunil. They pulled him to the back of the shed. She heard loud sounds including groaning. She observed that the galvanized structure was shaking and after that, she heard footsteps.

[8] She said after about an hour, the groaning and footsteps ceased. She came out of the house calling out to Sunil, but received no response. She then went to the back of the shed where she found Sunil hanging from a rope which had been tied to a rafter in the shed.

[1] (2004) 64 WIR 412 (PC).
[2] [1993] 43 WIR 340 (PC).

[9] It was not until about 4:30 am, some five hours later that Roseanne went to the nearby home of her father-in-law, Chandrebooj Ganga, to tell him that she saw Sunil hanging in the shed. There is a dispute between them as to what she told him. He testified that she said, "Pappy, Sunil hang himself." Roseanne contended that she said to him that she saw Sunil hanging. There is no dispute however, that at the time she told him she saw Sunil hanging, she made no mention of the appellants' presence at the scene where Sunil died. Chandrebooj then accompanied Roseanne to her home where he found Sunil hanging from the rope.

[10] The police were summoned and Sgt Flanders and other police officers arrived later around 7:00 am. Sgt Flanders observed stains resembling blood on Sunil's face and on the wall. He also noticed that there was a broken bottle on the floor. Sunil's feet at that time were touching the ground.

[11] Sgt Flanders interviewed Roseanne shortly after arriving at the crime scene. At that time she did not tell him about the appellants. However, she recounted to him that on reaching home around 11:00 pm on the night of 12 July 2003, she left Sunil in the shed and went to bed, as he had told her he was "breezing out." When she got up around 4:30 am and did not see Sunil in bed, she went outside and saw him hanging in the shed. This account differed significantly from her evidence at trial, which was outlined at paragraphs 7 and 8 above. In the latter account, she had noted bawling, groaning and footsteps, and had even gone outside after the groaning and footsteps had ceased, calling out to Sunil. Getting no response, she had gone to the back of the shed where she saw him hanging. She had not suggested in the latter account that she had gone to bed at any time between her return to the house at 10:30 pm and the discovery of Sunil's body.

[12] On the afternoon of 13 July 2003, Sgt Flanders recorded a statement from Roseanne. In that statement, she named the two appellants and reported what they had done to Sunil. As a result, both appellants were arrested that same afternoon.

[13] Inspector Phillip interviewed Ganga later that evening in Sgt Flanders' presence. The prosecutor claimed that Ganga was cautioned and told of his rights. Ganga then stated, "I was dey, but is Deenish who hit Sunil." Between 8:17 pm and 9:30 pm, Ganga gave a written statement in the presence of a Justice of the Peace ("JP"). Ganga signed the statement.

[14] In that statement, Ganga stated that he had been involved in a fight with Sunil some two weeks prior to the matter. On the night of Sunil's death, he and Benjamin had gone to Sunil's home. Sunil had thrown a bottle at Benjamin, who threw the bottle back at Sunil. The bottle struck Sunil, who collapsed on impact, telling Roseanne to run as he did. Benjamin then dragged Sunil to the back by the shed, where he placed a piece of rope around his neck and then around a rafter. Ganga helped to lift Sunil up. Benjamin then began to hit Sunil at which point he (Ganga) left.

[15] Around 10:40 pm that night, Inspector Phillip interviewed Benjamin. After being cautioned and told of his rights, Benjamin said, "I only help hang up Sunil." He also gave a written statement in the presence of a JP.

[16] In that statement, Benjamin said that upon Ganga's suggestion, they both went to Sunil's house. After they had observed Roseanne go inside, Ganga "locked" Sunil's neck and he then did the same. Ganga struck Sunil on his head and placed a rope around his neck. Ganga then dragged Sunil to the back of the house and he helped hang Sunil.

[17] On 14 July 2003 both appellants were charged for the murder of the deceased, Sunil.

[18] At trial, the judge conducted a *voir dire* to determine the admissibility of the appellants' respective oral and written statements.

1. Benjamin's attorneys provided comprehensive grounds of challenge. They were essentially:
    i. Upon being told to sign the statement of 13 July 2003 which he never dictated, he informed the police that he could neither read nor write. Thereafter, he was beaten and forced to sign the statement;
    ii. He was deprived of any meals before the taking of the statement;
    iii. He was not informed that he could have an Attorney at Law, a friend or relative present;
    iv. A JP was not present when he signed the statement.
2. Ganga's attorney's essential grounds of challenge were as follows:
    i. He was not told that he had a right to speak to a lawyer, friend or relative;
    ii. He was also beaten and forced to sign the statement of 13 July 2003 which he never dictated;

iii. He was burnt on his left ear with a cigarette lighter flame to get him to sign the statement;

iv. He was told that his parents were detained at the police station and would only be released if he signed the statement;

v. A JP was not present when he signed the statement.

[19] The material prosecution witnesses, including Sgt Flanders, Inspector Phillip and both JP Maharaj and JP Baptiste, testified on the *voir dire.* The prosecution denied the use of force or the existence of any improper circumstances when the respective statements were being obtained.

[20] Both appellants testified on the *voir dire* in keeping with their respective grounds of challenge and were cross-examined.

[21] The judge admitted the respective statements into evidence on the basis essentially that the prosecution had proved beyond reasonable doubt that the statements were voluntary and not made in improper circumstances.

The defence

[22] The defence of both appellants at trial was alibi and mistaken identification. Benjamin claimed that on the night of the murder he was in another village (Siparia). Ganga contended that he was at home all night. Both appellants testified at trial to that effect and both were cross-examined. Neither called any witnesses. They also denied making any oral or written statements. Both claimed that no JP was present at the police interviews and the written confessions were fabricated by the police. They relied essentially on the grounds of challenge mounted in the *voir dire*. Benjamin admitted that he had been in a fight with Sunil in 2002, but claimed that they had subsequently resolved their "issues." Ganga's testimony was that he was on good terms with Sunil.

III. Grounds of appeal

[23] The appellants' grounds of appeal are as follows:[3]

[3]Appellants' Written Submissions dated 4 June 2013 p 14 [51].

1. It is in the interest of justice to admit fresh evidence in relation to their mental disorders.
2. The fresh medical evidence shows the appellants' convictions to be unsafe as the appellants were:
    i. unable to understand the arrest, detention processes and procedures at the police station;
    ii. unable to make a confession;
    iii. unfit to plead and unable to properly participate in their defence; and
    iv. unable to avail themselves of the defence of diminished responsibility.
3. The death penalty for the mentally impaired is unlawful as it is:
    i. contrary to common law; and
    ii. contrary to section 5 of the Constitution of Trinidad and Tobago ("the Constitution") and Article 7 of the International Covenant on Civil and Political Rights 1966 ("ICCPR"), being tantamount to cruel and unusual punishment.

IV. Fresh evidence

[24] The appellants by their Notice dated 4 September 2013 applied, pursuant to section 47 of the Supreme Court of Judicature Act, Chapter 4:01 ("SCJA"), for leave to adduce fresh evidence in this court comprising of:

1. the psychological reports of Dr Green.
2. the psychiatric reports of Dr Latham; and

With respect to Benjamin the following reports were prepared:

1. Dr Green's report dated 3 March 2010;
2. Dr Latham's report dated 23 July 2010.

With respect to Ganga the following reports were prepared:

1. Dr Green's report dated 3 March 2010 and an addendum report dated 13 January 2011 which was to be read as one with his first report.
2. Dr Latham's report dated 18 July 2010 and an addendum report dated 20 November 2010 which was to be read as one with his first report.

[25] The appellants were also assessed by Ms Marissa Baksh ("Ms Baksh"), Clinical Psychologist, on behalf of the respondent. Her psychological evaluations are contained in her report on each of the appellants dated 19 January 2011. Ms Baksh's reports were placed before the Privy Council for their Lordships' consideration as to whether the appellants should be permitted to raise the question of their fitness to plead.[4]

[26] With respect to both appellants the following reports were prepared in response to, *inter alia*, the reports of Ms Baksh:

1. Dr Latham's report of 28 October 2011; and
2. Dr Green's report of 30 October 2011.

[27] Section 47 of the SCJA confers upon the Court of Appeal a discretion in a criminal appeal to receive fresh evidence "if it thinks it necessary or expedient in the interest of justice." Within recent times there has been an increase in the number of cases remitted by the Privy Council to this court to determine the safety of convictions in light of fresh evidence as to the mental impairment of appellants. This has caused some concern to our Court of Appeal.[5] An obvious reason for this developing trend is the failure to subject accused persons facing murder charges to assessment by a medical expert at an early stage of the proceedings. The Privy Council addressed this issue frontally in ***Pitman and Hernandez v The State***.[6] Lord Hughes at paragraph 48 stated:

> "*... the Board sees considerable force in the observations of both Archie CJ in Pitman and Narine JA in Hernandez that it is unsatisfactory that the mental condition of defendants should be raised for the first time only on appeal, and often many years after the trial. Very similar concerns were expressed by Lord Judge CJ in the English context in Erskine. The admission of fresh evidence on appeal is a matter of discretion. Not only must the evidence appear credible but the explanation for its absence at trial is very relevant to the exercise of the discretion. The best prevention of such late appearance of medical evidence lies in the regular expert examination, at an early stage, of all defendants facing murder charges. It must be*

[4] ***Benjamin and Ganga v The State*** [2012] UKPC 8 [35].
[5] ***Pitman v The State*** Cr App No 44 of 2004 [4]-[8]; ***Hernandez v The State*** Cr App No 63 of 2004 [59]-[60].
[6] [2017] UKPC 6.

for individual jurisdictions to devise such means of seeking to achieve this as are practical in local conditions. It may nevertheless occasionally happen that fresh, and late, evidence is compelling, and that justice requires its admission."

The decision whether to admit evidence under section 47 of the SCJA is fact and case specific.[7] Where such fresh evidence is sought to be adduced at a late stage, in the instant case many years after the trial, a court must, save in clear cases, rigorously examine the evidence.[8]

[28] It would appear that, having regard to the stance adopted by the respondent before the Board, the Privy Council was of the view that the fresh evidence of Dr Latham and Dr Green should be admitted in evidence. Thus, before the Board, the respondent conceded that the appeals should be remitted to the Court of Appeal because there was evidence that both appellants are of low intelligence which may have affected their fitness to plead. The respondent's position would no doubt have been influenced by the contents of the report of its own witness, Ms Baksh, who found a similar degree of intellectual impairment as the defence's experts.[9] Having regard to that concession, which was considered to have been correctly made, their Lordships remitted the appeals to the Court of Appeal to determine the safety of the convictions in light of the fresh medical evidence of Dr Latham and Dr Green, together with any rebutting evidence which the Court of Appeal may decide to admit.[10]

[29] Consistent with its approach before the Privy Council, the respondent, in its final submissions before this court, also agreed that the fresh evidence of Dr Latham and Dr Green should be admitted. It is plain that this evidence was not available at trial since, in the absence of any psychological or psychiatric assessment, neither the defence, nor prosecution for that matter, reasonably contemplated that the mental condition of the appellants was such as to warrant pursuing the issues of unfitness to plead or diminished responsibility. We are accordingly of the view that it is in the interest of justice to admit the fresh evidence of Dr Latham and Dr Green with respect to the mental capacity of

[7] ***R v Erskine*** [2010] 1 All ER 1196 [39] (Lord Judge CJ).
[8] ***R v Walls*** [2011] EWCA Crim 443; see also [36] below.
[9] Psychiatric Report of Dr Latham dated 28 October 2011 [1]; Reports of Ms Baksh dated 19 January 2011.
[10] ***Benjamin and Ganga*** (n 4) [36], [49] – [50].

Benjamin and Ganga since it raises a substantial issue about the fairness of their trial and the safety of their convictions.

[30] The only rebutting evidence relied on by the State is that of Mr Jason Jackson, Attorney at Law, who instructed Mr Rupert Frank (now deceased), Counsel for Benjamin, at the trial. Mr Jackson swore to and was cross-examined by Mr Scotland, Counsel for the appellants, on his two affidavits filed before this court on 14 February and 19 February 2014 respectively. Mr Jackson testified as to his interaction with Benjamin prior to and during the course of the trial which lasted approximately three weeks. His testimony, while admitting that his client could not read or write, sought essentially to consider Benjamin's mental capacity at the time of trial and to refute any contention that he was unfit to plead on his trial. Mr Scotland has quite properly not raised any objection to the admission of Mr Jackson's evidence. Accordingly, we exercise our discretion to admit the rebutting evidence of Mr Jackson.

[31] It is to be noted that among the documents sought to be admitted in the appellants' Notice of 19 July 2013 to adduce fresh evidence were two reports dated 19 January 2011 from Ms Marissa Baksh, a Clinical Psychologist. She examined both appellants and prepared reports on behalf of the State. She affirms in her reports that both appellants were tested following the request of the Privy Council for psychological evaluations, which were to be used as a measure of their levels of literacy. Even though she utilised different psychological assessment tools, her conclusion as to the degree of intellectual impairment of each appellant was similar to that of the defence's experts.[11] However, the appellants did not actively pursue this aspect of their application in seeking to have her evidence admitted, focusing instead on the reports of their experts, Dr Latham and Dr Green. Nor did the respondent seek to call Ms Baksh or rely on the contents of her reports. It is clear, however, that the Privy Council would have considered Ms Baksh's reports, which as indicated suggested a similar degree of intellectual impairment, before determining that the fresh evidence of Dr Latham and Dr Green should be admitted. And Ms Seetahal SC in this court availed herself of the opportunity to cross-examine both doctors on the contents of Ms Baksh's report.[12] In these circumstances, particularly where the respondent has

[11] Reports of Ms Baksh (n 9).
[12] CAT Report of 25 February 2014 p 38.

expressly commissioned the making of these reports by Ms Baksh and knowingly used them as true in judicial proceedings before the Privy Council to assert each appellant's level of literacy, it would be difficult for this court to simply ignore its contents.[13]

V. Miscarriage of justice.

Safety of convictions.

[32] Having admitted the fresh evidence, this court must now go on to evaluate its importance in the context of the other evidence given at trial. In ***Dookran v The State***[14] this court expressly approved of the test propounded by Lord Bingham in ***R v Pendleton***[15] in determining whether or not to allow an appeal against conviction where fresh evidence had been received on the appeal. The principle is best encapsulated in the following extract:

> "*The correct test to be applied by the Court of Appeal when considering whether or not to allow an appeal against conviction where fresh evidence had been received on the appeal was the effect of the fresh evidence on the minds of the members of the court, and not the effect that it would have had on the minds of the jury, so long as the court bore very clearly in mind that the question for its consideration was whether the conviction was safe and not whether the accused was guilty. It was undesirable that the exercise of the important judgment entrusted to the Court of Appeal by s 2(1) of the 1968 Act should be constrained by words not to be found in the statute and that adherence to a particular thought process should be required by judicial decision. Such a test reminded the Court of Appeal that it was not and should never become the primary decision-maker, and that it had an imperfect and incomplete understanding of the full processes which had led the jury to convict. The court could make its assessment of the fresh evidence it had heard but, save in a clear case, it was at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury had heard. For those reasons it would usually be wise for the Court of Appeal, in a case of any difficulty, to test its own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction had to be thought to be unsafe.*"[16]

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[13] HM Malek QC, *Phipson on Evidence* (18th edn Sweet & Maxwell, UK 2013) 4–27; see also CAT Report of 25 April 2014 p 37.
[14] Cr App Nos 67 & 68 of 2001 [11]-[13].
[15] [2002] 1 WLR 72 (HL).
[16] ***R v Pendleton*** [2001] All ER (D) 180 (Dec).

[33] Thus, the ultimate question for determination is whether, in the light of the fresh evidence, the conviction is safe, not whether the accused is guilty. The responsibility for determining whether fresh evidence renders a conviction unsafe is, save in cases regarded by the court as difficult, on the court itself, which must make up its own mind and not consider what effect the fresh evidence would have on the minds of the jury. In a case of any difficulty, the jury impact test may be deployed by the court to test its view as to the safety of a conviction: the court in these circumstances asking itself whether the evidence, if given at the trial, might reasonably have affected the decision of the jury to convict; if it might, the conviction had to be thought to be unsafe.[17]

VI. Fitness to Plead

[34] It is a basic principle of our criminal law that a person should be held liable only where he is of a sufficient capacity to be blameworthy for his actions.[18] A plea or defence of insanity or some other form of mental impairment invariably requires consideration of a person's mental capacity at a particular point in time. An accused person's sanity may become relevant at different stages of the proceedings. Thus, whether or not an accused is insane is to be determined in accordance with tests laid down by the common law. Firstly, where an accused is insane in the ***M'Naghten*** sense where the focus is on the mental capacity of the accused at the time of the commission of the act alleged to constitute the criminal offence: section 66 of the Criminal Procedure Act, Chapter 12:02. Secondly, where an accused is unfit to plead in the ***Pritchard*** sense where the focus is on the mental capacity of the accused at the time of trial: sections 64 and 65.[19] Having put forward the contention that the appellants are unfit to plead, the onus is on the defence to establish same on a balance of probabilities.[20]

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[17] ***Pendleton*** (n15); see also Professor D Ormerod QC (Hon) and others (eds), *Blackstone's Criminal Practice 2016* (26th edn Oxford University Press, NY 2015) D 26.19.
[18] D Ormerod, K Laird, *Smith and Hogan's Criminal Law* (14th edn Oxford University Press, NY 2015) p 321.
[19] Criminal Procedure Act; see also ***R v The Governor of His Majesty's Prison at Stafford ex Parte Emery*** [1909] 2 KB 81 pp 84-87; ***R v Podola*** [1960] 1 QB 325.
[20] ***Podola*** (n19).

[35] With respect to the substantive law relating to fitness to plead, the leading authority of ***R v Pritchard***[21] decided in 1836 lays down the guiding principles. The defendant, a deaf mute of otherwise sound mind, was indicted for a capital felony. Alderson B empanelled a jury to determine whether the defendant was fit to plead. His Lordship at pages 304 and 305 directed the jury as follows:

> "*There are three points to be inquired into: First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge [any jurors] to whom he may object – and to comprehend the details of the evidence… If you think that there is no certain mode of communicating the details of the charge to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters."*

The ***Pritchard*** criteria have been held to encompass the capability of the accused: (i) to understand the charges; (ii) to understand the plea; (iii) to challenge jurors; (iv) to instruct his legal representatives; (v) to understand the course of the proceedings; and (vi) to give evidence if he chooses.[22] In applying these criteria, the court must assess the capabilities of the accused in the context of the particular proceedings, by reference to the complexity or otherwise of the case and what the process will in fact demand.[23] The court in ***Taitt v The State***,[24] noted that the quality of his instructions to counsel or of any evidence that he may wish to give is not to the point. The emphasis is on his ability, or inability, to do those things. A high degree of abnormality does not of itself render the accused unfit to plead.[25]

[36] In ***R v Walls***[26] Thomas LJ highlighted the general obligation on the court, in an appropriate case, to carefully scrutinise the evidence before arriving at its own conclusion:

> "*… we consider that, save in clear cases, a court must rigorously examine evidence of psychiatrists adduced before them and subject that evidence to careful analysis*

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[21] (1836) 7 C&P 303.
[22] ***R v M*** [2003] EWCA Crim 3452 [20]; *Smith and Hogan's Criminal Law* (n 18) p 326.
[23] Professor D Ormerod QC (Hon) and others (eds), *Blackstone's Criminal Practice 2017* (27th edn Oxford University Press, NY 2016) D12.5 (f); ***R v Marcantonio*** [2016] EWCA Crim 14.
[24] [2012] UKPC 38 [16].
[25] ***R v Berry*** (1977) 66 Cr App R 156.
[26] ***Walls*** (n 8) [38].

against the Pritchard criteria as interpreted in Podola. Save in cases where the unfitness is clear, the fact that psychiatrists agree is not enough… a court would be failing in its duty to both the public and a Defendant if it did not rigorously examine the evidence and reach its own conclusion."

[37] We can now go on to consider the specific issue of the degree of mental impairment of Benjamin and Ganga and what effect, if any, it had on: (i) their fitness to plead; (ii) the reliability of their confessions; (iii) the availability of a defence of diminished responsibility.

[38] We have carefully evaluated the entirety of the evidence before us. This would include the evidence of the appellants' experts and the record of proceedings at trial. In the case of Benjamin, we would have also factored in the evidence of Mr Jason Jackson, his Instructing Attorney at Law. We are satisfied on the evidence available to us that, for the reasons that follow and notwithstanding the degree of mental impairment of each of the appellants, their convictions are safe.

VII. Expert Evidence

[39] Dr Green is a Chartered Clinical Psychologist employed as Lead for Psychological and Talking Therapies in Forensic Services of the South London and Maudsley NHS Foundation Trust. He also holds the post of Honorary Researcher in the Psychology Department at the Institute of Psychiatry in London. He has, among other matters, several years assessing and treating mentally disordered offenders.

[40] Dr Latham is a Consultant in Forensic Psychiatry, working in the National Health Service in London. He is a member of the Royal College of Psychiatrists and is on the Forensic Psychiatry Specialist Register of the General Medical Council. He is approved under section 12 (2) of the Mental Health Act 1983 (England and Wales) as having special experience in the diagnosis or treatment of mental disorder.

[41] The Privy Council has referred to both specialists as being distinguished in their field.

[42] Both appellants were examined by Dr Green and Dr Latham in 2010 and 2011. Benjamin would have been 29 and Ganga 28 years of age at the time their assessments began. These were carried out some 6 years after the commission of the offence and some 4 years after

conviction. Dr Green agreed that ordinarily an interview is best conducted as soon as possible after the incident, although what was done here was not uncommon.[27]

[43] Benjamin was interviewed by Dr Green on 30 November 2009 and Ganga either the day before or the day after. Each interview lasted approximately 4 hours.

[44] Dr Latham conducted an interview with each of the appellants on 15 June 2010; each lasted approximately 1 - 1 $\frac{1}{2}$ hours.

[45] Both doctors had access to the material documents concerning the trial, appeal and hearing before the Privy Council.

[46] In arriving at his opinions, Dr Green utilized the results from the Wechsler Adult Intelligence Scale 3rd Edition – UK version (WAIS III – UK), which he described as the most robust measure of a person's intellectual functioning across a number of domains.[28] However, with Ganga, he was able to administer the Rey-Ostreith Complex Figure Test and the Coin in the Hand Test, the latter of which is designed to detect malingering. Time did not permit him to do this latter test with Benjamin, but he was satisfied that malingering did not feature in his responses.

[47] The clinical picture painted by each appellant was remarkably similar.[29] The primary psychiatric disorder of each is a mild learning disability. Benjamin has a full scale IQ of 54; Ganga has a full scale IQ of 52. This is significantly lower than the usual cut-off of 70. Both appellants fall within the 0.1 percentile. This suggests that 99.9% of adults in the general population would score higher. The scores of Benjamin and Ganga are fairly consistent across verbal and non-verbal tests.[30] Both Dr Green and Dr Latham are of the view that the mild learning disability of the appellants is likely to be relevant to the issues relating to their arrest, police interviews, original trial and current circumstances. Dr Latham concluded:

1. that the level of intellectual impairment of both appellants was such that it would have affected the reliability of any confessions.

[27] CAT Report of 24 February 2014 p 19.
[28] *Ibid* p 7.
[29] See for e.g. CAT Report of 25 February 2014 p 41 (Dr Latham).
[30] CAT Report (n 27) p 21.

2. In applying the ***Pritchard*** criteria, it was unlikely that either Benjamin or Ganga was fit to plead or stand trial.
3. The diagnosis of learning disability would almost certainly constitute an abnormality of mind within the definition of diminished responsibility.

[48] With respect to the ***Pritchard*** criteria, both experts, with limited reservations, inclined to the view that the appellants were capable of: (i) understanding the charge of murder; (ii) understanding the difference between guilty and not guilty; and (iii) challenging jurors. Given our findings (set out more fully below), we agree with the experts that, despite their cognitive impairment, the appellants would nonetheless have been able to meet the above criteria. In any event, these three are the least complex of the six ***Pritchard*** criteria and we are satisfied that both appellants, having been represented by competent counsel, were not prejudiced in this regard. However, it is with the other aspects of this criteria, namely instructing their legal representatives, following the course of the proceedings and giving evidence in their own defence, that serious issue is taken. Both doctors were of the opinion that these required a much greater degree of cognitive ability; and that the intellectual impairments of the appellants were too severe to render them capable of instructing their legal representatives, following the course of proceedings and giving evidence in their own defence.

VIII. <u>The Evidence at trial</u>

[49] The case against the appellants at trial rested to a great extent on the reliability of: (i) the eyewitness testimony of the deceased's wife, Roseanne; and (ii) the appellants' confessions. This evidence included:

1. The written statements of Benjamin and Ganga.
2. Evidence on the respective *voir dires*, at which both Benjamin and Ganga testified.
3. Evidence led at trial, including that of Benjamin and Ganga.

IX. Expert Evidence: Benjamin

[50] Dr Green's material conclusions are as follows:

> "*6.1 Mr. Benjamin describes a background in which he was, from an early age, unable to manage many of the tasks of daily living. He describes a socially and economically impoverished background with limited opportunities for learning. He describes having difficulties in many areas of activities of daily living including self-care, food preparation, transport, social engagement and work. He does not describe any incidences in which he was able to effectively manage daily life without the support and assistance of others.*
> *6.2 Mr. Benjamin's intelligence coregent scoring falls within the range thought to be indicative of a learning disability. In order to diagnose a learning disability one must not only look at an IQ score but also at an individual's social functioning score. Taken together, his IQ score, along with his description of his social functioning, and all other descriptions of his functioning available to me, it is my opinion that Mr. Benjamin qualifies for a diagnosis of a learning disability. In order to formally diagnose a learning disability it would be most appropriate to interview Mr. Benjamin's family. However, as this has not been possible in this case, I believe it is appropriate to conclude that he does have a learning disability.*
> ……
> *6.4 Whilst Mr. Benjamin describes some rudimentary understanding of the court process, I am not convinced that he has an ability to fully comprehend the nature of the trial against him and would have significant difficulty in instructing his legal team as to his defence, not least because Mr. Benjamin has significant difficulties in reading and writing*."[31]

[51] Both Dr Green and Dr Latham prepared further reports dated 30 October 2011 and 28 October 2011 respectively. These reports addressed the psychological assessments conducted by Ms Baksh on both appellants. Both her reports are dated 19 January 2011. She found that Benjamin had a full scale IQ of 57 while Ganga had a full scale IQ of 41. She concluded[32] that each appellant's overall performance on the Stanford Binet – V 5th Ed (SB-V) was within the moderately impaired or delayed range of functioning; while their measured academic skills on the Wide Range Achievement Test – Revision III (WRAT 3) were significantly low.

[52] They essentially conclude that Ms Baksh's assessments in no way altered their opinions. Indeed, Dr Latham opines that the assessments appear to confirm the degree of intellectual

[31] Psychological Report of Dr Green dated 3 March 2010 p 7.
[32] Reports of Ms Baksh dated 19 January 2011 pp 7, 10-11 (Benjamin) and pp 8, 12 (Ganga).

impairment, albeit using different psychological assessment tools.[33] In this court's view, Ms Baksh's reports support those of Dr Green[34] and Dr Latham that both appellants have an IQ that falls below the first percentile.

[53] Dr Latham in his report of 23 July 2010 concluded:

1. The primary psychiatric disorder is mild learning disability. It is only possible to make this diagnosis by considering the psychiatric, social and developmental history in conjunction with the psychological findings of Dr Green. Benjamin has convincing evidence of cognitive impairment on psychological testing. The diagnosis is supported by a history of him needing significant support with all but the simple activities of daily living, his description of only really undertaking work that was simple and with a high degree of instruction and supervision. His capacity to use normal, everyday speech and manage his own self-care in basic terms is entirely compatible with the diagnosis of mild learning disability and explains why the diagnosis would not be obviously apparent. In Dr Latham's view, the impairment described in the history observed at interview and results of psychological testing mean that the diagnosis can be made with relative certainty.
2. Benjamin's diagnosis of mild learning disability is a permanent state that not only applies now but would have applied at the time of the offence. His learning disability is therefore highly likely to be relevant to issues relating to his arrest, police interviews, the original trial and current circumstances.
3. Benjamin's learning disability is relevant in different ways. As others have found, it enables him to use relatively normal language and to provide basic levels of self-care. This is likely to contribute to the degree of impairment he has being overlooked. Mild learning disability is a key factor in someone's vulnerability in a police station and may be overlooked because there is an apparent superficial level of understanding. Even though there are disputed versions of events surrounding his arrest, in some ways his opinion makes a dispute of those facts less relevant in that even if Benjamin was given the opportunity to have people present, even if his rights were fully explained to him, Dr Latham is of the view that Benjamin would

[33] Psychiatric Report of Dr Latham dated 28 October 2011 p 2.
[34] Psychological Report of Dr Green dated 30 October 2011 p 3.

not have been able to understand these matters clearly. On one version of the events, Benjamin is described as being asked or indeed asking to make a statement. However, his intellectual impairment has a significant impact on the way that he would be able to respond to or understand that request. There is likely to be a similar difficulty in understanding the police caution. He would understand and recognise the words and be able to repeat the statement, but if there is any testing of the detail of his understanding, which Dr Latham says he carried out, then Benjamin fails that test. This situation can be assisted by the presence of a friend or relative or other adult who was familiar with the nature of the person's difficulties, so they can rephrase, simplify and check the level of understanding. As a default position, someone with this degree of impairment is unlikely to understand the complexity of the situation they were in and be able to weigh up the information they were given in order to make a decision. Unfortunately, even if he was asked whether he wanted to exercise his right to have someone present, without detailed and thorough explanation and checking of his understanding, it should be assumed (with the results of validated testing) that he did not fully understand this. As Benjamin did not have an advocate present, then any understanding of the process beyond this must also be assumed to have been very limited.

4. Benjamin's signed confession has been subject to consideration with regard to matters which are beyond Dr Latham's remit as a psychiatric expert. However, for the reasons expanded on above, Benjamin's level of understanding of the contents of the statement is likely to be very limited.

[54] Benjamin's fitness to plead and stand trial at the time of the alleged offence is an issue that can be relatively easily considered as a learning disability is a stable state and his learning disability or intellectual impairment will be unaffected by the time that has passed since the original trial. Dr Latham considered separate criteria relating to fitness to plead and stand trial:

(i) Understanding the charges:

In basic terms Benjamin is able to understand the charge of murder. In his view, Benjamin did understand that he was convicted of killing another person and in that sense he understood the original charge.

(ii) Deciding whether to plead guilty or not:

Benjamin was able to understand the fundamental difference between guilty and not guilty and generally was able to say whether he admitted to or did not admit to the offence.

(iii)Exercising his right to challenge jurors:

Benjamin had the necessary ability to exercise his right to challenge a juror.

(iv)Instructing solicitors and counsel:

Benjamin could only give basic and superficial instructions. This particular issue can be broken down into whether:

(a) He would be able to understand lawyer's questions.

(b) He would be able to apply his mind to answering them.

(c) He could convey intelligibly to lawyers the answers or instructions he wishes to give.

Dr Latham did not think it easy to state whether Benjamin was able to convey intelligibly any instructions and this may be a question better answered by those who are required to take instructions. However, Benjamin's intellectual impairment does have a significant impact on the other two limbs. In contrast to the issue of understanding the distinction between guilty and not guilty, other matters require a much greater degree of cognitive ability, in terms of conceptualising the issues of relevance and reasoned thought to a response. They particularly require aspects of executive functioning (described above) necessary to plan and initiate or inhibit a response. These are not conscious functions. In other words we are not aware and indeed it is not possible to observe these cognitive processes, but the testing of Benjamin strongly suggests his abilities in these regards are severely limited. Unless a very low threshold is applied to this issue, then it is highly unlikely that Benjamin was sufficiently able to instruct solicitors and counsel.

(v) Following the course of proceedings:

Dr Latham indicated that this was perhaps the most complex requirement and given that proceedings may be confusing for any person attempting to follow them, it is necessary to consider Benjamin's capacity in this regard in relative terms. His intellectual impairment renders him unable to follow complex proceedings. He describes trying to follow things and he is able to

pick out individual important issues that have been explained to him, but it is highly unlikely that he can follow the details of evidence. This was apparent in an analogous form in his interview with Benjamin when it was necessary to always keep questions simple and to at times repeat things. In some circumstances it is possible to institute special measures such that somebody may be able to follow proceedings. In his view, Benjamin's impairment is of a degree that would not be possible as his impairment is simply too severe.

(vi) Giving evidence in his own defence:

In basic terms, Benjamin is able to communicate and could therefore give evidence. If, however, it is considered necessary that there is a requirement that he be able to apply his mind to the answers, then he almost certainly cannot.

[55] In summary, when considering these criteria as a whole, it is unlikely that Benjamin is and was fit to plead and stand trial. This ultimate issue is obviously for the court.

Evidence of Mr Jason Jackson

[56] Mr Jackson was Instructing Attorney and Mr Rupert Frank Advocate Attorney for Benjamin during the course of the trial in the High Court. From his principal affidavit and testimony it can be gleaned that Mr Jackson was inexperienced. This was his first time participating in a trial for a serious offence. However, Mr Frank could be regarded as fairly experienced.

[57] Mr Jackson considered: (i) the findings of Dr Latham and Dr Green filed in their reports; (ii) his written instructions dated 30 June 2006; and (iii) his personal recollection of what transpired at trial.

[58] Mr Jackson found Dr Green's opinion as to Benjamin's inability to fully comprehend the nature of the trial against him and his significant difficulty in instructing his legal team as to his defence to be at odds with his interaction with Benjamin. Mr Jackson stated at paragraph 6:

> "*... I was aware that the Appellant had very little formal education and could not read and write properly and I made allowances for same… Despite the Appellant's lack of schooling, he was able to express himself clearly and give instructions*." [35]

[59] Mr Jackson disagreed with Dr Latham's opinion[36] that "Mr Benjamin could only give basic and superficial instructions". Mr Jackson said that his interactions with Benjamin demonstrated otherwise as he gave full and clear instructions and was alert and engaged during the trial process.[37]

[60] Mr Jackson recounts that he paid several visits to Benjamin at the remand section of the Prisons.[38] After he was appointed by Legal Aid, he visited Benjamin at the prison on at least two occasions. And, prior to the commencement of the trial, he would speak to Benjamin on the occasions when the matter was called and adjourned.[39] During the trial, he would speak with Benjamin every day at the attorneys' desk in the cell block area of the High Court.

[61] Mr Jackson also stated that prior to, and throughout the trial, there was nothing to indicate that Benjamin was unable to give instructions or understand the nature of the case. Indeed, upon their first interaction, Benjamin "explained what occurred at his preliminary enquiry and was able to answer questions pertaining to his case. [Benjamin] was unable to read and therefore I read out his statement in my interviews with him and he agreed what was read to him was correct and he placed an "X" at the end of his instructions in place of signing."[40]

[62] Paragraphs 11 to 14 of his principal affidavit bear repeating in full.

> "*11. The Appellant gave me instructions to challenge the validity of the written statement allegedly given by him at the Police Station. He was very vocal during the questioning of the police in this regard. He was so vocal that at one point during the voir dire that Mr. Rupert Frank advised me that the Learned Trial Judge might take issue with the practice and he instructed me to avoid such interaction.*
>
> *12. The Appellant was able to give instructions of his alibi which I personally investigated with Mr. Rupert Frank. In fact, we went to a very remote village in order to find witnesses in support of the alibi but were unable to locate them and it seemed that they had moved out of the area. The Appellant was very meticulous in*

[35] Affidavit of Jason Jackson dated 14 February 2014.
[36] Psychiatric Report of Dr Latham dated 23 July 2010 p 15, paragraph 7 (iv).
[37] Affidavit (n 35) [8].
[38] *Ibid* [9].
[39] CAT Report of 8 April 2014 p 6.
[40] Affidavit (n 35) [10].

his directions to me in this regard and such was necessary since the area was remote and the final 400 metres had to be travelled on foot.

13. The Appellant appeared very alert and attentive in court and told me on more than one occasion that he had waited a very long time for the trial and he needed to do his best to be free as he was innocent of the charge. He questioned me on the law at length. I formed the impression he was probing because of my relative inexperience. He would also question Mr. Frank.

14. The Appellant testified in the voir dire on November 15, 2006 and at the trial on November 26, 2006. ***It was apparent to me that the Appellant understood the case against him and he gave cogent evidence****.*" [Emphasis added.]

[63] In his supplemental affidavit filed 18 February, 2014 Mr Jackson recalls Benjamin drawing his attention to a newspaper article headlined "3 Years for Killing Stepson." This article was accompanied by a picture of Benjamin who was mistakenly identified as "Ashram Bajrath." Benjamin asked him to sue the newspaper on his behalf because he was portrayed as a child killer. Benjamin appeared to be dissatisfied when he told him that he was not a civil attorney. Benjamin also raised this matter with Mr Frank. Benjamin was very persistent in seeking to persuade Mr Frank to pursue the civil action against the newspaper. Mr Jackson said that it was apparent that Benjamin had learned of other persons who had received damages in similar matters. Benjamin also indicated that he would not get a fair trial because the jury may have seen this article and formed an adverse opinion of him.[41] That matter was raised with the trial judge and thereafter Benjamin appeared to have abandoned the idea of suing the newspaper. Mr Jackson opined that this experience served to affirm his view that Benjamin, despite his lack of schooling, possessed a certain street wisdom, had the ability to express himself clearly, to comprehend his circumstances, and to understand the trial process.

[64] The court notes that Mr Jackson's opinion would have to be evaluated in the context of Benjamin being unable to read or write, so that the contents of the newspaper article could only have been related to Benjamin by someone else.[42] Suffice it to say that, in this court's view, and after considering all the evidence, Benjamin's ability to convey to his lawyers what he perceived might impact unfairly on his trial suggests some level of cognitive functioning beyond the superficial.

[41] CAT Report (n 39); Supplemental Affidavit of Jason Jackson filed 18 February 2014 [6].
[42] CAT Report (n 39) p 11.

Cross-Examination of Dr Green & Dr Latham Re: Mr Jackson

[65] Dr Green and Dr Latham opine, with respect to the affidavit evidence of Mr Jackson, that nothing contained therein changes their ultimate opinions. This is because, whilst this evidence is of some relevance, it is, firstly, from his legal representative, not from a psychological or psychiatric expert; secondly, it is consistent with the way in which mild mental retardation is understood. Dr Latham explains what is meant by the latter:

> "*…that people can communicate and it does demonstrate that he was able to say things that were plausible; and what it doesn't do is it does not provide any information on the way in which he processed information, the way in which he assimilated information and the way in which he managed all of the competing information to communicate it to then reach the decision that he could communicate."*[43]

[66] With respect to the newspaper article Dr Latham opines that all Mr Jackson's affidavit reveals is some information that Benjamin is able to recognize himself in a photograph.[44] He acknowledges that it is possible that Benjamin's conduct may have stemmed from what he was being told by other prisoners of the significance of this article; or he may have himself been able to read or understand sufficiently the details of what was included in it. Dr Latham goes on to say that even if Benjamin was upset by this article and leapt to the conclusion that he should sue, it does not really help with making a decision on the diagnosis of his level of functioning, particularly in light of his cognitive assessment.[45] In response to a question posed by this court that Benjamin was not only complaining about suing because his reputation might have been besmirched, but as to the impact that it could have on the fairness of his ongoing (at the time) trial, he responded:

> "*I mean, there is, I suppose it gets back to this point, he has some understanding. We are not saying this is someone who has, as I have described it, a profound or severe learning disability, he has some understanding. My position is that an IQ in the 50s and that degree of impairment really is at the level where people say things to cover-up how impaired they actually are. But people do sometimes say things that they may be heard other people say or someone else has told them to say, or*

[43] CAT Report of 24 February 2014 p 54.
[44] *Ibid.*
[45] CAT Report of 25 February 2014 p 15.

you know, it doesn't reflect the underlying impairment and the cognitive assessment range does give us a better idea of that."[46]

[67] Where Mr Jackson describes Benjamin as "possessing a certain street wisdom," Dr Latham testified that:

> "*…it is entirely consistent that Mr Benjamin was able to have some ability to become street wise, [and] it doesn't mean he doesn't have the mental retardation. Again by expressing himself clearly doesn't contradict things, but I am not sure that there is any formal assessment of his ability to have understood or comprehended his circumstances*."

Analysis of the Expert Evidence

[68] The fresh evidence of the experts makes it clear that both Benjamin and Ganga suffer from a mild learning disability. The critical question arises as to the degree of mental impairment. This court acknowledges the significance of expert evidence in matters such as these, but is mindful of the court's role as the ultimate decision-maker. Accordingly, the expert evidence must be weighed against other relevant evidence, including the Notes of Evidence which provide a record of the appellants' performances on the *voir dire* and at trial. Also essential to this evaluation is the evidence of Benjamin's Attorney at Law, Mr Jackson.

[69] Notwithstanding an undisputed finding of mild learning disability, a legitimate criticism that can be levelled against the experts is their failure or omission to interview Benjamin's family and/or friends (and Ganga's for that matter) to provide objective verification for a significant component of their diagnosis. Nor have they provided a satisfactory explanation for such an omission. This assumes greater significance in the circumstances of this case, particularly where the evidence reveals *ex facie* Benjamin's meaningful participation in his trial, including testifying both on the *voir dire* and in his substantive defence. Dr Green agreed with Ms Seetahal SC that with such a diagnosis, the IQ score must coexist with an assessment of the patient's adaptive behaviour, that is, his social, occupational and educational functioning. Dr Green stated one method of assessment is a clinical interview:

> "*I spent four hours with Mr. Benjamin and interviewed him at length about his history. He had, it seemed to me, difficulties in all of those areas. It would be most*

[46] *Ibid* p 16.

appropriate to also interview his family but I didn't have the opportunity to do that…

It might have been preferable to have more information but I was satisfied from my clinical interview, given my experience, Mr. Benjamin's presentation and his scoring and psychometric testing is entirely consistent with people I work with clinically on a daily basis in my work."

[70] Dr Green agreed that his opinion would have been limited to the extent that they had no opportunity of observing Benjamin in situations where adaptive behaviour would have been required; and was unable to corroborate what Benjamin told him. Dr Latham himself acknowledged that he was forced to place more weight on Benjamin's IQ testing because he had relatively limited information on his social and occupational functioning. That information, which was supplied by Dr Green, was to the effect that Benjamin needed significant support with all but the simple activities of daily living. Even though he utilised the fact that Benjamin lived with his parents as an indicator of him being dependent on others, Dr Latham readily acknowledged that a 22-year-old living with his parents was not by itself an indicator that he was in fact so dependent. This court interjects to note that in a local and cultural context, the same point can be made for young adults in our society who continue to be nurtured by their families. It is regrettable therefore that this court does not have before it objective verification of Benjamin's social and occupational functioning.

X. <u>Evidence at Trial: Benjamin</u>

[71] As noted earlier (in greater detail),[47] Benjamin testified on the *voir dire*. The allegation was that the oral and written statements were obtained in improper circumstances. In chief, Benjamin was able to articulate facts as to the time and place of his arrest; that he was not cautioned by the police; that he was not informed of his right to an Attorney at Law, relative or friend; that he was not fed; that the written statement was not voluntary; and that the JP was never present at any time when he was at the police station.[48] The cross-examination, even though concise, was directed at refuting any allegations of impropriety or unfairness. Benjamin not only maintained a consistent account, but was able to recall that, on the first

[47] See [18] above.
[48] Notes of Evidence p 60.

occasion he attended court (the Magistrate's court), his lawyer, Mr Singh, complained of him being beaten at the police station.

[72] Benjamin's testimony at trial was understandably more expansive as he also advanced his substantive defence of alibi, and was subjected to cross-examination thereon. Even though in all likelihood his attention would have been directed to a particular sequence, his evidence in chief, as on the *voir dire*, was fairly coherent and consistent. At the very beginning of cross-examination he was confronted with an inconsistency between what he had said on the *voir dire* and what he was now saying in the trial:

> "*Mr. Phillip and Mr. Flander were there when I was arrested – they arrest me. I recall giving evidence on a prior occasion in this court when I gave evidence last week.*
> *Mr. Phillip and other arrested me. I remember Mr. Phillip alone.*
> *I say that last week. I understand that what I said the last time is different from what I say just now.*
> *Put – why is there that difference between what you said last week and now.*
> *Answer – No answer.*"

[73] This exchange suggests an understanding in layman's terms of the nature of an inconsistency. This is buttressed by further cross-examination on another inconsistency. Benjamin testified at trial that, even though he was beaten, he did not tell his lawyer what happened to him nor did his lawyer complain to the Magistrate about any beating. He was confronted with what he had said earlier on the *voir dire*, namely that he had complained to his lawyer about the beating and his lawyer had brought it to the attention of the Magistrate on the first occasion he had attended court. On this occasion Benjamin was able to resile from what he had said at trial and positively adopt what was said on the *voir dire*.[49] Pausing there, Benjamin's responses to cross-examination on previous inconsistent statements appear to be indicative of someone who can follow the details of evidence and the course of proceedings.

[74] Again Benjamin was able to put forward that he had never held a pen nor written anything before in his life. His signatures and initials were placed by him on certain parts of the written statement after the police had written out his name and initials so that he could copy it on to the statement. However, Benjamin denied placing his signatures and

[49] Notes of Evidence pp 112-113.

initials on every part of this document. He was also able to contend that even before copying his signatures thereto, he could not even remember if this document had anything written on it.

XI. Conclusion: Benjamin

Fitness to Plead

[75] Having considered the evidence as a whole, Mr Jackson struck the court as a witness on whose evidence it can place great reliance. His interaction with Benjamin was on an intermittent basis as early as June 2006[50] and on a daily basis while the trial continued over a period of four weeks.

[76] The Notes of Evidence at trial provide some support for Mr Jackson's testimony. They reveal an accused who testified both on a *voir dire* and at trial, and was able to withstand the rigours of extensive cross-examination. Throughout he maintained a coherent and consistent version of what he alleges truly happened. In the *voir dire* he testified as to the circumstances which would have rendered the admissibility of the oral and written statements unfair.[51] The evidence-in-chief on the *voir dire* reveals a coherent, consistent and sequential account of the circumstances in which the statement came to be recorded. Nothing in the cross-examination suggested that Benjamin had difficulty in understanding the questions raised. Rather, he was able to articulate cogently the full extent of his case. At trial, he was again able to canvas what he alleges were the improper circumstances in which the oral and written statements were obtained; and to advance his defence of alibi. Understandably, cross-examination at trial was more extensive and detailed. Even so, Benjamin responded to this forensic exercise in a manner similar to that of the *voir dire*. In the circumstances, we are prepared to attach great weight to Mr Jackson's opinion, including that it was apparent to him that "the Appellant understood the case against him and he gave cogent evidence."[52] It follows therefore that in our overall evaluation of the evidence, we ascribe only limited weight to the assessment of the experts as it relates to

[50] Affidavit (n 35) [4].
[51] See [18] above.
[52] See [62] above.

the degree of this appellant's cognitive impairment and its relevance to his fitness to plead. In the premises, we are of the view that Benjamin was fit to plead.

Confessions

[77] Counsel argues that Benjamin's mild learning disability made him particularly vulnerable in a police station[53] and may be overlooked because there is an apparent superficial level of understanding.[54] It would therefore have a significant impact on his ability to make a statement.[55] There is likely to be a similar difficulty for him in understanding the police caution. In the absence of a lawyer, friend, relative or an appropriate adult, his confession should not have been admitted into evidence.

[78] In ***Pitman and Hernandez v The State***[56] the Privy Council addressed a similar issue. Their Lordships made clear that the test of admissibility applicable in such a case was: (a) voluntariness and (b) absence of fairness. The voluntary nature of a statement is the major factor in determining fairness: ***Peart v The State***.[57] On the question of voluntariness, the judge heard the evidence, including that of Benjamin. The judge would have had before him evidence of Benjamin's literacy level to the effect that he had never attended school and could not read, but could only sign his name.[58] He accepted to a substantial extent the evidence of the prosecution witnesses on the *voir dire*. The judge disbelieved the defence's assertions and was satisfied that: (i) Benjamin was informed of his rights, which would have included being cautioned and there being compliance with the rule enshrined in section 5 (c) (ii) of the Constitution, namely the right to retain, instruct and communicate with a lawyer of his choice; (ii) he was provided with proper refreshment; (iii) he was not beaten by Inspector Phillip or any other police officer in any manner; (iv) he made the oral statement; (v) he dictated the written statement in question; (vi) the JP and Officer Badree were present for and did witness the dictating of this statement; and (vii) this statement was given voluntarily. In accepting the evidence of the prosecution witnesses, the judge would also have accepted the circumstances in which the oral and written statements were given.

[53] Appellants' Submissions dated 4 June 2013 [76].
[54] Psychiatric Report of Dr Latham dated 23 July 2010 p 13 [5].
[55] Submissions (n 53) [77].
[56] [2017] UKPC 6 [20]-[21].
[57] (2006) 68 WIR 372 (PC) [24].
[58] Notes of Evidence p 60.

In relation to the written statement, the evidence revealed that even though the relevant officers were willing to wait until the following morning to contact the JP for the commencement of its recording, it was Benjamin who insisted that he was ready to give the statement that night. In all the circumstances, the fresh evidence of mental impairment appears to have no bearing on the issue of voluntariness.

[79] In addressing the issue of unfairness, the trial judge found that Benjamin was informed of his rights, which would have included being cautioned and being informed of his right to retain, instruct and communicate with a lawyer of his choice. He also found that both the oral and written statements were given voluntarily. Even though the JP testified that on arrival at the police station he interviewed Benjamin in the absence of the police officers, the judge preferred the evidence of the officers involved in the recording of the written statement (Phillip and Badree). Their evidence was to the effect that the JP questioned Benjamin in their presence. While it would have been preferable for the JP to have seen Benjamin on his own, the combined effect of the evidence of the JP, Phillip and Badree is that the JP satisfied himself prior to the recording of the statement that: (i) Benjamin was informed of the reason for his arrest; (ii) he was cautioned and informed of his right and privilege of having a lawyer, friend or relative present during the recording of the statement; (iii) there was the absence of threats, promises or violence; (iv) he was provided with refreshment; and (v) he had told Inspector Phillip that he would like to give a statement as to what had happened. "It is not the law that a neutral person such as the JP is duty bound to advise a suspect not to answer questions, nor to refuse to say what has happened, whether it involves admission or not."[59] The evidence led at trial for the jury's consideration in relation to the statements was of a similar nature. We also note that Benjamin would have testified on two occasions before the trial judge who expressed no concern, as he no doubt would have, as to Benjamin's mental capacity. In all of the circumstances, both the oral and written statements were properly admissible and there was nothing unfair about their admission into evidence.

[59] ***Pitman and Hernandez*** (n 56) [21].

XII. Expert Evidence: Ganga

[80] It is now possible to consider the issue of Ganga's mental impairment in a more concise manner. This is because the clinical picture painted by him was very similar to that of Benjamin and the varied concepts have been set out above in some detail. However, it is still necessary to focus on the individual circumstances of his case.

[81] Dr Green's main conclusions are as follows:

1. Ganga describes a background in which he had great difficulty learning at school and has had adequate social interaction and occupational success. The latter appears to have been with the help and the guidance of others. Specifically, he described how he had to be shown tasks in his work environment before he could do them independently. He also described tasks that were repetitive in nature and did not change or deviate from a familiar pattern.
2. Ganga described periods of having difficulty in adapting to novel stimuli or new or challenging situations. It is interesting that he found it difficult to cope with bullying in the past as he could not generate novel or flexible means of coping with a new social situation.
3. Ganga described living at home (until the time of his arrest), where he was looked after and catered for by his family. Dr Green was of the opinion that Ganga's description of his social functioning, coupled with the result observed on intelligence testing, suggests that Ganga qualifies for a diagnosis of a learning disability. In order to formally diagnose a learning disability it would be most appropriate to interview Ganga's family. However, as this has not been possible in this case, Dr Green believes it is appropriate to conclude that he does have a learning disability.

[82] Dr Green was of the opinion that the damage to Ganga's cognitive functioning, along with his low IQ and almost certain learning disability, would have made it very difficult for him to understand the process of a trial and to properly instruct his legal representatives. The fact that Ganga could neither read nor write very well would have also compromised

his ability in this regard. (It should be noted that Benjamin, contradictorily, communicated to Dr Latham that he was unable to read or write at all)[60]

[83] Consequent upon further examination, Dr Green prepared an addendum report dated 13 January 2011 in which he concluded that, upon review of his previous assessment and the other evidence, it continues to be his opinion that Ganga has an extremely low intellectual functioning. He agrees with Dr Latham that this may not have been immediately apparent to his legal team. Indeed, upon further review of his results on psychometric testing he would comment, as he did in his original report, that Ganga may have "overlearned" certain skills and may appear, on superficial encounters, to be more able than is actually the case. Specifically, he would comment that Ganga's scoring on objective assessment of his intellectual functioning produced highest scores on the arithmetic and information sub-test, while on all the other sub-tests (of which there are 9) Ganga's performance was extremely low. Arithmetic and information are sub-tests that tap knowledge that is of an everyday nature, and does not require the mental manipulation of unusual, novel or abstract material. These sub-tests also represent material that Ganga might have "overlearned" as they examine general knowledge (which Ganga would have been exposed to) and basic mathematics (which Ganga would similarly have been called upon to practice in his daily life).

[84] Dr Green further believes that, over the span of his life, Ganga may have learned to mask his poor understanding and learning disability by presenting himself as being more able than is actually the case in order to avoid embarrassment. This might include agreeing to or going along with conversations in order to avoid admitting to poor understanding. This is a common feature in people with a learning disability and often comes to light at times when they continue with this behaviour despite the fact that there may be negative consequences for them. He believes that this may well be the case in the examples of Ganga's behaviour with his legal representatives.

[85] He does not believe that Ganga has the capacity to comprehend the charges, and has grave doubts that he could manage the process of a legal trial.

[60] See Psychiatric Report of Dr Latham dated 18 July 2010 p 4.

[86] Dr Latham, whose findings were based largely on Dr Green's psychological reports,[61] in his report dated 18 July 2010 concluded:

1. The primary psychiatric disorder is mild learning disability. The diagnosis is made with a combination of the findings of Dr Green, a description of school performance, subsequent academic achievements and the degree of social impairment. The clinical picture is that Ganga, whilst having a general ability to use everyday speech and to provide his own self-care, has intellectual impairment becoming most pronounced or apparent in academic or work settings.
2. Dr Latham could find no evidence for a specific cause of Ganga's intellectual impairment, but this is not something that has been investigated fully. The functional impairment (social, occupational etc.) that must be present in association with the IQ assessment is difficult to assess for someone in prison and a judgment was made on the available information.
3. In Dr Latham's opinion, there is evidence of impairment in self-care, home living skills, self-direction and functional academic skills. He does not believe Ganga's impairments can be considered to be a product of psychosocial factors. Education was not denied and his parents apparently provided much of the practical support for matters Ganga could not cope with. In summary, Ganga fulfils the criteria for mild learning disability. The main information that is unavailable or impractical to gather is relating to information from schools, previous support network and any other professional or medical assessments. This is not an uncommon situation in legal situations and the diagnosis is made with the best evidence available.
4. Ganga's intellectual functioning is potentially relevant to a number of different legal issues. In general terms, Dr Latham found that his intellectual impairment is of a degree that enables him to give a relatively convincing superficial account of events, legal processes and other matters. In other words, Ganga understands the basic notion of what would constitute a crime and that a crime is wrong. What is apparent however, is that beyond that superficial understanding, he struggles. This is entirely consistent with the degree of intellectual impairment revealed by the psychological assessment. If the initial legal process is considered first, then in his

[61] CAT Report of 25 February 2014 p 27

view, Ganga would not have a clear understanding of the caution given by the police. Ganga understands the words, he may recognise the caution, and that familiarity with the words (which is so prominent in the media) causes him to acknowledge them as though understanding, when in actual fact he does not.

5. Dr Latham stated that he discussed with Ganga the nature of the evidence. Ganga struggled with the relatively basic ideas relating to the police caution. His intellectual impairment does not make this problem insurmountable. When it was explained to Ganga in more straightforward language he appeared to better grasp this notion. This is something that may have been achievable with a friend or family member of normal intellect present. Similarly, his capacity to understand the benefit of having a friend or family member present or requesting a legal presence, was limited. He could understand that a lawyer was there to defend you, so that you would be found not guilty. But again this was a simplistic understanding that should not be considered equivalent to recognising the benefits of having a lawyer present at a police interview. In other words, his capacity to make this kind of decision in an informed way was impaired by his limited intellectual functioning. The learning disability is a global impairment, or, stated otherwise, is not limited to just understanding things. Fear and confusion, rather than a clear and rational thought process, may have driven the decisions he was asked to make. The absence of any other advocate, legal or otherwise, is likely to have exacerbated his confusion and limited understanding.
6. The specific issue of whether Ganga's signed confession should be considered reliable is only partially for mental health expert evidence to address. There are obviously a number of factors that may contribute to whether a confession is made: police interviewing styles, the nature of the case, coercion and threats of violence. Dr Latham acknowledged that all of these factors had been considered in Ganga's case, but it is not within his remit to comment on them. The other factor that is recognised as significant is the individual psychological or psychiatric characteristics of the person being interviewed. There are identified risk factors for false confessions which apply to Ganga. The main factor is his limited intellectual capacity. The relationship between this and the other factors described above would

lead to the ultimate reasoning for him confessing, and Dr Latham recognises that there is uncertainty about those other factors. What is clear, however, is that whilst the intellectual impairment on its own cannot be said to make the confession unreliable, it is a psychiatric risk factor for this, and the confession being made in the absence of any advocate increases the risk of its unreliability. If Ganga was subject to particularly oppressive interviewing styles, including threats, then his vulnerability to making unreliable statements would have been magnified.

[87] Dr Latham considered separate criteria in assessing Ganga's fitness to plead and stand trial:

(i) Understanding the charges:

Ganga has a rudimentary and basic understanding of the nature of the original charge and subsequent conviction. He struggled with the more complex aspects of the charge and the relationship of the nature of the charge with the intent. He did understand that murder meant to kill another person and that this was illegal.

(ii) Deciding whether to plead guilty or not:

In similar terms to the above, Ganga understood the basic distinction between guilty and not guilty.

(iii) Exercising his right to challenge jurors:

In general terms Ganga's intellectual impairment should not prevent him from exercising his right to challenge jurors.

(iv) Instructing solicitors and counsel:

Ganga could give basic instructions. If, however, the process of giving instructions is broken down into whether Ganga would first be able to understand lawyers questions; secondly be able to apply his mind to answer them; and, thirdly, whether he could convey intelligibly to lawyers the answers or instructions he wishes to give, then there is highly significant cause for concern. Ganga's tendency is to indicate understanding, but when this is checked, his confusion is often exposed. This superficial state of understanding is created because of his ordinary use of language, and, because he gives a convincing impression of understanding. Given his degree of cognitive impairment, Dr Latham was of the view that Ganga was

only likely to have understood basic questions from lawyers, and not to an extent that would have allowed him proper participation in a trial. This opinion goes towards the issue of Ganga understanding and applying his mind to answering questions. Again, this becomes a matter of threshold, but it is highly unlikely that Ganga was capable of instructing solicitors and counsel.

(v) Following the course of proceedings:

This is perhaps the most complex requirement, and, given that proceedings may be confusing for any person attempting to follow them, it is necessary to consider Ganga's capacity in this regard in relative terms. Proceedings obviously vary depending on a number of factors, and Ganga's limitations mean that he is only likely to be able to follow things in very basic terms. He can identify people and has a notion of different people's roles, but beyond this he struggles. It is highly unlikely that Ganga would have the ability to follow the details of evidence. His generally cheerful demeanour and his convincing agreement that he understands things should not be taken as proof of his following evidence. The most objective evidence available is the results of cognitive testing by Dr Green, and this clearly highlights extreme limitations in Ganga's functioning. This would make his following the course of proceedings highly unlikely.

(vi)Giving evidence in his own defence:

Ganga can give oral evidence in a strict sense, but his capacity to formulate and apply his mind to answers is extremely limited.

[88] In summary, when considering these criteria as a whole, Dr Latham, while recognising that this was an issue ultimately for the court, concluded that it is unlikely that Ganga is and was fit to plead and stand trial.

Analysis of the Expert Evidence

[89] The expert assessment and conclusion effectively corresponds with that of Benjamin. There would have been very little understanding of any and all proceedings beyond the basic or superficial, consistent with a diagnosis of mild learning disability. As noted

above,[62] for a diagnosis of learning disability, the IQ score must coexist with an assessment of a patient's adaptive behaviour. However, there was a glaring omission by the experts to interview Ganga's family and/or friends to provide objective verification for his social, occupational and educational functioning. Had this been done, it may have avoided the conundrum that both experts found themselves in when faced with Counsel for the State's cross-examination as to their failure to properly assess Ganga's degree of literacy. In their respective interviews with Ganga, he told them that he could not read or write very well (Dr Green), or at all (Dr Latham). However, Ms Seetahal SC confronted both with the JP's certificate endorsed by him on the written statement to the effect that Ganga read the statement:

> "*I have read the above statement and I have been told that I can correct, alter or add anything I want. This statement is true I have made it of my own free will.*"

[90] Notwithstanding that both experts were in possession of the material trial documents, neither questioned Ganga on this apparent inconsistency.[63] Dr Latham indicated that he would not attach too much significance to this discrepancy as, even on the assumption that it was deliberate, it demonstrated a rather foolish and poorly thought out attempt by Ganga to manage the situation.[64] We respectfully disagree. We are of the view that, on a careful evaluation of the entirety of the evidence, Ganga's insistence at trial that he could not read until confronted and compelled to acknowledge that he could in fact do so, was motivated by a realisation of the significance of ensuring that the confession did not go into evidence.[65]

XIII. Evidence at trial: Ganga

[91] This court did not have the benefit of the additional objective evidence of the kind made available through Mr Jackson, Attorney at Law for Benjamin. Mr Learie Alleyne-Forte was Advocate Attorney for Ganga at trial. However, it is regrettable that neither he, nor

[62] See [50], [69]-[70] above.
[63] CAT Report of 24 February 2014 pp 39-40 (Dr Green); CAT Report of 25 February 2014 pp 27-31 (Dr Latham).
[64] CAT Report of 25 February 2014 p 30.
[65] *Ibid* p 29.

Instructing Attorney, testified so that the court could have had the benefit of their opinions on the experts' findings. The contemporaneous views, particularly of lawyers representing their clients, are of great importance: ***R v Walls***.[66] This court must therefore closely scrutinise the evidence, including the conduct of this appellant at the *voir dire* and at trial and balance this against the conclusions of the experts.

[92] Ganga testified both on the *voir dire* and at trial. On the *voir dire* he essentially contended that: (i) he was not advised of his right to speak to a lawyer, friend or relative; (ii) he was beaten and forced to sign the written statement which he never dictated; (iii) he was told that his parents were detained at the police station and would only be released if he signed the statement; and (iv) a JP was not present when he signed the statement. His account on cross-examination was consistent with that given in chief and he was able to withstand robust cross-examination and advance his version in clear and articulate language, including the following exchange:

> "A*fter he cuff me up, slap me up and burn my ears, I had the presence of mind to look at his watch to see the time…*
> *The lighter burn got infected. I never got any treatment for it. I did not get a plaster for it. After the incident, the area became discoloured and was very noticeable…*"[67]

[93] The JP also testified on the *voir dire* and the trial. He described interviewing Ganga in the absence of the police. He satisfied himself that Ganga could read and that he was giving the statement voluntarily. He said in cross-examination that he was not concerned about Ganga's level of literacy; he was satisfied that Ganga was knowledgeable about what he was doing.

[94] At trial, in chief, Ganga articulated his defence of alibi and maintained throughout that he did not make the oral statement, and the written statement was not given voluntarily. Consistent with his defence, he set out the police improprieties which rendered the statements inadmissible, including a direct response challenging the evidence of Inspector Phillip on the issue of the caution:

> "*I heard Phillip in evidence say I was cautioned when I was taken from home – he never asked me them thing.*" [68]

[66] [2011] EWCA 443 [36].
[67] Notes of Evidence pp 56 and 57.
[68] *Ibid* p 115.

He was subjected to extensive cross-examination. Nothing in the transcript hinted at Ganga faltering, or at any inability to comprehend the questions posed. A perusal of the Notes of Evidence reveals a more than adequate command of language on the part of this appellant. In one instance, while recounting his work as a fisherman, Ganga stated:

> "*We used to fish in Morne Diablo – Moruga, Erin, Palo Seco. I used to work day and night. In the areas we fished had lots of carite fish. It is strange to hear of carite biting people – I never hear of carite biting anybody since I working.*"[69]

[95] These are but examples gleaned from the contemporaneous documents before this court, which, at the very least, provide support for the conclusion that this appellant was capable of articulating himself in a manner at odds with the degree of mental impairment ascribed to him by the experts. Rather, Ganga conducted himself in a manner remarkable in its similarity to the conduct of the majority of laymen appearing daily before the courts. Further, it is noteworthy that the record does not hint at any concern being harboured by the trial judge specific to Ganga's mental capacity.

XIV. <u>Conclusion: Ganga</u>

Fitness to Plead

[96] Having evaluated the evidence as a whole, including the Notes of Evidence, we respectfully disagree with the assessment of the experts that Ganga was unfit to plead because of his cognitive impairment. A reasonable inference to be drawn on the evidence is that Ganga was able to participate meaningfully in his trial. Both on the *voir dire* and at trial, he gave consistent accounts relevant to the material issues. On the *voir dire* he was able, consistent with the grounds advanced, to testify as to the improper circumstances in which he alleged the oral and written statements were obtained. At trial he repeated those allegations and also put forward his defence of alibi. On both occasions, similar to Benjamin, he withstood the rigours of cross-examination and acquitted himself reasonably well. The failure of the experts, in the particular circumstances of this case, to: (i) obtain objective verification of his social, occupational and educational functioning; and (ii) bring

[69] *Ibid* p 116.

to Ganga's attention the discrepancy between his asserted illiteracy and the JP's endorsement that Ganga read the written statement,[70] impacts on the weight to be attached to their assessment. We also note that Ganga gave conflicting accounts to Dr Green and Dr Latham: the former being told that he could not read and write very well; and to the latter that he could not read or write at all. Moreover, Ganga's duplicity, as we have earlier found,[71] was motivated by a realisation of the significance of ensuring that the confession was not admitted into evidence.

[97] In light of the above, we find that this appellant possessed adequate cognitive capabilities and was fit to plead, despite his diagnosis of mild learning disability.

Confessions

[98] Dr Latham opines that Ganga struggled with the relatively basic ideas relating to the police caution. However, his intellectual impairment does not make this problem insurmountable. When it was explained to him in more straightforward language, he appeared to better grasp this notion. This is something that may have been achievable with a friend or family member of normal intellect present. The specific issue of whether his signed confession should be considered reliable is only partially for mental health expert evidence to address. There are a number of factors that may contribute to whether a confession is made, one of them being the individual psychological or psychiatric characteristics of the person being interviewed. There are identified risk factors for false confessions which apply to Ganga, the main one being his limited intellectual capacity. The confession being made in the absence of any advocate increases the risk of it being unreliable. If Ganga was subject to particularly oppressive interviewing styles, including threats, then his vulnerability to making unreliable statements would have been magnified.

[99] As indicated earlier, the test of admissibility is: (a) voluntariness; and (b) absence of fairness. After hearing evidence on the *voir dire*, the judge determined that the oral and written statements were voluntary in the widest sense of the word. He found the prosecution witnesses, which included the testimony of the JP, to be truthful. The JP testified that in keeping with his understanding that he had to be fair, he asked all the police officers to

[70] See [89] above.
[71] See [90] above.

leave the room prior to the recording of the statement so that he could interview Ganga. He satisfied himself that Ganga could read and write, and there existed no oppressive circumstances. He considered Ganga not highly, but fairly literate in relation to his ability to read and write. He had no concern about Ganga's level of literacy as he was satisfied that Ganga was knowledgeable about what he was doing. The judge would also have been satisfied on the evidence that Ganga was appropriately cautioned and informed of his right to communicate with a lawyer. The evidence led at trial for the jury's consideration, in relation to the statements, was to a similar effect. We accordingly make similar findings as we did with Benjamin that, in all of the circumstances, both the oral and written statements were properly admissible and there was nothing unfair about their admission into evidence.

XV. Disposition

[100] We have considered: (i) the fresh evidence of Dr Green and Dr Latham as to the mental impairment of the appellants and their diagnosis of mild learning disability; (ii) the evidence of Mr Jackson on Benjamin's fitness to plead; and (iii) the evidence at trial, including the responsiveness, relevance and cogency of the appellants' replies under cross-examination and the manner in which they gave their evidence. We bear in mind the authority of ***Taitt***[72] that trial counsel's conclusion that his client is fit to plead would normally be given great weight. Looking at the evidence as a whole, we are satisfied that:

1) The appellants were fit to plead and stand trial.
2) Their confessions were properly admitted into evidence and there was nothing unfair about their admission.
3) The appellants cannot avail themselves of the defence of diminished responsibility as the diagnosis of mild learning disability was not sufficient to substantially impair their mental responsibility for the killing of the deceased.

[101] Accordingly, the appeals against conviction are dismissed and we are satisfied that their convictions are safe.

[72] [2012] UKPC [18].

XVI. Sentence

[102] Having remained in custody for a period exceeding 5 years after the date of conviction and subsequent sentence of death, it would be tantamount to cruel and unusual punishment in the circumstances of this case to nonetheless subject the appellants to such a sentence given the guidelines concerning the effect of such a delay established in the case of ***Pratt***.[73] Thus, their sentences of death must be set aside. This court is of the view therefore that appropriate sentences for both Deochan Ganga and Deenish Benjamin would be ones of life imprisonment, with the additional stipulation that each must serve a minimum term of 30 years. The sentences are to run from the date of conviction. Full credit must be given for time spent in pre-trial custody.

[103] In arriving at this conclusion, the court considered the clear premeditation revealed on the evidence, as well as the violent nature of the crime. The appellants discussed and formulated a plan, which they put into action by strategically placing themselves in the yard of the deceased. There they awaited his return, following which they proceeded to accost him, hitting him with a bottle and beating him about the body. They then took him to a shed where, using a rope they had brought with them, hanged him by the neck from the rafters. These deliberate actions together reveal an intention on their part to not merely cause grievous bodily harm, but to take the life of Sunil Ganga.

[104] We have also considered the fact that both appellants were young men at the time of the commission of the crime, and are still relatively young. Nothing adverse has been drawn to our attention concerning their character. We are therefore minded to leave open the possibility of release. Nonetheless, we deem it fit to sentence both appellants to life imprisonment, each to serve a minimum term of 30 years.

XVII. Delay

[105] We acknowledge the length of the delay in the delivery of this judgment as the last submission in these proceedings was filed by the State on 24 July 2014.

[73] [1993] 43 WIR 340 (PC).

[106] The Privy Council remitted the appellants' appeals to the Court of Appeal on 13 March 2012. In so doing, the Board recognised that there was no decided case in any of the appellate jurisdictions of the Caribbean which considered whether a sentence of death, if passed on a mentally impaired person, would constitute cruel and unusual punishment whether as contrary to a constitutional provision or in breach of a common law rule.[74] The Board considered that it would be wholly inappropriate to embark on this consideration without the opinion of this Court of Appeal, as many issues of fundamental societal significance would require examination in order to inform the correct approach in this far-reaching submission.

[107] In two decisions emanating from the Court of Appeal, namely ***Pitman v The State***[75] delivered on 18 December 2013, and ***Hernandez v The State***[76] delivered on 15 July 2014, decisions which are binding on this court, the court (particularly in ***Hernandez***) sought to address these issues. These two appeals were heard together by the Board on 16 and 17 May 2016. On 23 March 2017 the Board conclusively answered the questions arising for consideration in the instant appeal.

[108] It is in these circumstances that this judgment is only now being delivered on 28 July 2017. The delay is nonetheless regretted, and we echo the sentiments expressed in ***Pitman***,[77] whilst reaffirming the court's continued commitment to the proper administration of justice, including the dissemination of written reasons in an efficient and timely manner.

P. Moosai
Justice of Appeal

[74] ***Benjamin and Ganga v The State*** [2012] UKPC 8.
[75] Cr App No 44 of 2004.
[76] Cr App No 63 of 2004.
[77] ***Pitman*** (n 75) [79].