THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. P 009 of 2014

BETWEEN

RONALD BISNATH

APPELLANT

AND

THE STATE

RESPONDENT

PANEL:

A. Soo Hon, JA

R. Narine, JA

M. Mohammed, JA

APPEARANCES:

Mr. D. Khan, Ms. S. Hinds, and Mrs. U. Nathai-Lutchman for the Appellant.

Mr. G. Busby for the Respondent.

DATE OF REASONS: November 14, 2018.

JUDGMENT

Joint Judgment Delivered By: A. Yorke-Soo Hon, JA; R. Narine, JA and M. Mohammed, JA.

INTRODUCTION

[1] The appellant, Ronald Bisnath was charged with the offence of murder. On March 27, 2014 he was found guilty by the jury and was sentenced to death. He has appealed his conviction.

[2] On July 30, 2018 we dismissed the appellant's appeal and affirmed his convictions. Our written reasons follow.

THE CASE FOR THE PROSECUTION

[3] On Sunday October 29, 2006, the deceased, Parmanan Persaud, aged twelve, also known as "Boyo", left his home between the hours of 8:00 a.m. and 9:00 a.m. to visit his uncle, Anil Maharaj, who lived a short distance away. He never returned home. The deceased lived with his parents, Vimala and Mahesh Persaud, at John Street, Crown Trace in Enterprise, Chaguanas. At the time, the deceased was a form two student at the Chaguanas Junior Secondary School.

[4] On the day in question, the deceased was given $20.00 by Juanita Maharaj, Anil's wife, to purchase two boxed lunches at the "Lucky Shop". The deceased purchased the lunches and returned to Anil Maharaj's home. Whilst there, he ate one of the boxed lunches and then left at around 12:30 p.m.

[5] The appellant lived next door to Anil. On the day in question, at around noon, he was seen by his cousin, Shawn Bisnath, entering the premises of Merlyn Phillip at John Street. The appellant had previously done some construction work for her on an unfinished concrete structure at the front of her house and enquired whether she had further work for him, to which she answered in the negative.

[6] Between the hours of 12:00 p.m. and 1:00 p.m., Ryan Burnette saw the deceased in the company of the appellant along the roadway in the vicinity of a video club on John Street.

[7] Ms. Phillip returned home from work at around 3:50 p.m. and discovered the body of a partially nude, young male, lying motionless in a pool of blood in the toilet area of the unfinished concrete structure. Ms. Phillip ran outside and raised an alarm and the police were contacted. Cpl. Figaro arrived at the scene and secured the area. Later that afternoon, PC Patrick investigated the scene of the crime. He observed a male body clad in a white t-shirt and a pair of red short pants lying on its back. During his investigation, PC Patrick recovered several items, among them, a silver knife blade with a jagged edge which was found near the doorway inside the toilet area.

[8] The post-mortem report obtained on behalf of the deceased revealed that he died from cervical spine and other neck injuries and hemorrhaging due to stab wounds to the neck. Human spermatozoa was identified on two mouth swabs, two penile swabs, and one anal swab. It was revealed through the DNA test results that the spermatozoa identified on the penile swabs originated from the appellant and that the swab taken from the anus did not originate from the appellant but was a mixed profile of at least two unknown donors.

[9] Anil gave evidence that on October 28, 2006, at around 7:30 p.m., the appellant came to his home. The appellant's clothes appeared to be soaked with water and was clad only in a pair of green track pants. He asked to borrow a pair of pants and Anil lent him a pair of yellow short pants with white stripes. Anil stated that the appellant had never asked to borrow clothes before that day. The appellant then went to the back of the house near a water tank and changed. Juanita Maharaj was also home at that time and she testified that she heard the appellant say to her husband, *"Don't call my name because I am working by Ms. Merlin and it have police on the road."*

[10] On Monday October 30, 2006, PC Nicholls, accompanied by PC Shepherd, visited Anil's house, where they were given the pair of green track pants that the appellant had been wearing the day before. The police officers then proceeded to the appellant's house and upon seeing them, the appellant fled by jumping over the back fence. The police officers chased after him and he was

eventually arrested in the vicinity of "Price Smart" along Endeavour Road in Chaguanas. He was cautioned and remained silent. Around 9:45 a.m., the appellant was handed over to Cpl. Pariman of the South Branch of the Homicide Bureau of Investigations (the HBI), who informed him of the report which he was investigating. Cpl. Pariman told the appellant that he wished to speak to him regarding the death of the deceased and the appellant remained silent. He was subsequently conveyed to the Criminal Investigations Department at the Chaguanas Police Station and later to the South Branch of the HBI at around 8:00 p.m. in order to be interviewed. He was informed of the ongoing investigations in relation to the incident and was asked whether he desired a friend or attorney to be present during the interview. He responded by saying, "*Ay cyar run hide from something ah done do already. Ah doh need no lawyer."* The appellant was asked to clarify his statement and he replied, *"The boy catch me and Juanita kissing and I was undressing she so I stop undressing she and tell him to go and see if the neighbor, Ms. Merlyn home."* The appellant explained that the "boy" who he was referring to was the deceased. The appellant was then cautioned by Cpl. Pariman and he continued, "*When he gone to see, ah walk behind him inside the bathroom area by Miss Merlyn, ah lock he neck and ah take out my knife and ah cut he neck about three or four time, dat is it dey."* A written record of the appellant's utterances was made by Sgt. Harripersad. The notes were read over to the appellant at the end of the interview and he confirmed its accuracy and placed his signature on them. Sgt. Harripersad and Cpl. Pariman also signed the interview notes. The appellant did not show any signs of being under the influence of drugs. Cpl. Pariman had experience dealing with drug addicts, both in his capacity as a police officer and in his social and community works.

[11] On October 31, 2006, the appellant was taken to the office of Dr. Clem Ragoobar where he was medically examined. A blood sample was taken from the appellant. A medical report was prepared on behalf of the appellant which revealed that he had a bruise on the head of his penis. The report also indicated that the rest of the appellant's examination was "normal".

[12] On October 31, 2006, Justice of the Peace (JP) Sasiprabha Arjoonsingh visited the South Branch of the HBI at around 8:45 p.m. She was introduced to the appellant and was informed that he had been interviewed on the previous day. She asked the police officers to leave the room and

enquired from the appellant whether an interview had been conducted between him and the police, to which he replied, *"Yes."* Arjoonsingh showed the appellant the interview notes and he confirmed that the signature on it belonged to him. He also confirmed that he was cautioned and informed of his rights and privileges before the interview. He indicated that he understood the caution and that he had received good treatment whilst in custody. Arjoonsingh read over the interview notes to the appellant and he indicated that *"the information was true"* and that he did not wish to make any changes. The appellant was later charged for the murder of the deceased.

[13] At the trial, Dr. Hazel Othello, a forensic psychiatrist, was called upon to give evidence. She testified that she had examined the appellant and that, in her assessment, he was not experiencing symptoms of psychosis at the time of the alleged offence. She was also of the opinion that the appellant was of sound mind at the time of the alleged offence and that the defence of diminished responsibility did not apply to him.

THE CASE FOR THE DEFENCE

[14] The appellant relied on the defence of diminished responsibility. He gave evidence at the *voir dire,* which was necessitated by his calling into issue the voluntariness of the oral admissions attributed to him, but decided against giving evidence before the jury. He called one witness, Professor Gerard Hutchinson, a Psychiatrist and University Professor, who gave evidence both at the *voir dire* and before the jury. Professor Hutchinson testified that based on his findings, at the time of the incident, the appellant was suffering from a condition described as poly-drug dependence, the drugs in question being cocaine, marijuana, and alcohol. Professor Hutchinson also stated that the appellant had an associated psychotic illness which was likely as a result of his drug dependence.

THE APPEAL

GROUND 1(A): The Learned Trial Judge erred by allowing the expert to give evidence on the ultimate final issue of the state of the mind of the Appellant at the time of the offence.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[15] Counsel for the appellant, Mr. Khan, indicated that at the trial, the appellant relied on the defence of diminished responsibility. The evidence of the expert was that the appellant suffered from schizophrenia ("an abnormal mind") (sic) and/or from a poly-substance related psychosis (also considered an abnormality of the mind) (sic).

[16] Mr. Khan submitted that the evidence given by Dr. Othello that the appellant was of sound mind at the time of the offence, was inadmissible. He submitted that an expert can express his conclusions in terms of the degree of support that a forensic procedure provides for that conclusion and based on his experience in the field provided that, (i) he emphasises that it is a subjective opinion; (ii) the absence of an objective criterion, such as a database of persons sharing the same characteristics, is made clear to the court; (iii) the degree of support is expressed in conventional language that is not designed to mislead; and (iv) he is prepared to explain and justify that degree of support. Mr. Khan relied on the decision in **R v Atkins and Atkins**[1] in support of this submission. He submitted that Dr. Othello did not give evidence in line with this approach. He further submitted that she gave no explanation, justification or basis as to why she came to her final conclusion, which was one that had to be determined by the jury.

[17] Mr. Khan submitted that Dr. Othello's finding was inconsistent with her initial assessment and was in contradiction with her acceptance of all other aspects of her evaluation of the appellant. He relied on the decision in **Pora v The Queen**[2] where Lord Kerr said at paragraph 24:

> *"…The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. Professor Gudjonsson trenchantly asserts that*

[1] [2009] EWCA Crim. 1876.
[2] [2015] UKPC 9.

Pora's confessions are unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity. It would be open to Professor Gudjonsson to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession but, in the Board's view, it is not open to him to assert that the confession is in fact unreliable…"

[18] Lord Kerr went on to say at paragraph 27:

"The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter which is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to give an opinion on such a matter but this is not one of them. It appears to the Board that, in general, an expert should only be called on to express an opinion on the "ultimate issue" where that is necessary in order that his evidence provide substantial help to the trier of fact. As observed above, Professor Gudjonsson could have expressed an opinion as to how the difficulties that Pora faced might have led him to make false confessions. This would have allowed the fact finder to make its own determination as to whether the admissions could be relied upon as a basis for a finding of guilt, unencumbered by a forthright assertion from the expert that the confessions were unreliable. In this way it would be possible to keep faith with and preserve the essential independence of the jury's role, which is to evaluate all the relevant evidence, including both expert evidence and other evidence which the expert may have no special qualification to evaluate."

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[19] Counsel for the respondent, Mr. Busby, submitted that the most accurate description of what might be regarded as the ultimate issue, testified to by Dr. Othello, was whether or not the defence of diminished responsibility was available to the appellant. He submitted that Dr. Othello gave evidence on the ultimate issue when she said:

"My assessment having regard to all the sources of information did not support the contention that the Accused was experiencing such symptoms at the time of the alleged offence.

I was of the opinion that he was of sound mind at the time of the alleged offence. My expert opinion in respect of the issue of diminished responsibility as it related to the Accused, I did not think that diminished responsibility would apply in this case." [3]

[20] Mr. Busby submitted that the case law shows that an expert is in fact permitted to give evidence on the ultimate issue. He relied on the decision in **R v Stockwell**[4] in support of this submission. Mr. Busby further submitted that what is important is that the members of the jury are properly directed that they, and not the expert, are taxed with making the final decision as the ultimate decision makers.

[21] Mr. Busby contended that Dr. Othello gave proper justification for her opinion. He submitted that Dr. Othello's opinion, that the appellant was *"malingering with regard to his claim that he could not remember the incident that he was charged for having committed or the circumstances around that time"*, was not the sole basis upon which she came to the view that the defence of diminished responsibility was not applicable in this case. He submitted that Dr. Othello's findings were justified and were based on several sources of information, some of which included personal assessments, as well as assessments and psychological test reports by other persons; records of the appellant's medical history while incarcerated and an interview with the appellant's sister.

[22] Mr. Busby sought to distinguish the decision in **Atkins and Atkins**[5] from the present case. He submitted that in **Atkins and Atkins**, Hughes L.J. made it clear that the issue in that appeal related to the permissible manner in which an expert in facial photograph comparison, often called "facial mapping", what he termed to be a new area of expertise, might express his opinions. Mr. Busby argued that the decision in that case was specific to that particular area of expertise and is not to be taken to be instructive on any general approach to the giving of evidence by experts. Mr. Busby argued that in the present case, *"malingering"* is a well-known occurrence that

[3] See the Notes of Evidence at page 48, lines 15-20.
[4] (1993) 97 Cr. App. R. 260.
[5] **Atkins and Atkins** (n. 1).

psychiatrists are of necessity trained to be alert to, as alluded to by the defence expert witness, Professor Hutchinson[6].

THE LAW, ANALYSIS AND REASONING

[23] On the issue of whether Dr. Othello's finding on what can be termed as, "the ultimate issue", that is, whether or not the partial defence of diminished responsibility was available to the appellant, was admissible, the decision in **R v Stockwell**[7] is instructive. In **Stockwell**, the appellant was convicted on two counts of robbery. In order to assist the jury in the matter of identification, as it was alleged that the appellant had been disguised, the Crown called a facial mapping expert, N, to compare photographs of the perpetrator of each robbery. Although N had given evidence in other trials where his opinions were inconclusive and he had changed his mind, he gave an opinion that the person in those photographs was the appellant. The appellant appealed against the conviction on the ground that the evidence of N should not have been admitted. He submitted that the issue did not justify expert evidence, that N was not an expert and his evidence was unreliable, as was his past record, and that the expert should not usurp the role of the jury. In dismissing the appeal, the court held that N's evidence was admissible as being of assistance to the jury, having regard to his experience in comparing photographs. They also found that there was nothing wrong in N giving evidence that he thought the perpetrator of the robbery and the appellant were the same person. However, the judge should make clear to the jury that they were not bound by the expert's opinion and that the issue was for them to decide.

[24] On this issue, Lord Chief Justice Taylor said at page 265:

> *"Whether an expert can give his opinion on what has been called the ultimate issue, has long been a vexed question. There is a school of opinion supported by some authority doubting whether he can (see Wright (1821) Russ & Ry. 456, 458). On the other hand, if there is such a prohibition, it has long been more honoured in the breach*

[6] See the Notes of Evidence at page 69, lines 5-13.
[7] **Stockwell** (n. 4).

than the observance (see the passage at page 164 in the judgment of Parker L.J. in Director of Public Prosecutions v. A and B.C. Chewing Gum Ltd. [1968] 1 Q.B. 159 and the cases cited at page 501 of Cross on Evidence (7th ed.).

Professor Cross at page 500 of that work said:
'It is submitted that the better and simpler solution, largely implemented by English case law, and in civil cases recognised in explicit statutory provision, is to abandon any pretence of applying any such rule, and merely to accept opinion whenever it is helpful to the court to do so, irrespective of the status or nature of the issue to which it relates.'"

[25] At pages 265-266, Lord Chief Justice Taylor opined:

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

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

[26] It is clear to us that an expert is permitted to give evidence on "ultimate issues". However, it is crucial that the judge direct the jury that, being tasked as the finders of fact, the "ultimate issue" is a matter for them to decide and they are not bound by an expert's opinion.

[27] In the case at bar, the judge properly explained the concept of expert evidence to the jury and directed them, that as the sole judges of facts in the case, if they did not accept the evidence of the expert witnesses, they did not have to act upon it. The judge's directions to the jury on this issue were as follows:

"…Expert evidence is permitted in a criminal trial to provide you with scientific information and opinion which is within the witness' expertise but which is likely to be

outside your experience and knowledge. It is by no means unusual for evidence of this nature to be admitted before you. However, it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence to assist you with regard to the nature of any opinion and/or findings made by the respective expert, and I would come to each of those experts' evidence in due course. ***But the purpose is that an expert is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to that particular part of that expert's evidence and to the opinions expressed by him or her when coming to your own conclusions about those relevant aspects that they relate to in this case.***

You should bear in mind, however, that if, having given the matter careful consideration, you do not accept the evidence of one or more or even any of the experts, you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of an expert and that is because, as I explained to you earlier, you, Members of the Jury, are the sole judges of the facts in this case.

You should remember that the evidence of each expert relates only to a certain aspect of the case or part of the case and that whilst it may be of assistance to you in reaching your verdict, you must reach your verdict having considered all of the evidence."[8] (sic) [emphasis added]

We can find no fault with the judge's approach.

[28] With respect to Mr. Khan's complaint that Dr. Othello's findings were unjustified, we have perused her evidence and note that her findings were based on the following:

(i) She first saw and treated the appellant in prison on January 17, 2007 when she made a tentative diagnosis that he was suffering from schizophrenia and cocaine dependency[9].

(ii) In July, 2011 the appellant was referred to the Forensic Unit, St. Ann's Hospital for psychiatric evaluation and assessment. Dr. Othello evaluated him and prepared a report dated October 24, 2011[10].

[8] See the Summing Up: Day 1 dated March 24, 2014 at page 17, line 44 to page 18, line 26.
[9] See the Notes of Evidence at page 46.
[10] See the Notes of Evidence at page 43.

(iii) On June 3, 2013, the appellant was once again admitted to St. Ann's Hospital for further examination. Dr. Othello evaluated him and prepared another report dated November 22, 2013[11].

(iv) During her assessment of the appellant, Dr. Othello dealt with the issue of his mental state at the time of the offence – including whether diminished responsibility was available to him. She asked him specific questions about his life around the time of the offence and conducted a mental status examination to evaluate his current mental state[12].

(v) Dr. Othello caused and had recourse to a psychological test report done by the clinical psychologist, Dr. Krishna Maharaj. This report allowed her to get information about the appellant's intelligence and his personality[13].

(vi) She had a psychiatric social work evaluation performed by Mr. Rajpaul Sinanansingh, a psychiatric social worker at the St. Ann's Hospital. This provided her with information from the appellant's relatives, friends, neighbours and persons who knew the victim. This information gave her an indication as to the appellant's mental status around the time of the incident[14].

(vii) She conducted an interview with the appellant's sister, Ms. Rhonda Melissa Mohammed[15].

(viii) She accessed the records of the appellant being seen by Dr. Ghany and several junior doctors from the St. Ann's Hospital on May 16, 2007[16].

[29] We are not in agreement with Mr. Khan's argument that Dr. Othello did not give proper justification for her opinion. Contrary to what was submitted by Mr. Khan, and in light of the above, Dr. Othello provided several bases as to how she arrived at her conclusion that the appellant was of sound mind at the time of the offence. At the end of the day, it was a matter for

[11] See the Notes of Evidence at page 43.
[12] See the Notes of Evidence at page 44.
[13] See the Notes of Evidence at page 45.
[14] See the Notes of Evidence at page 45.
[15] See the Notes of Evidence at page 45.
[16] See the Notes of Evidence at page 47.

the jury, as properly directed by the judge, whether they would place reliance on her evidence or not.

This ground of appeal is unmeritorious.

GROUND 1(B): The Learned Trial Judge erred by failing to direct the jury that they are the sole fact finders on the issue of the state of mind of the Appellant at the time of the offence.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[30] Mr. Khan submitted that although the trial judge directed the jury that they were the sole judges of the facts in the case, it was incumbent on him to direct them that it was for them to decide whether the appellant was suffering from diminished responsibility at the time of the offence. Mr. Khan contended that Dr. Othello's opinion on this issue was inadmissible and therefore the jury should have been directed to disregard it.

[31] Mr. Khan also submitted that the jury should have been directed that they were not bound by the expert opinion in so far as the expert expressed an opinion on the ultimate issue in the trial. The decision in **R v Stockwell**[17] was relied on.

[32] He further submitted that the jury might have believed that they were tasked with deciding between the evidence of Dr. Othello and that of Professor Hutchinson, when in fact they did not contradict each other, but for the inadmissible final conclusion of Dr. Othello.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[33] Mr. Busby submitted that the judge's summing up was replete with examples of the jury being directed that the facts of the case, including whether or not they could find the appellant not

[17] **Stockwell** (n. 4).

guilty of murder, but guilty of manslaughter on the basis of diminished responsibility, were matters for them. Mr. Busby referred the court to several instances where the judge directed the jury in these terms, including on Day 2 of his summing up, where the judge said:

> *"…Where you draw the line is for your own good judgment, Members of the Jury. If you conclude that the accused was in a schizophrenic episode and/or in an alcohol drug-induced psychotic episode and its effects probably did substantially impair his mental responsibility, then your verdict would be 'not guilty of murder' and 'guilty of the lesser offence of manslaughter'.*
>
> *If, on the other hand, you conclude that he was not in a schizophrenic episode, or psychotic at the time, or even if he was, it did not substantially impair his mental responsibility, your verdict would be 'guilty of murder'."*[18]

[34] Mr. Busby also submitted that Dr. Othello's evidence on the ultimate issue was admissible and no prejudice accrued to the appellant provided the judge made it clear to the jury that they were not bound by the expert's opinion, and that the issue was for them to decide, which it was submitted, the judge did.

[35] Counsel for the respondent submitted that it was quite probable that the jury relied on the admissible evidence of Dr. Othello when they decided to reject the suggestion that the appellant was suffering from diminished responsibility at the time of the offence. This, Mr. Busby submitted, was what the jury was entitled to do. He submitted that in so far as the evidence of the "competing experts" were concerned, the jury would not have been persuaded, on a balance of probabilities, by the evidence led at the trial, that the appellant suffered from such abnormality of mind, which substantially impaired his mental responsibility for his acts at the time of the offence.

[18] See the Summing Up: Day 2 dated March 27, 2014 at page 20, lines 4-17.

THE LAW, ANALYSIS AND REASONING

[36] The trial judge, at several points throughout his summing up, directed the jury that the facts of the case were within their domain, including the issue of the state of mind of the appellant at the time of the offence. The judge directed the jury in the following terms:

> *"And, of course, expert evidence is permitted in a criminal trial to provide you with scientific information and opinion which is within the witness' expertise but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be admitted before you. However, it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence to assist you with regard to the nature of any opinion and/or findings made by the respective expert, and I would come to each of those experts' evidence in due course. But the purpose is that an expert is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to that particular part of that expert's evidence and to the opinions expressed by him or her when coming to your own conclusions about those relevant aspects that they relate to in this case.*
>
> ***You should bear in mind, however, that if, having given the matter careful consideration, you do not accept the evidence of one or more or even any of the experts, you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of an expert and that is because, as I explained you earlier, you, Members of the Jury, are the sole judges of the facts in this case.[19]"*** [emphasis added]

[37] The judge went on to direct the jury on Day 2 of his Summing up that:

> *"It is not a medical term and it does not have to be a mental illness as you would usually understand it.* ***So, in other words, these experts, Psychiatrists, have been called to assist you, the jury, to apply your minds to determine whether, having heard the directions in law that you will be given, that the evidence helps you to find whether or not you think the accused was suffering from this "abnormality of***

[19] See the Summing Up: Day 1 dated March 24, 2014 at page 17, line 44 to page 18, line 20.

mind" that would, if you do accept it, reduce the offence from murder to manslaughter.[20]" [emphasis added]

[38] On Day 2 of his Summing up, the judge also said:

> *"That is a matter for you, you see.* ***So a lot, as I say, of what depends on the Psychiatrists' opinions is dependent by your own assessment of other aspects of the evidence, as well, so that you can determine what weight, if any, to give to those opinions.[21]"*** (sic) [emphasis added]

[39] The judge went on to day on Day 2 of his Summing up:

> *"…**Where you draw the line is for your own good judgment,** Members of the Jury.*
>
> ***If you conclude that the accused was in a schizophrenic episode and/or in an alcohol drug-induced psychotic episode and its effects probably did substantially impair his mental responsibility, then your verdict would be 'not guilty of murder' and 'guilty of the lesser offence of manslaughter'.***
>
> ***If, on the other hand, you conclude that he was not in a schizophrenic episode, or psychotic at the time, or even if he was, it did not substantially impair his mental responsibility, your verdict would be 'guilty of murder'.[22]"*** [emphasis added]

[40] With respect to Mr. Khan's argument that the jury should have been directed that they were not bound by the expert opinion in so far as the expert expressed an opinion on the ultimate issue in the trial, we reiterate that the judge in his summing up properly explained to the jury the concept of expert evidence and directed them that being the sole judges of the facts in the case, if they did not accept the evidence of the expert witnesses, they did not have to act upon it (see paragraphs [37] and [38] above).

This ground is without merit.

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[20] See the Summing Up: Day 2 dated March 24, 2014 at page 6, line 50 to page 7, line 9.
[21] See the Summing Up: Day 2 dated March 24, 2014 at page 17, lines 35-40.
[22] See the Summing Up: Day 2 dated March 24, 2014 at page 20, lines 4-17.

GROUND 2(A): The Learned Trial Judge erred by isolating the evidence that showed that the Appellant could have been suffering from diminished responsibility.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[41] Mr. Khan submitted that the following evidence could have been relied upon by the jury, and that the judge ought to have so directed:

(i) The forensic evidence of the killing - Mr. Khan submitted that swabs taken from the deceased's mouth and penis showed that the spermatozoa that was found on those swabs had come from the appellant. The spermatozoa identified on the two anal swabs, "did not originate from the appellant but was a mixed profile of at least two unknown donors." It was submitted that consequently, the forensic evidence might have led the jury to the inescapable conclusion that the deceased was sexually assaulted by three male persons either before or after the killing.

(ii) The polydrug habits of the appellant – there was clear evidence from the prosecution witnesses that the appellant was a habitual user of cocaine and alcohol.

(iii) The mental health history of the appellant.

(iv) The appellant's statements given during his psychiatric evaluations.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[42] Mr. Busby submitted that the judge fairly and comprehensively laid out the evidence given by both psychiatrists and that no complaint could be maintained about his directions in that regard. It was submitted that there was no evidence in the case that could properly support a defence of diminished responsibility.

[43] It was also argued that Dr. Othello clearly and categorically opined that the defence of diminished responsibility was not available to the appellant. Professor Hutchinson however, vacillated and spoke tentatively, of "possibilities" and in the hypothetical. He also admitted that he had no information about the appellant close in time to the offence and that his opinion was based on his examination carried out some five years later.

[44] Mr. Busby submitted that notwithstanding that the evidence to support the defence of diminished responsibility was poor, the appellant was still given the benefit of the defence by the judge in his summing up.

THE LAW, ANALYSIS AND REASONING

[45] In order to determine this ground of appeal, it is necessary to highlight the evidence of the expert witnesses in the case, that is, the two psychiatrists, Dr. Othello and Professor Hutchinson.

[46] Dr. Othello gave the following evidence:

> *"My opinion is that Ronald Bisnath is a poorly educated man of borderline intelligence who had been using cocaine, marijuana and alcohol for several years prior to the offence… He insisted that he has no memory of committing the offence; however his responses to specific questions about events preceding and following the period he claims to be unable to recall were inconsistent.*
>
> *For someone experiencing psychosis, this sort of drug induced psychosis, they could be experiencing what we call hallucinations, these are disorders of perception where they perceive things that are not really there, so that they may see things that are not present, they may hear things being said when no one is actually speaking. They may smell or taste things where there is no real stimulus or they may feel things falling on their skin or touching them that may not be present…*
>
> *… A person may be using cocaine and may be experiencing formication and nothing else and that person is not psychotic as oppose to genuine tactile hallucinations in the context of a psychotic episode or illness. Such hallucinations, auditory and visual – seeing and hearing things and the other things adverted to, may be considered to be*

a form of poly-substance abuse psychosis… The correct term is 'Substance Induced Psychotic Disorder'…

My assessment having regard to all the sources of information did not support the contention that the Accused was experiencing such symptoms at the time of the alleged offence.

I was of the opinion that he was of sound mind at the time of the alleged offence. My expert opinion in respect of the issue of diminished responsibility as it relates to the Accused, I did not think that diminished responsibility would apply in this case. *My reason for arriving at that conclusion ,the combination of all the sources of information available to me, the evaluation, the persons who I spoke to… as well as my own examination of the Accused and his answers to my questions.*

…

… ***I formed the opinion that the Accused was malingering with regard to his claim that he could not remember the incident that he was charged for having committed or the circumstances around that time***[23]*."* [emphasis added]

[47] It is also important to note the following exchange between the trial judge and Dr. Othello:

Judge: *The schizophrenia, the finding of schizophrenia, he is schizophrenic in your view. You are of that view as early as January 2007, the offence is October 2006?*

Dr. Othello: *Yes.*

…

Judge: *So the fact is, if he was actually schizophrenic back in 29th October, 2006 and having one of his episodes, then it may amount to diminished responsibility in terms of the law?*

Dr. Othello: *Yes*

[23] See the Notes of Evidence at pages 47-50.

[48] The evidence of Professor Hutchinson was as follows:

> *"My findings were that Mr. Bisnath was suffering from a condition that is described as a poly-drug dependence. The drugs in question being cocaine, alcohol and marijuana. And had an associated psychotic illness that was likely due to this combination of drug dependence."*[24]
>
> *"…In the individual unless blood tests are done at the time to see the levels in the system, it is almost impossible to say what stage they are at, at any given time, until or unless overt physical symptoms that suggests that they are in withdrawal."*[25]
>
> *"The Accused was suffering from poly substance abuse with associated psychotic illness when I interviewed him.* ***It would be difficult to say if he (was) suffering from poly substance abuse with associated psychotic illness at the time of the offence.*** *I interviewed him (in) 2011 and the alleged offence took place in 2006,* ***it does certainly appear that his drug use pre-dated that alleged event, so within the realms of possibility I would say it is likely that he certainly had the poly substance abuse problem at the time. Whether at that time he also had the psychotic illness would be difficult to say, except if he were to have been examined at that time. It is possible that the psychosis could have existed when the alleged murder occurred."***[26]
> [emphasis added]

[49] In cross-examination, Professor Hutchinson gave the following evidence:

> ***"I expressed my opinion in tentative terms at the time of the offence and that was deliberate. I cannot say the Accused was suffering from the associated psychosis at the time of the killing or under the influence of drink or drugs. Diminished responsibility is a partial defence to the charge [of] murder. In my assessment of the Accused in 2011 I did not have this in mind."***[27]
>
> *"In arriving at my opinion I would want to cross reference what the Accused is saying with other factors. I did not have the depositions in this matter from the preliminary*

[24] See the Notes of Evidence at page 57, lines 12-15.
[25] See the Notes of Evidence at page 59, lines 14-17.
[26] See the Notes of Evidence at page 57, line 20 to page 58, line 4.
[27] See the Notes of Evidence at page 60, lines 15-20.

[enquiry] when I assessed the accused. I did see the notes or medical history of the Accused in 2011. I did not have a Social Welfare Officer Report at hand at the time of my examination…Such a social worker report is a usual ingredient in compiling [a] psychiatrist['s] opinion on an Accused person so far as his criminal responsibility is concerned. In terms of his functioning and his behaviour as perceived by others prior to the offence.

At the time I compiled the report I did not speak to any witness, friend, family or neighbour of the Accused to ascertain what he was like at the time of the murder.
At the time of my opinion I did not have access to the St. Ann's Psychiatric Records in respect of Ronald Bisnath. I did not have a psychological report on hand when I interviewed him on February 3, 2011.

He had said he had given a statement though he could not remember what he had said. I did not have any statement before me. It is advantageous to have all the source[s] of information upon which to arrive at a fair conclusion[28]."

"I indicated in answer to Ms. Francis that there was considerable difficulty in assessing the state of mind of the Accused at the time of the offence when I was interviewing him some 5 years or so after. I saw Bisnath in 2011 and the alleged offence took place in 2006."[29]

…

…

…

"I am unable to assist to say whether or not at the time of the killing such a psychosis had a substantial impairment on the mind of the Accused or perhaps a trivial or negligible impairment."[30] [emphasis added]

[50] Our review of the evidence of both psychiatrists reveals that there was no unequivocal evidence that could support a defence of diminished responsibility in respect of the appellant. The evidence of Dr. Othello was clear and unambiguous and indicates that the defence of diminished

[28] See the Notes of Evidence at page 61-62.
[29] See the Notes of Evidence at page 63, lines 1-4.
[30] See the Notes of Evidence at page 66, lines 10-12.

responsibility was not available to the appellant. Professor Hutchinson's evidence could not be described as categorical or clear-cut and contained several grey areas.

[51] We are of the view however, that notwithstanding that the partial defence of diminished responsibility was not available to the appellant, he nevertheless benefitted from such a direction. The judge in his summing up instructed the jury that:

> *"'Diminished responsibility', as I say, has a particular legal meaning which I need to explain. If the accused, when he attacked the deceased, was suffering from an abnormality of mind arising from inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for his act, then his responsibility is diminished and he should be found not guilty of murder and guilty of the lesser offence of manslaughter.*
>
> *Now, the burden is upon the Defence to make good this defence on the balance of probabilities. In other words, before you find the defendant guilty of manslaughter, you would need to conclude that it was more likely than not, on the evidence, that the accused's responsibility was diminished.[31]"*

[52] With respect to Mr. Khan's submission that the judge ought to have directed the jury on the forensic evidence, we find that such a direction would not have made the defence relied on by the appellant, that is, diminished responsibility, more tenable. Further, directions on the appellant's statement given during his psychiatric evaluations would not have given the defence more traction given the fact that Dr. Othello had come to an unequivocal conclusion based on a wide array of information, including his polydrug habits.

Based on the foregoing, this ground of appeal is without merit.

[31] See the Summing Up: Day 2 dated March 27, 2014 at page 18, lines 11-25.

GROUND 2(B): The Learned Trial Judge erred by stating that the Appellant's version contained in the expert reports could not be relied on to show he was suffering from diminished responsibility.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[53] The appellant did not give evidence at the trial. His alleged confession was a very short statement made to the police. Nothing in that statement could be firmly relied on to raise the defence of diminished responsibility save for the lie about kissing Juanita, his neighbour[32]. The judge directed the jury that the statements made by the appellant and referred to by the experts during their evidence, could not be relied on to show that the appellant was on a drug binge[33]. Mr. Khan submitted that such evidence was admissible for its truth and the appellant could have relied on them.

[54] Mr. Khan further submitted that the statements of the appellant detailing his drug use and episodes of psychosis and delusions were statements against his interest. It was further submitted that the judge's directions that those statements could not be relied on for their truth, robbed the appellant of his defence and destroyed the ability of the defence to discharge its burden of showing that the appellant was suffering from diminished responsibility at the time of the offence.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[55] Mr. Busby submitted that the statements made by the appellant to the psychiatrists were hearsay and inadmissible. He submitted that the appellant's contention that they were

[32] See the Summing Up: Day 2 dated March 27, 2014 at page 12, lines 44-45 – And he says, the accused, *"The boy ketch me and Juanita kissing and I was undressing she…"*

[33] See the Summing Up: Day 2 dated March 27, 2014 at page 10, lines 17-20 – *"So that her finding of 'schizophrenia', that it may be cocaine-induced or alcohol-induced if there was such a binge at the time. So it is a possibility, but, in her view, she does not make that a finding"* and at page 15, lines 2-7: *"Professor Hutchinson…explain that if, in fact, these substances had been consumed prior to the alleged offence and certainly before the accused was arrested."*

admissible because they were declarations against his interests, was ill-founded. It was submitted that in the context of this case, the statements made by the appellant to the psychiatrists revealing his drug use were statements in his interest, not against it, as they sought to establish the defence of diminished responsibility.

[56] Mr. Busby further submitted that while, in the ordinary way, a doctor may give hearsay evidence of what the appellant said to him for the purpose of founding his opinion, the truth of what the appellant said was not thereby established. It was for the appellant to provide the necessary evidence, either by himself or through witnesses, the burden of proof being on him to prove the facts in support of the expert's opinion. Mr. Busby relied on the case of **R v Colin Bradshaw**[34] in support of this submission.

[57] He also submitted that the judge never expressly stated that, *"the statements made by the appellant and referred to by the experts during their evidence could not be relied on to show that the appellant was on a drug binge."* Instead, the judge directed the jury that as a result of the appellant's decision not to give evidence, there was no direct evidence from him as to what he might have been thinking at the time of the offence. It was submitted that, taken as a whole, the judge's directions on this issue were flawless and no criticism could therefore be sustained.

THE LAW, ANALYSIS AND REASONING

[58] In addressing the appellant's argument that the trial judge was wrong to direct the jury that the statements made by him during his evaluations by the psychiatrists could not be relied on to show that he was on a drug binge, it becomes necessary to highlight the evidence of both psychiatrists in this regard.

[34] (1986) 82 Cr. App. R. 79.

[59] Dr. Othello gave the following evidence in respect of what the appellant said to her upon being examined:

> *"I made an enquiry of the Accused in the terms of substance abuse… He told me that he had started using marijuana around the age of 11, and cocaine around the age of 17. He said that prior to his arrest, he used alcohol occasionally. However, on further questioning he divulged that he would drink about a bottle and a half of rum at a time and added 'when yuh smoking you don't get high with alcohol.'"*
>
> *… The first documented time that he* [the Accused] *was treated or assessed by a psychiatrist and subsequently placed on treatment was when I saw him at the Maximum Security Prison on January 17, 2007.*
>
> *My observation at that time, he complained that he was hearing voices saying, "Kill him" and seeing his deceased grandmother while hearing the voice saying, "Kill him." He also complained that ants were walking on his skin and he was somewhat agitated and his face showed very little emotion.*
> *…*
> *The circumstances surrounding the offence in question in this trial, the defendant told me that he was unable to remember anything about the murder of his neighbour's son. I questioned him in detail about his memory of that day on more than one occasion and each time I questioned him, he gave me a different account of those circumstances.* ***The only thing that remained constant was his assertion that he had been using drugs heavily and that he could not recall committing the offence…*** [35]*"* [emphasis added]

[60] In respect of the appellant's responses, Professor Hutchinson testified as follows:

> *"I saw Mr. Bisnath on very said 3rd February 2011 at the Golden Grove Prison, that was the first time that I saw the Accused. My interview lasted about 2 hours I think.*
>
> *I did not perform psychometric testing on that occasion. I performed a mini mental state examination and I found he was in the normal range 26. [Normal 26-30]. The lower limit of normal. During this clinical with the Accused he expressed he had no recollection about the alleged murder. His recollection was only patchy.*

[35] See the Notes of Evidence at pages 46-47.

The accused did venture to tell me that he had been on a cocaine and alcohol binge during the time, the period leading up to the murder, the alleged murder and he may have spent 10 days plus drinking and smoking cocaine."[36] [emphasis added]

[61] In **R v Colin Bradshaw**[37], helpfully referred to us by counsel for the respondent, the appellant was charged with murder and the only issue at his trial was diminished responsibility. Before calling medical evidence, the appellant's counsel sought guidance from the trial judge as to how the doctors could be permitted to give evidence as to what the appellant had told them during interviews and how far they could express opinions based on such statements and whether, in the event of the appellant not giving evidence, the judge would be minded to make adverse comment about it. The judge indicated that it was for counsel to decide how to present his case, and ruled that if the truth of what the appellant had said to the doctors was in question, the only appropriate course was that the appellant, or some other person be called to prove those facts. The judge continued that it was then for counsel to consider whether there were facts to be proved, or facts which could be admitted, upon which alone, the opinion of the psychiatrists could be based. The doctors' opinions were that the appellant was suffering from an abnormality of mind which substantially impaired his mental responsibility and this was based upon a diagnosis of "erotomania", the delusional belief concerning the affections of another.

[62] In **Bradshaw**, the main ground of appeal was that the trial judge had erred in ruling that the only appropriate course for the defence to take with a view to establishing a defence of diminished responsibility was to call the defendant himself to give evidence. On this issue, the Lord Chief Justice said at page 83:

"Although as a concession to the defence doctors are sometimes allowed to base their opinions on what the defendant has told them (i.e. hearsay) without those matters being proved by admissible evidence, yet ***the strict (and correct) view is that expressed at p.446 of Cross on Evidence, 5th ed. , in the following terms: "A doctor may not state what a patient told him about past symptoms as evidence of the existence of those symptoms because that would infringe the rule against***

[36] See the Notes of Evidence at page 61
[37] **Bradshaw** (n. 34).

hearsay, but he may give evidence of what the patient told him in order to explain the grounds on which he came to a conclusion with regard to the patient's condition." [emphasis added]

[63] In our view, the judge, having allowed the psychiatrists to give evidence of what the appellant said to them in relation to his drug binge, went to his defence of diminished responsibility and was favourable. As stated by the Lord Chief Justice in **Bradshaw**[38], a doctor is allowed to give hearsay evidence of what a patient says to him for the limited purpose of founding his opinion but he may not state what a patient told him about past symptoms as evidence of the existence of those symptoms. To have admitted the evidence of what the appellant told the psychiatrists about his symptoms at the time of the offence as evidence of their existence, would have infringed the hearsay rule as such evidence was not admissible for their truth. The burden fell on the appellant, either through himself or through witnesses called on his behalf, to prove those facts that supported the psychiatrists' opinions. For example, if the appellant had opted to give direct evidence on this issue, or call family members or friends who might have been of assistance in advancing it. No such evidence was led as the appellant exercised his right to remain silent and called no witnesses to support the underlying factual strata of his partial defence. Ultimately, the expert witness called on his behalf did not advance his partial defence.

[64] In relation to the judge's directions to the jury on this issue, contrary to what was submitted by Mr. Khan, the judge did not expressly direct the jury that *"the statements made by the appellant and referred to by the experts during their evidence could not be relied on to show that the appellant was on a drug binge"*.

[65] From our review of the summing up, we discerned that the judge directed the jury in the following terms:

"*So you have, however, heard that he has been interviewed by the doctor, the psychiatrist and that he has given certain responses to them. I have to explain to you, then, the purpose of that, what is the relevance of that, what the accused has told the*

[38] Ibid.

doctors in his interviews. Well, the sole purpose is for each psychiatrist to render a diagnosis. The psychiatrist, he or she, depends on other things and what is told to the psychiatrist by the patient. ***And so what was told by the accused to the doctors was only brought out to test the quality and the weight of the experts' opinion but it does not go in any way as evidence which you can use to rely on in order to prove the guilt of the accused or to negate any offence; it doesn't help you with that. It only helps you with respect to assessing the strength and weight of the psychiatrist's opinion."***[39] [emphasis added]

[66] The judge's directions to the jury on how they were to approach the evidence in relation to what was said to the psychiatrists by the appellant were unassailable. He correctly directed the jury that that evidence only assisted them with assessing the strength and weight of the psychiatrists' opinions and did not go towards proof of the guilt of the appellant or to the negativing of the offence for which he was charged. To have directed the jury otherwise would been a ground for reasonable complaint. We therefore do not agree with Mr. Khan's submission that, as a result of the judge's directions, the appellant was effectively robbed of his defence of diminished responsibility.

This ground of appeal is without merit.

GROUND 2(C): The Learned Trial Judge erred by tailoring the directions on diminished responsibility to the circumstances of the individual case, given drugs and alcohol were factors to be considered by the jury. (sic)

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[67] Mr. Khan submitted that where alcohol or drugs were factors to be considered by the jury, they should be directed to disregard what in their view, was the effect of these substances on the appellant, since abnormality of mind induced by alcohol or drugs is not due to an inherent cause and therefore does not fall within the realm of the partial defence of diminished responsibility.

[39] See the Summing Up: Day 2 dated March 27, 2014 at page 8, lines 31-47.

He relied on the decision in **R v Dietschmann**[40] in support of this submission. That case resolved an uncertainty about how to approach the case of a defendant who suffered from a mental abnormality and who was also intoxicated. The House of Lords held that the correct approach was for the jury to ignore the effects of intoxication and to ask whether, leaving out the drink, the defendant's other condition(s) of mental abnormality substantially impaired his responsibility for the killing. In that case, the appellant's conviction for murder was substituted with a conviction for manslaughter.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[68] Mr. Busby sought to distinguish the decision in **R v Dietschmann** from the present case. He submitted that the issue which arose on appeal in that case was the nature of the direction that a trial judge should give to a jury when a defendant, raising the defence of diminished responsibility, had taken alcohol prior to the killing and was also allegedly suffering from a mental abnormality at the time of the killing. At the trial in **Dietschmann**, the appellant admitted that he had consumed alcohol and was heavily intoxicated at the time of the killing. In contrast, in the case at bar, the appellant neither gave evidence nor made any admissions at the trial that he *"spent about ten days plus drinking and smoking cocaine."* The information that he consumed drugs and alcohol prior to the killing only came from the history taken from him during his interview with the doctors. This was hearsay in the context of such a history being relied upon to substantiate the partial defence of diminished responsibility. Mr. Busby contended that there was no evidence in the case at bar to support the argument that the judge should have modified his direction on diminished responsibility to include this fact.

[69] He also submitted that this ground of appeal is a non-starter as the condition precedent required to activate any such modification did not exist.

[40] [2003] UKHL 10.

THE LAW, ANALYSIS AND REASONING

[70] In **R v Dietschmann**[41], the defendant had killed D in a savage attack. At the time of the killing he was heavily intoxicated, and was also suffering from a mental abnormality. The defendant was charged with murder. At his trial, the central facts relating to, inter alia, the consumption of alcohol and the violence leading to D's death, were all admitted by the appellant. In his evidence, the appellant also claimed that he was not badly affected by alcohol at the time when he attacked D. Psychiatrists giving expert evidence for the defence and for the Crown agreed that the defendant had been suffering from an adjustment disorder which was a depressed grief reaction to a bereavement. The Crown's expert believed that he was also suffering from alcohol dependency syndrome at the time of the killing; that alcohol had been a significant factor as a "disinhibiter"; and that if the defendant had been sober, he probably would have exercised self-control. The defence expert disagreed on the question of alcohol dependency syndrome, but was of the opinion that the defendant had been in a transient psychotic state at the time of the killing.

[71] In **Dietschmann**, the judge directed the jury that if they were satisfied that there was an abnormality of mind, whether on the basis of an adjustment disorder alone or coupled with a transient psychotic state or alcohol dependence syndrome, or however, they had to ask themselves if the defence had satisfied them on a balance of probabilities that if the defendant had not taken drink (i) he would have killed if, in fact he did, and (ii) he would have been under diminished responsibility when he did so. If they were satisfied that the answer to both questions was 'Yes', then it was a case of diminished responsibility, but if it was 'No', then it was not. The appellant was convicted and appealed to the Court of Appeal, contending that that part of the summing up constituted a misdirection on the ground that the defence of diminished responsibility could be established notwithstanding that the defendant had failed to prove that if he had not taken drink he would have killed. The Court of Appeal dismissed his appeal, holding that there was no evidence capable of establishing alcohol dependence syndrome as being an

[41] Ibid.

abnormality of mind within the relevant Act. The defendant appealed that decision to the House of Lords, where his appeal was allowed. Lord Hutton said at paragraph 41:

> *"Without attempting to lay down a precise form of words as the judge's directions are bound to depend to some extent on the facts of the case before him, I consider that the jury should be directed along the following lines:*
>
> > *'Assuming that the defence have established that the defendant was suffering from mental abnormality as described in section 2, the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the defendant had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility arising from that abnormality. But you may take the view that both the defendant's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question for you to decide is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him.'"*

[72] We wish to underscore that, as discussed under Ground 2(b), at paragraphs [59] to [60] above, the evidence that the appellant *"had spent about ten days plus drinking and smoking cocaine"* and that "*he had been using drugs heavily"* at the time of, and prior to the commission of the offence, came from the evidence of the consultant psychiatrists. Such evidence went to the weight of the psychiatrists' opinions and not to proof of the actual existence of the drug binge. In the absence of any evidence to support that the appellant was in fact on a drug binge at the time of the offence, the judge was not required to give a modified direction on diminished responsibility including those details, in the terms set out by Lord Hutton in **Dietschmann**[42] in paragraph [71] above. Such a direction was not necessary as there was no evidence to activate

[42] Ibid.

it. We agree with the submission of Mr. Busby that on that basis alone, the decision in **Dietschmann**[43], which was heavily relied on by Mr. Khan, is not applicable to the case at bar.

This ground of appeal is unmeritorious.

GROUND 3: A verdict of murder is unsupported by the evidence.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[73] Mr. Khan submitted that the evidence in this case could only lead to the conclusion that the appellant's mental state was substantially impaired. He however conceded that this submission required the acceptance of the first two grounds advanced. While it was accepted that the appellant was what is known locally as a "piper", a term usually associated with drug addicts, he submitted that there was nothing before the jury to cast doubt on the expert evidence, which indicated that the appellant suffered from an abnormality of mind that could substantially impair his mental responsibility. He relied on the case of **R v Brennan**[44], in support of this submission. Mr Khan further contended that there was no verdict other than that of manslaughter based on diminished responsibility if this court were to make the following findings:

(i) That the opinion of Dr. Othello that the appellant was of sound mind at the time of the offence was inadmissible.

(ii) That the expert evidence was uncontradicted on the material issue that the appellant suffered from an abnormality of mind that could substantially impair his mental responsibility.

(iii) That the appellant's statement that he was on a drug binge as given in the psychiatrists' report was evidence that could be relied on to prove diminished responsibility.

[43] Ibid.
[44] [2014] EWCA Crim 2387.

(iv) That the evidence of the circumstances of the killing was evidence that could be relied on to prove diminished responsibility.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[74] Mr. Busby submitted in response, that the jury accepted and acted on the statement given by the appellant, that he had murdered the deceased. He contended that by their verdict, the defence of diminished responsibility had been rejected by the jury.

THE LAW, ANALYSIS AND REASONING

[75] **Section 44(1) of the Supreme Court of Judicature Act** gives this court the power to set aside the verdict of a jury on the ground that the verdict is unreasonable or cannot be supported having regard to the evidence. It is a power that the court exercises cautiously. This court is always mindful that it must not usurp the function of the jury. Where there is evidence upon which the jury could reasonably have decided as they did, the Court of Appeal will not interfere with the verdict.

[76] Having regard to the evidence presented before the jury, including the medical evidence and the statements given by the appellant during his interview with the police, referred to *in extenso* at paragraphs [3] to [13] and [46] to [49] above, a verdict of manslaughter based on diminished responsibility would have been entirely unsupportable on the evidence. Indeed, we go as far as to say that based on the evidence of Dr. Othello and Dr. Hutchinson (the "competing experts"), such a verdict would have been perverse. The finding arrived at by the jury was entirely consistent with the evidence.

It follows that this ground must be rejected.

GROUND 4: Errors made regarding the admissibility of the alleged confession of the appellant.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[77] Under this ground Mr. Khan challenged the admissibility of the appellant's confession under two limbs:

(i) that it was unfair; and

(ii) that unfairness arose out of the failure of the police to caution the appellant.

[78] Under "unfairness affecting its admissibility" Mr. Khan submitted that the appellant's alleged confession should have been ruled inadmissible because unfairness arose not because of any *mala fides* on behalf of the police but because of their failure to caution the appellant. Mr. Khan submitted that the trial judge applied the wrong test on the *voir dire* when considering whether to admit the appellant's confession. The judge confined the test to the narrow issue of *whether the interview was conducted fairly*, instead of, *whether it was fair to admit the statement having regard to all the circumstances*.

[79] In support of this contention, Mr. Khan submitted that the judge appeared to confine his ruling on this issue on the narrow point as to whether the police officers acted *mala fide.* This is evidenced by the judge's reference to the case of **Benjamin and Ganga v The State**[45]*.* Mr. Khan submitted that whilst the test in **Benjamin and Ganga** is relevant to admissibility in terms of accusations made against the police, the issues of fairness and voluntariness of a confession are not limited to those considerations. Even though police officers acted in a bona fide manner, a confession may still be ruled inadmissible if the surrounding circumstances show that it may have been given in circumstances that render it unreliable or unfair to the accused.

[80] Mr. Khan continued that a separate but related aspect touching admissibility is whether it would be fair in all the circumstances to admit into evidence the statement of the accused in light of his

[45] [2012] UKPC 8.

mental state at the time of the taking of the statement. Mr. Khan relied on the cases of **The State v Monica Rochard**[46], **The State v Harrinarine Achalal**[47] and **Williams v R**[48]**.**

[81] Concerning the unfairness arising out the failure of the police to caution the appellant, Mr. Khan submitted that the appellant's statement was made without receiving a caution and in the absence of an attorney-at-law. He stated that the appellant's abnormal mental state due to his drug induced psychosis meant that the presence of an attorney-at-law was necessary to protect and maintain his constitutional right not to incriminate himself. His mental state also made him incapable of waiving his right to have a lawyer present. Furthermore, the presence of a JP could not be a proper substitute for a relative/friend given the kind of precaution which is necessary when interviewing a drug addict. The lack of complaint by the appellant to the JP did not render the issue of unfairness moot, especially since the JP was called to authenticate the interview after it had already been made.

[82] Mr. Khan submitted that despite the Privy Council referring to the Judges' Rules as administrative guidelines, the requirement to caution a suspect is a constitutional right and its codification into the Judges' Rules cannot lower its importance to a simple guideline. The requirement to caution from the Judges' Rules is mandatory. Whether or not the requirement to give a caution is a constitutional right or a guideline, the consequence is that the failure to give the appellant the caution in these circumstances should result in the alleged confession not being admitted into evidence. In that regard Mr. Khan relied on the case of **Simmons and Another v R**[49].

[83] On March 21, 2017, Mr. Khan filed further submissions in support of his earlier contention that a suspect had a constitutional right to be informed of his right to remain silent/against self-incrimination. In his further submissions, Mr. Khan rehashed some of his earlier submissions and sought to impress upon the Court that an appellant's right to remain silent and the right against self-incrimination were constitutional rights. He submitted that the appellant's rights were

[46] Unreported.
[47] HCA No. 111 of 2003.
[48] [2006] UKPC 21.
[49] [2006] UKPC 19.

infringed upon when he was not cautioned under Rule II of the Judges' Rules when he became a suspect in the matter.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[84] In response Mr. Busby submitted that the admissibility of a statement on a voir dire is a mixed question of fact and law for the judge, and that a judge's findings of fact should be respected unless they were tainted by clear error. An appellate court should not interfere with the trial judge's findings unless it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principles of law. Mr. Busby submitted that a reading of the trial judge's ruling on the *voir dire* will disclose that he properly directed himself on the applicable law.

[85] In relation to the failure to caution the appellant, Mr. Busby stated that the judge was satisfied that it was fair to admit the statement. Also, the court found as a fact that the appellant was cautioned upon arrest and during the course of the interview.

[86] Mr. Busby also submitted that the appellant's utterances before the caution, whilst incriminatory, were insufficient to prove that the accused committed the offence. It was his statement that followed the caution which was what amounted to sufficient evidence upon which a jury could have decided to convict the appellant of murder.

[87] Relative to Mr. Khan's submission that the appellant was suffering from withdrawal symptoms brought on by poly substance abuse when he was interviewed, Mr. Busby submitted that the judge's findings of fact that the appellant was not, ought to be respected and accorded the traditional "due deference" which is attached to the findings of the primary fact finder.. At paragraph 33 of his ruling the judge stated: "*the medical report of Dr. Othello… that has been admitted before the Court makes no finding of anything to the contrary that he was not in a fit state."* Mr. Busby also stated that the medical report issued by Dr. Clem Ragoobar, the District Medical Officer, described that the rest of the appellant's examination was "normal".

[88] With respect to Mr. Khan's submission that a caution is a constitutional right, Mr. Busby relied on the ruling in *Peart,* to the effect that the overarching criterion was that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted into evidence. Mr. Busby concluded that the appellant had failed to show that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle.

[89] In response to Mr. Khan's further submissions, that a suspect has a constitutional right to be informed of his right to remain silent and to not incriminate himself, Mr. Busby submitted that the judge did find as a fact that the appellant was informed of his right to silence, both on arrest and during the course of the interview. As such, any discussion on the constitutional ramifications of the right to silence simply did not arise on the facts of this case.

THE LAW, ANALYSIS AND REASONING

[90] At the *voir dire*, the appellant's alleged confession was impugned on essentially same ground as on appeal, that it was unfair to admit the statement based on the appellant's prevailing circumstances (his mental health condition *vis a vis* withdrawal symptoms) and the failure to caution at the beginning of the interview. After stating the appropriate law regarding the voluntariness of confessions, the judge considered the cases of **R v Crampton**[50] and **R v Goldenberg**[51] and the evidence of the police officers who conducted the interview, the JP, the appellant and Dr. Othello.

[91] In order to understand the judge's rationale, we have found it necessary to set out his ruling on the *voir dire in extenso*. The judge in his ruling delivered on February 11, 2014, said:

> *"So, In applying the law set out above and most importantly the test in the case of Reed (supra) to this present case, it must be determined firstly whether there was …anything said or done by the police to render the confession unreliable.*

[50] (1990) 92 Cr App Rep 369.
[51] 88 Cr App R 285.

Now, the police officers testified that the Accused was not cautioned in accordance with Rule II of the Judge's Rules prior to the interview but that it was administered during the said interview. The reason for this was that at the commencement of the interview the Accused was a person of interest and not necessarily a suspect. Therefore, only Rule I of the Judges' Rules was applicable.

Objectively, this Court finds that the Accused would have been a suspect and that he ought to have been cautioned under Rule II. However, the Accused was cautioned by the arresting officer under the same rule. Further the Justice of the Peace testified that:

> *'I enquired from him if he was cautioned and informed of his constitutional rights and privileges before being interviewed and he replied yes. I also enquired from him if he understood what the caution meant, and he said yes, the police explained the meaning to him'*

Equally, the medical report by Dr. Othello dated the 22nd of November 2013, which addressed this issue, stated that the Accused can understand instructions given orally and thus would have been able to understand his legal rights once they were explained to him in ordinary English. Additionally, he would have been able to communicate his responses to these instructions sufficiently and could have made an informed decision to make a statement, provided that he was informed of his right to do so. Thus the Court accepts the doctor's conclusion that the Accused would indeed understand these rights if they were explained to him in ordinary English.

Now, the Court has a discretion to allow evidence in breach of the Judges' Rules once it is fair. This was expounded in the case of Shabadine Peart v The Queen…

…

The Court finds that notwithstanding the fact that the Accused was not cautioned at the commencement of the police interview he was cautioned upon arrest and during the interview, and the Court is satisfied so that it is sure in all the circumstances that this was fair.

The second issue is whether or not the Accused was experiencing withdrawal symptoms. ***A number of points were put to the two officers that were conducting the interview that the Accused has shown signs of these symptoms such as sweating, rubbing his hands on his pants and so forth. The officers denied this, they said they made no such observation and he appeared to be normal and***

comfortable. When the Accused gave his evidence at the voir dire, he made no such suggestion either, so that the only evidence before the Court was his assertion that there were only sparse things that he could remember about the police interview.

Now, the judgment of Crampton (supra) states that it is those that are interviewing the suspect or person in police custody to decide whether that person is fit to be interviewed if they are in fact a drug addict. ***In this case, Inspector Pariman claimed that he had years of experience dealing with drug addicts. This experience comes from both his professional work as a police officer and his personal community work, which made him aware of the behaviour and symptoms present in drug addicts. Thus in his view, he saw nothing untoward with the Accused and he certainly did not observe any of the usual symptoms of persons on drugs or otherwise that gave him any reason to think that the Accused was not fit to be interviewed.***

Also, the Court finds that the Accused made no complaint to the police officers, the Justice of the Peace, or to the Doctor. *In fact, the medical report by Dr. Othello dated the 22nd of November, 2013, that has been admitted before the Court makes no finding of anything to the contrary that he was not in a fit state.*

So, for all those reasons then, the Court is satisfied so that it is sure that, there was nothing that the officers would have observed to give rise to any concern that the Accused was not in a fit state to give a reliable and voluntary statement to the police. In the circumstances, the Court finds the answers given by the Accused in the interview notes were given voluntarily and free of any oppression." [emphasis added]

[92] The trial judge assessed the evidence of the police officers who conducted the interview against that of the appellant and found that there was nothing to suggest that the appellant was suffering from withdrawal symptoms at the time of the interview. The trial judge took judicial notice of the fact that the appellant made no complaint to either the JP, the doctor, or even the police of feeling unwell. Consequently, he found that the statement given was voluntary and reliable.

[93] The trial judge accepted that at the beginning of the interview, the police officers did not caution the appellant and were wrong not to do so as he was a suspect and, rightfully, should have been cautioned. Despite this breach, the judge exercised his discretion[52] to allow the statement.

[52] See **Shabadine Peart v The Queen** [2006] UKPC 5.

[94] It is well settled in this jurisdiction that evidence of a confession of an accused person will not be admitted into evidence unless the prosecution proves, beyond reasonable doubt, that it is a voluntary statement that has not been obtained from the accused by fear of prejudice, or hope of advantage excited or being held out by a person in authority: **Ibrahim v The King**[53].

[95] The trial judge, in assessing the voluntariness of the confession, had recourse to the three-step approach laid out by the Court of Appeal in **Benjamin and Ganga v The State**[54], namely:

(i) To identify the thing said or done by the police;

(ii) To ask whether what was said or done was likely in the circumstances to render a confession unreliable. The test is an objective one, taking into account all the relevant circumstances; and

(iii) Whether the prosecution has proved beyond reasonable doubt that the confession was not obtained in consequence of the thing said or done, which is a question of fact to be approached in a common sense way.

[96] Mr. Khan asserts that the trial judge merely limited the issue to the conduct of the police officers and not the totality of the interview process and whether that rendered the alleged confession to be unreliable. We disagree with that assertion. The admissibility of a confession is an issue of both fact and law and the trial judge must be seized of all the circumstances surrounding the giving of the confession. This fulsome approach ensures that the overarching criterion of fairness is considered when assessing the evidence. In **Shabadine Peart v The Queen**[55], Lord Carswell in delivering the opinion of the Board said:

> *"Their Lordships acknowledge the importance of the principle of voluntariness, but are unable to accept that it is the only applicable criterion… In their Lordships' opinion, the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence."*

[53] [1914] AC 599, [1914] UKPC 16.
[54] **Benjamin and Ganga** (n. 45): the test was enunciated in the case of **Barry** (1992) 95 Cr App R 384 CA.
[55] **Peart** (n. 52).

[97] The foregoing approach has the ultimate effect of engaging the trial judge in determining not only the fairness of the procedure in the more limited circumstances pertaining to the giving of the admission, but also the context of the trial.

[98] The equivalent of our Judges' Rules (Appendix A) can be found in section **76**(**2**) **Police and Criminal Evidence Act 1984** (UK). The relevant section, for the purposes of this appeal, is found in subsection (b) which states:

> *"If, in any proceedings where the Prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained:-*
> *(a)…*
> *(b) in consequence of anything said or done which was likely, in the circumstances existing at the time to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except insofar as the prosecution proves to the court beyond reasonable doubt that the confession was not obtained as aforesaid."*

[99] The "circumstances" which are to be taken into account include the mental, physical and emotional condition of the defendant at the time[56]. This would have required the trial judge to inquire into the mental condition of the appellant at the time of the confession.

[100] We are also mindful of the dictum of Lord Salmon in **DPP v Ping Ling**[57]:

> *"The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle - always remembering that usually, the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."*

[56] See R v Everett*;* R v Crampton [1991] Crim LR 277*, CA;* R v McGovern (1990) 92 Cr App Rep 228*, CA;* R v Walker [1998] Crim LR 211*, CA;* Re Proulx [2001] 1 All ER 57.
[57] [1976] AC 574.

[101] The appellant placed reliance on **Harrinarine Achalal**[58] and **Williams**[59] (supra) but these cases can be distinguished on their own facts. In **Achalal**, the accused had been involved in a car accident and had sustained head injuries. He went to the police station and made certain utterances, which were recorded by the police offices. He also gave a written statement to the police. One of the police officers enquired whether he wanted to seek medical attention and the accused replied that it was "okay" and referred to his injury as a "small thing." At no point did the accused complain to the police of feeling unwell. He was not given medical attention until after the statement was recorded. In **Williams**, the appellant was twelve years old at the time of the murder, his literacy was doubtful and the statement was taken without a parent/guardian present and after he had sustained a beating from the police officers.

[102] The Court is satisfied that the trial judge directed himself properly on the appropriate law and based his ruling on a proper assessment of the evidence given his first-hand view of the witnesses. With respect to Mr. Khan's assertion, that the police did not take into account the mental health of the appellant at the time of the recording of the alleged confession, we are mindful that the judge factored into his assessment the fact that Cpl. Pariman had several years of dealing with drug addicts and that he had no reason to believe that the appellant was unfit to be interviewed since he was not observed to be displaying any of the usual symptoms associated with drug addicts.

[103] Before leaving this ground, we will address briefly the contention that unfairness arose out of the failure to caution the appellant.

[104] In the judge's ruling, part of which is set out at paragraph [91] above, the judge recognised that the police should have cautioned the appellant at the commencement of the interview as he would have been rightly viewed at that point as a suspect. The trial judge considered the propositions established in **Peart**[60] and exercised his discretion to admit the statement given that

[58] **Achalal** (n. 47).
[59] **Williams** (n. 48).
[60] **Peart** (n. 52).

he was cautioned on his arrest and during the interview. The judge's finding was reasonably open to him on the evidence. His analysis of the pertinent issues was careful and he took into account the entire range of relevant circumstances. We can find no viable basis to fault his decision.

[105] In dealing with Mr. Khan's further submission that a suspect has a constitutional right to be informed of his right to remain silent/against self- incrimination, we note that the evidence shows that the appellant was in fact cautioned, albeit during the interview. In fact, it was after he had been cautioned that the appellant stated, "*When he gone to see, ah walk behind him inside the bathroom area by Miss Merlyn, ah lock he neck and ah take out me knife and ah cut he neck about three or four time*." We further acknowledge that the trial judge found that the appellant was informed of his right to remain silent on arrest. We disagree with Mr. Khan's contention that there was a deprivation of the appellant's right to remain silent or his right against self-incrimination.

We therefore find no merit in this ground of appeal.

GROUND 5: The conviction is unsafe/trial unfair in that the appellant was deprived of the right to make an informed decision whether or not to give evidence.

[106] In support of this ground of appeal, Mr. Khan made an application under **section 47 of the Supreme Court of Judicature Act Chapter 4:01** to elicit evidence from the appellant himself.

[107] With the consent of Mr. Busby, we heard, *de bene esse*, the evidence of the appellant, as well as the evidence of his trial counsel, Ms. Amerelle Francis.

SUMMARY OF AFFIDAVIT EVIDENCE

- ***Affidavit of Ronald Bisnath filed on July 28, 2017***

[108] The appellant deposed that in his initial conversations with instructing attorney, Mr. Kern Saney, he stated that he was on drugs at the time of the murder and could not recall how the deceased was killed. They discussed whether or not a plea of manslaughter should be entered and eventually, instructions were given and then signed.

[109] The appellant said that he gave evidence at the *voir dire* and indicated that he could not understand what was being asked by prosecuting counsel, Mr. Winter. He did not receive any assistance from Ms. Francis. Sometime during the trial, Ms. Francis and Mr. Saney spoke to the appellant about giving evidence at the substantive trial. He indicated that he wanted to give evidence before the jury. Ms. Francis said to him, "*Mr. Winter will chew you up and spit you out like chow chow*." Upon being told this, he decided not to give evidence and he signed instructions indicating that he did not wish to do so.

[110] He said that Ms. Francis and Mr. Saney did not explain to him what would happen if he did not give evidence. He maintained that he wanted to give evidence before the jury.

- ***Affidavit of Ms. Amerelle Francis filed on October 27, 2017***

[111] Ms. Francis deposed that she was not a party to the initial discussions between Mr. Saney (instructing attorney) and the appellant and that she explained to the appellant the difference between the actual trial and the *voir dire*.

[112] Regarding the allegation that there was disagreement between both attorneys and the client on whether he should give evidence, Ms. Francis denied it and stated that the appellant was told

that it was his choice whether or not he wanted to go into the witness box and that he should think about it carefully before exercising that option.

[113] She also stated that he appellant never indicated that he wanted to give evidence at the substantive trial and denied making the remark that prosecuting counsel would *"chew him up and spit him out like chow chow"*. She said that she did not know the meaning of that expression and that she had never heard it used until it was mentioned in the appellant's affidavit.

[114] Ms. Francis indicated that based on the DNA evidence that became available during the trial, which revealed that the appellant's DNA was found in the mouth of the deceased and that other DNA profiles were found in the deceased's anus, she had certain discussions with him. She told him that the prosecution might consider accepting a plea of guilty to manslaughter if he disclosed the names of the other persons involved in the incident. The appellant indicated that he would think about this. She said that the fact that the appellant needed an opportunity to think this confirmed to her the psychiatric report that he was malingering as to his lack of memory of the events.

[115] Ms. Francis indicated that the appellant gave written and signed instructions that he did not wish to give evidence in his own defence and he was advised of the legal consequences of so doing. The instructions signed by the appellant were in the following terms:

> *"I, Ronald Bisnath hereby instruct my Attorney, Mr. Kern D Saney that I do not wish to give evidence in CR 112 of 2008 THE STATE v RONALD BISNATH.*
>
> *I have been shown the Certificate of Analysis with respect to the DNA profiles and I am still unable to recall what happened on 29th October, 2006.*
>
> *I have been advised and am fully aware of the consequences of not giving evidence. I have considered whether to give evidence before (since the 28th February 2014) and since considering I have decided on 28th February, 2014 not to give evidence. I still do*

not wish to give evidence in this matter and I make that decision of my own free will understanding the consequences of not doing so."

The instructions appeared to be signed by the appellant and were dated March 7, 2014.

[116] She said that at no time did she, or anyone in her presence, force the appellant not to give evidence at the substantive trial. She said that the appellant never expressed his desire to give evidence before the jury.

- ***Supplemental Affidavit of Mr. Ronald Bisnath filed on January 8, 2018***

[117] In response to Ms Francis's affidavit filed on October 27, 2017, the appellant deposed as follows:

(i) The DNA test results came out during the trial, after the *voir dire*. and Ms. Francis informed him that the prosecution would offer him a plea bargain if "he gave the names of the other two men". He informed her that he did not know about two other persons. She asked him to think about it and he acquiesced, even though he knew that there was nothing to think about. He only agreed to think about it because she was being "aggressive" and kept asking him about it.

(ii) He wanted to give evidence and was not afraid of anyone asking him about any other persons involved because he "knows nothing about that."

(iii) He indicated that no one forced him to not give evidence.

- ***Affidavit of Ms. Amerelle Francis dated February 5, 2018***

[118] Ms. Francis deposed that the prosecution had rejected their offer that the appellant plead guilty to diminished responsibility based on the report of Dr. Othello. Her plan before the trial was for the appellant to give evidence at the *voir dire* as well as at the substantive trial. It was irrelevant

that he had previous convictions or that he would not be the best witness in the box because his character was one of a drug addict. His convictions would be consistent with proving his addiction. Ms Francis intended to address this in her closing address to the jury.

[119] According to Ms. Francis, the appellant's instructions to her were that he could not recall the events of the afternoon of the murder because of his substance abuse. She had no instructions which might suggest that the appellant's illness was connected to the killing. She said that there was no evidence from any other witness about the way that the appellant was behaving at the material time which would suggest that his responsibility for his conduct was substantially impaired by his illness.

[120] Ms. Francis stated that before the trial, she informed the appellant of the "pros and cons" of giving evidence on his own behalf in the *voir dire vis a vis* the substantive trial. She informed him that he had to give evidence at the *voir dire* as there would be no evidence for the trial judge to consider on his behalf and that would constitute a "failure" in his case. She further explained to him that he would have to give evidence at the substantive trial before the jury and that his answers were expected to be consistent with what he gave at the *voir dire*. She also explained to him the rule with respect to previous inconsistent statements in terms that he could understand.

[121] Ms. Francis said that when she asked the appellant whether he would give evidence at the substantive trial, since the plan had always been for him to testify, he informed her that he did not want to go into the witness box. This took her by surprise. She explained to him that if he did not go into the witness box, there would be no direct evidence from him as to his drug binge as a consequence of which he could not recall the events of October 29, 2006.

[122] On March 7, 2014, the appellant asked Ms. Francis whether, if he testified, he would be asked questions about the Certificate of Analysis and DNA results, to which she responded that there was a possibility that he would. She again repeated to the appellant the importance of his going into the witness box, otherwise there would be no facts to support his defence of diminished responsibility. Once again, the appellant indicated that he did not wish to give evidence.

THE LAW, ANALYSIS AND REASONING

[123] **Section 47** of the **Supreme Court of Judicature Act Chapter 4:01** enables this Court, in criminal matters, to, if it thinks it necessary or expedient in the interest of justice, receive the evidence of any witness including the appellant, who is a competent but not a compellable witness. In the decision in **Solomon v The State**[61], this Court affirmed that section 47 does not remove the common law requirements that the fresh evidence must be credible and have a bearing on the safety of the conviction if admitted and that a reasonable explanation must be furnished for the failure to adduce it at trial. Further, in the decision in **Pitman v The State**[62], the Privy Council held that an appellate court has an overriding statutory power to admit fresh evidence if it is necessary to further the interests of justice.

[124] In the decision in **R v Parks**[63], the Court of Appeal set out four factors which the court should consider in exercising its discretion in admitting fresh evidence on a criminal appeal, namely:

(i) The evidence sought to be called must be evidence which was not available at the trial;

(ii) The evidence must be relevant to the issues;

(iii) It must be credible evidence in the sense of being well capable of belief, and

(iv) The court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[61] (1999) 57 WIR 432.
[62] [2001] 4 LCR 307.
[63] [1961] 1 WLR 1484.

[125] However, in **Kenrick London and Chandrouti London v The State**[64], Hamel-Smith, J.A. (as he then was), in relation to the **Parks**[65] criteria, said at paragraph 30:

> ***"These principles are not cast in stone in that if one is absent the application need not necessarily fail. The evidence must be looked at in the round and even if the applicant is unable to provide a satisfactory excuse for not having adduced it at the trial it does not necessarily follow that the application will be refused.*** *Much depends on all the circumstances and in the final analysis the test is whether the appellate Court thinks that the evidence, if given at the trial, might have affected the decision of the jury to convict. (See R v Pendleton [2002] 1 WLR 72)."* [emphasis added]

[126] In the decision in **Malchan Moonsammy v The State**[66], this Court, on an application to adduce fresh evidence, stated that the test for the reception of fresh evidence has two limbs. The first limb is that the evidence was not available at trial notwithstanding the exercise of reasonable diligence and secondly is that the evidence must be sufficiently credible. At paragraph 12 the Court said:

> *"12. The rationale for these requirements is the necessity to promote an appropriate level of finality in criminal litigation. The Court of Appeal is not simply a conduit through which the proposed additional evidence is uncritically advanced. The evidence must satisfy a minimum threshold standard of credibility and reliability in order to justify its reception, otherwise there would be no proper end to the adjudicative process."*

See also **Hernandez v the State**[67]; **Pitman and Hernandez v The State**[68] and **Michael Maharaj and Ors. v The State**[69].

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[64] Cr App Nos. 31 & 32 of 2002.
[65] **Parks** (n. 63).
[66] Cr. App. No. 14 of 2014.
[67] Cr App No. 63 of 2004.
[68] [2017] UKPC 6.
[69] Cr App Nos. 56, 57, 58, 59, 60, 61, 62, 63, 64 and 65 of 2001.

[127] In light of the foregoing authorities, this court is empowered to admit the evidence even though it does not meet the requirement of it not having been available at the trial. However, in order accede to the application to adduce fresh evidence, it must satisfy a minimum threshold standard of credibility. As such, we turn now to evaluate the proposed fresh evidence of the appellant.

[128] In the decision in **R v Mark Sales**[70], Rose L.J. said at page 438 that proffered fresh evidence in written form is likely to be in one of three categories:

(i) Plainly capable of belief;
(ii) Plainly incapable of belief, and
(iii) Possibly capable of belief.

[129] In the examination-in-chief and cross-examination of the appellant before this Court, we found his material evidence to be plagued with inconsistencies, some of which are highlighted below:

(i) In his examination-in-chief before us, the appellant stated that Ms. Francis did not tell him about the advantages and disadvantages of going into the witness box at the *voir dire* and at the substantive trial.

(i) He said that he informed Ms. Francis that he wanted to go into the witness box and defend himself. He said that she persuaded him not to give evidence. The appellant said that on February 28, 2014, Ms. Francis asked him if he would be going into the witness box and he told her that he did not want to give evidence but that was after she had persuaded him not to. She told him earlier that prosecuting counsel would *"eat him up and spit him out like chow chow"* and this caused him to become frightened. He admitted that Ms. Francis explained to him that if he did not go into the witness box, there would be no direct evidence as to his drug binge. She also told

[70] [2000] 2 Cr App R 431.

him that if he did not go into the witness box, there would be no evidence to go to his defence of diminished responsibility[71]. However, in cross-examination, the appellant said, ***"If I had followed the lawyers instructions, I woulda give evidence in the box."*** Mr. Busby repeated this bit of evidence to the appellant and enquired whether he understood what he had said and he replied, *"Yes."*[72] The appellant also said under cross-examination that on February 28, 2014, Ms. Francis did not tell him that if he did not give evidence, there would be no facts for the jury to consider how the use of drugs affected him. Under re-examination by Mr. Khan, the appellant admitted that Ms. Francis told him that if he did not give evidence before the jury, there would be no evidence of his drug binge. He however said that she neither advised him on the importance of giving evidence before the jury nor informed him of the consequences of not giving evidence before the jury.

(ii) In cross-examination before us, the appellant said that at the stage of the *voir dire*, Mr. Saney did not want him to give evidence but he did not get the impression at that time that Ms. Francis did not want him to give evidence. In fact, he stated quite clearly that at the stage of the *voir dire,* Ms. Francis did not tell him not to give evidence, even though Mr. Saney did[73].

(iii) The appellant agreed that at the time of the *voir dire*, he understood that, no matter what his counsel told him to do with respect to the giving of evidence, if he insisted, he would be able to give evidence. He agreed that even though his counsel were supposed to know best, if he thought he should give evidence, he could insist on doing so. He accepted that this showed that he was not willing to accept what they told him blindly and that he could follow his own mind[74]. He also accepted that at the voir dire, he showed that even though Mr. Saney advised him not to give evidence, he could

[71] See the Transcript dated the 6th February, 2018 at page 7, line 2 to page 8, line 30.
[72] See the Transcript dated the 6th February, 2018 at page 21, lines 34 to page 22, line 9.
[73] See the Transcript dated the 6th February, 2018 at page 16, lines 6 to 42.
[74] See the Transcript dated the 6th February, 2018 at page 17, lines 12 to 22.

follow his own mind and insist that he give evidence[75]. However, he went on to say that even though he wanted to give evidence at the substantive trial, he followed Ms. Francis' advice not to do so[76].

[130] Based on the foregoing material inconsistencies which arose both in the examination-in-chief and the cross-examination of the appellant, it cannot be gainsaid that there are serious issues going to the root of his reliability. In our view, his evidence is plainly incapable of belief. The appellant admitted that his counsel at the trial, Ms. Francis, did not prevent him from giving evidence at the *voir dire.* Further, he indicated that she advised him that if he did not give evidence before the jury, there would be no evidence concerning his drug binge which would negatively impact on his defence of diminished responsibility. Under cross-examination, when questioned about following his attorney's instructions in relation to the trial before the jury, the appellant made it clear that if he had followed his attorney's advice, he would have given evidence at the trial. Mr. Busby posed this question to the appellant several times and each time, his answer was the same. Mr. Busby also asked the appellant if he understood what he had said and he responded in the affirmative. The appellant demonstrated to the Court that he was capable of understanding the questions put to him by counsel. We find the appellant to be quite clever by his general disposition and demeanour whilst in the witness box. This was also apparent through his ability to understand and differentiate between evidence given at a *voir dire* and evidence given at a trial, before a jury.

[131] We therefore find that the appellant's evidence has failed to meet the requisite minimum standard of reliability in order to justify its reception as fresh evidence. It is axiomatic that we are not satisfied that the appellant was deprived of the right to make an informed decision whether or not to give evidence.

This ground of appeal is unmeritorious.

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[75] See the Transcript dated the 6th February, 2018 at page 19, lines 45-50.
[76] See the Transcript dated the 6th February, 2018 at page 20, lines 4 to 9.

GROUND 6: **The combination of the cross-examination of the psychiatrists and the manner in which the issue of diminished responsibility was left to the jury in the summing up, rendered the appellant's conviction for murder unsafe. In particular they deprived the jury of the help it needed in focusing on the issue and putting aside the relevant considerations. (sic)**

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[132] The ground was formulated while Mr. Khan was on his legs. Unfortunately, in his oral submissions, he did not specify what aspects of the cross-examination of the psychiatrists he was targeting, or what aspects of the judge's summing up he found to be so defective as to render the verdict unsafe. He also did not specify the "relevant" (or irrelevant) considerations the jury should have put aside.

[133] In support of this new submission, Mr. Khan rehashed his complaints that the judge failed to direct the jury that they were the sole fact finders on the issue of the state of mind of the appellant, and that Dr. Othello should not have been permitted to express her opinion on the final issue.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[134] In response, Mr. Busby, in oral submissions made before the court, repeated his submissions made under ground 1(b): see paragraphs [33] to [35] above.

THE LAW, ANALYSIS AND REASONING

[135] The cross-examination of the psychiatrists included several topics. Dr. Othello in her cross-examination gave evidence that when she first examined the appellant in 2007, she had made a tentative diagnosis of schizophrenia and that he suffered from hallucinations and delusions. She also went on to define schizophrenia in her evidence. She stated that she thought that the

appellant was malingering specifically with respect to his account of the incident for which he was charged and the events surrounding it. She indicated that he did not show any evidence of having been traumatized by any recent events or traumatised by any events surrounding the offence. She also stated that he had made several attempts to commit suicide. Under cross-examination, she gave evidence that the appellant had indicated to her that around the time of the incident he was on a binge with cocaine, marijuana and alcohol.

[136] On the other hand, under cross-examination, Dr. Hutchinson stated that he could not say that the appellant was suffering from the associated psychosis at the time of the killing or that he was under the influence of alcohol or drugs. He stated that his report dated February 3, 2011, did not address the issue of diminished responsibility. He gave his opinion that the appellant was probably suffering from poly-substance related psychosis and was likely in that state at the time of the offence. He gave evidence that the psychosis was due to a combination of cocaine and alcohol related abuse. However, he testified that he was unable to assist as to whether or not at the time of the killing such a psychosis had substantially impaired the mind of the appellant or whether there was a trivial or negligible impairment. Like Dr. Othello, he gave evidence that the appellant had told him that he had been on a cocaine and alcohol binge during the time leading up to the murder and that he may have spent 10 days or more drinking alcohol and smoking cocaine.

[137] The evidence adduced by the psychiatrists required careful treatment by the trial judge in order for the jury to consider the issue of diminished responsibility. In his summing up, the judge reviewed the evidence of the two psychiatrists (see the Summing up Day 2 dated March 27, 2014). His summary of the evidence was careful and accurate. He gave the jury directions on the law on the issue of diminished responsibility:

> *"So, finally, I am going to return, then, to the law on this issue of "diminished responsibility".*
>
> *So, Mr. Foreman, in every criminal trial, Members of the Jury, there are usually a number of issues that arise for determination, but at the heart of the case there may*

be just one or two fundamental issues that will determine its final outcome. I said to you already much turns on the police interview. That is your first issue that is important. If, of course, you find that police interview to be true, then, of course, there is an admission of the act by the accused of killing the deceased, and then, of course, it turns on the central issue of 'diminished responsibility'.

So, if the Prosecution has proved, so that you are sure, that the accused, by his deliberate, unlawful act killed the deceased, intending to kill him or to do him really serious injury, then you will be sure of the elements of murder. You would therefore find the accused guilty of murder unless you conclude that diminished responsibility applies in this case.

'Diminished responsibility', as I say, has a particular legal meaning which I need to explain. If the accused, when he attacked the deceased, was suffering from an abnormality of mind arising from inherent causes or induced by disease or injury, which substantially impaired his mental responsibility for his act, then his responsibility is diminished and he should be found not guilty of murder and guilty of the lesser offence of manslaughter.

Now, the burden is upon the Defence to make good this defence on the balance of probabilities. In other words, before you find the defendant guilty of manslaughter, you would need to conclude that it was more likely than not, on the evidence, that the accused's responsibility was diminished. Let us consider each element.

'Abnormality of mind' is not a medical term and it does not have to be a mental illness as you would usually understand it. It is a legal term and is a state of mind which is so different from that of ordinary people that you would recognize it as abnormal. The term covers all of its workings - - ability to form appropriately, to exercise perception, understanding, judgment and will.

Now, there were a number of opinions expressed by the experts that may suggest that the accused was suffering from such 'abnormality of mind'. First, that the accused may have been schizophrenic. Second, that the accused may have been suffering from polysubstance dependence, that is, a lack of control and use despite the negative consequences associated with it and an associated psychotic illness due to this dependence. The abnormality relied upon by the accused is the effect of his schizophrenia and/or cocaine or marijuana or alcohol, that is to say a polydrug dependence and associated psychosis. On the one hand, Professor Hutchinson says

that it is possible, because of the intake of drugs, some brain damage had occurred to the accused to have psychotic symptoms even in the absence of drug use. Dr. Othello said schizophrenia is a mental illness and during the course of that illness people have episodes and when not treated they experience symptoms of psychosis.

If, at the time of the offence there was an active episode and the person was sufficiently ill so as to have mental responsibility - - so ill, sorry, let me say that again. If, at the time of the offence there was an active episode and the person was sufficiently ill so as to have mental responsibility for his acts or omissions impaired, and this may be induced by alcohol or cocaine, if there was a binge at the material time, this may amount to 'diminished responsibility'. So here, on the one hand, the accused may be suffering from schizophrenia and co-existing drug and alcohol dependence.

The Consultant Psychiatrists who gave evidence for both sides both agree that the accused's condition was diagnosed in December 2006/January 2007, and Professor Hutchinson says it was more likely than not that he, the accused, was suffering from schizophrenia at the time of the index offence, having had an opportunity to further review some of the circumstances of the alleged incident including the police interview and some details of the post mortem report.

Now, if you accept the police interview, then the accused says that he did attack the deceased, causing his death, to the extent that these effects of loss of judgment and ability to exercise control were caused when the accused was in an episode of schizophrenia and/or induced by drugs and alcohol consumed as a consequence of any such dependency, the accused may argue that they arose from this "abnormality of mind" caused by disease. You should then consider the following question: To what extent was this "abnormality of mind" suffered by the accused, that is, the loss of judgment and the ability to exercise self-control occasioned by a schizophrenic episode and/or a psychotic episode induced by alcohol and drugs? The reason you need to consider this question is that 'diminished responsibility' only applies if the abnormality of mind substantially impaired the accused's mental responsibility for his acts.

To what extent did the accused's abnormality of mind cause/make his state of mind to differ from that of the ordinary person? Was his state of mind so abnormal that the accused - - let me just repeat that sentence. To what extent did the accused's

abnormality of mind cause/make his state of mind to differ from that of the ordinary person?

Was his state of mind so abnormal that the accused's mental responsibility was substantially reduced? 'Substantially' is an ordinary English word to which you would bring your own experience. It means 'less than total' and 'more than trivial'. Where you draw the line is for your own good judgment, Members of the Jury.

If you conclude that the accused was in a schizophrenic episode and/or in an alcohol drug-induced psychotic episode and its effects probably did substantially impair his mental responsibility, then your verdict would be 'not guilty of murder' and 'guilty of the lesser offence of manslaughter'.

If, on the other hand, you conclude that he was not in a schizophrenic episode, or psychotic at the time, or even if he was, it did not substantially impair his mental responsibility, your verdict would be 'guilty of murder'.[77]

[138] An analysis of this excerpt reveals that the judge correctly explained the nature of the partial defence and its three essential elements. His balanced summary of the facts and the clear directions given by him on the issue of diminished responsibility would have assisted the jury in having a better perspective on the evidence presented by the psychiatrists. In addition to this, the judge directed the jury at several points throughout the summing up, that they were the finders of the facts in the case, which included the issue of the state of mind of the appellant at the time of the offence. The judge directed the jury that:

"You should bear in mind, however, that if, having given the matter careful consideration, you do not accept the evidence of one or more or even any of the experts, you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of an expert and that is because, as I explained you earlier, you, Members of the Jury, are the sole judges of the facts in this case.[78]"

[77] See the Summing Up: Day 2 dated the 27th March, 2014 at page 17, line 41 to page 20, line 17.
[78] See the Summing Up: Day 1 dated the 24th March, 2014 at page 18, lines 13 to 20, said:

[139] The judge gave further directions to the jury on the concept of "abnormality of mind", and made it clear to them that it was for them to decide whether the appellant was suffering from an "abnormality of mind" at the material time:

> *"It is not a medical term and it does not have to be a mental illness as you would usually understand it. So, in other words, these experts, Psychiatrists, have been called to assist you, the jury, to apply your minds to determine whether, having heard the directions in law that you will be given, that the evidence helps you to find whether or not you think the accused was suffering from this "abnormality of mind" that would, if you do accept it, reduce the offence from murder to manslaughter."*[79]

[140] It can be gleaned from this that the jury were properly directed throughout the summing up that they were the sole finders of the facts and that they were the ones to make a determination on the ultimate issue of the appellant's state of mind at the time of the commission of the offence. The judge's directions on this issue were entirely correct.

Accordingly, we find no merit in this new ground.

DISPOSITION

[141] The appeal is dismissed and the conviction and sentence are affirmed.

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A. Yorke-Soo Hon. J.A.

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R. Narine. J.A.

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M. Mohammed, J.A.

[79] See Summing Up: Day 2 dated March 27, 2014 at page 6, line 50 to page 7, line 9.