Neutral Citation Number: [2014] EWCA Crim 2387

Case No: 201401425B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
HHJ BALL QC
T20137111

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 21st November 2014

Before :

LORD JUSTICE DAVIS
MR JUSTICE KING
and
THE RECORDER OF NOTTINGHAM HIS HONOUR JUDGE STOKES QC
(SITTING AS A JUDGE OF THE CACD)

- -

Between :

	MICHAEL JAMES BRENNAN	**Appellant**
	- and -	
	THE CROWN	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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MISS SARAH FORSHAW QC (instructed by **Bailey, Nicholson, Grayson**) for the **Appellant.**
MR ANDREW JACKSON (instructed by the **Crown Prosecution Service**) for the **Respondent.**

Hearing date: 31 October 2014

- -

Judgment**Lord Justice Davis :**

Introduction

1. On the night of 3 May 2013 the appellant, then aged 22, killed Paul Simons. He was charged with murder. The only issue at trial was the defence raised by the appellant of diminished responsibility. The evidence adduced in support of that defence was from a consultant forensic psychiatrist of acknowledged standing and expertise. Her opinion was firmly and entirely in support of the defence. That opinion was not controverted by any expert evidence adduced by the Crown, who called no expert evidence at all in this regard. The jury convicted of murder. The question is whether such conviction is to be

regarded as safe.

2. This appeal, brought by leave of the single judge, thus throws up a problem of a kind which has been before the appeal court over the years on a number of different occasions. Those cases, however, were decided in the context of a defence of diminished responsibility under the former statutory provisions contained in s.2 of the Homicide Act 1957. The present case is, so far as the researches of counsel go, the first of this particular kind to come before the appellate court in the context of a defence of diminished responsibility under s.2 of the 1957 Act as amended by s.52 of the Coroners and Justice Act 2009.

3. At the conclusion of the hearing all three members of this court were of the view that the conviction for murder could not, in the particular circumstances of this case, stand and that a verdict of manslaughter should be substituted. The court so announced, giving directions as to the obtaining of further reports for the purposes of sentencing, which is to take place before this court in due course. It also said that it would provide its reasons in writing for its conclusion at a later date. These are those reasons.

The background facts

4. The appellant was born on 2 August 1990. He has had personality and mental health issues going back to his childhood. He was brought up by his mother as a single parent: he was to describe his relationship with her as a mother in the most positive of terms. He was, however, also to describe a childhood of no happiness and ongoing and repeated sexual abuse by another family member. At all events, the appellant had a history of mental and behavioural problems. He had great difficulties at school. He was small in stature and was bullied. He avoided large groups of people at school and preferred the company of girls. He frequently absconded both from home and from school. He experienced regular night terrors, then and as an adult. At the age of 18 he was sectioned and admitted to the Linden Centre psychiatric unit after taking an overdose: on release he was kept under review by a Crisis team. He had in fact had repeated contact with mental health professionals from around the age of 13. He had been diagnosed as suffering from a depressive disorder and had latterly been treated with anti-depressant medication and indeed was taking anti-depressants at the time of the killing. He had also been diagnosed as suffering body dysmorphic disorder by reason of his distress at (self-perceived) aspects of his physical appearance; and there had been incidents of self-harm, involving the use of a razor or knife. Latterly, he was also receiving medication for epileptic seizures. All this was fully documented or otherwise evidenced.

5. He was in due course to say that from around 2013 he was feeling increasingly depressed and unwell. In the months before the killing, he had given up his work as a part-time cleaner because of his feelings of stress. He sought to manage his feelings by resorting to alcohol, cannabis and cocaine. He was also to tell the experts – and as was amply corroborated – that he had (and over a long period of time) constant thoughts about Satanism and voodoo. He was obsessed with videos featuring ritualistic and satanic killings. There was also evidence that he had a keen interest in Hare Krishna.

6. Although he had preferred the company of girls at school, the appellant's sexual experiences had always been with other men. He was to tell the psychiatrists that his first serious sexual relationship was with a man aged 30, when he was 16. That lasted

some four years, although he had other relationships with men during that time. At the time of the killing he was in a relationship with a man called Nick Budge. They did not live together but he frequently stayed at Mr Budge's rented flat at 52A Moulsham Street, Chelmsford. He was later to say to the psychiatrists that his relationship with Mr Budge was good and involved no coercive or violent sexual activity.

7. From around the age of 18 the appellant had, with a view to making extra money, worked as a male escort, which frequently involved sexual relations with the male clients with whom he came into contact. One such client was the victim, Paul Simons, a man aged 53. The appellant had met him on four or five occasions before the killing had occurred, they having made initial contact through his internet male escort site. They had engaged in sexual activity on each of these occasions. He was to say that the victim had required him to engage in particularly degrading acts which he had greatly disliked, but the victim insisted and he needed the money. At various stages they would exchange text messages.

8. On 2 May 2013 Mr Budge went to France on a holiday. Unbeknown to him, the appellant had had a set of keys cut for his flat in Moulsham Street and so was able to gain access to it in Mr Budge's absence. That is what he did on the night of 3 May 2013.

9. On 3 May 2013, the appellant sent a text to the victim suggesting they meet. It was to be discovered that at around that time he had typed into his computer: "Hide in bedroom stab heart cut throat bang head cut solar then groin at mo of death Krishna rhade jaya jaganatha place body in pentagram".

10. The victim went to the flat, where the appellant already was (having used the duplicate set of keys to gain entry). This was at around 9.15 p.m. CCTV captured the arrival of the victim's car. Shortly after midnight the appellant left the flat and went to the local police station. He first rang 999 from outside. He then said to the police that he had murdered a man, explaining that he worked as an escort and had stabbed someone in the heart and back and slit his throat "after things started to get rough". At a later stage he told a police officer "I have killed someone. I hate men. They just do what they want".

11. The police went to the flat. The victim was found naked in the bedroom. He was dead. He had been the subject of a savage and sustained attack. He had been stabbed repeatedly, in the chest and also (and mainly) in the back. There were some 22 stab wounds, one of which had penetrated the heart to a depth of 15 cms: that particular wound was assessed as the probable cause of death. There were no signs of defence injuries. Three knives had been used; the blade of one of them was snapped. Two hammers were also found: one had been used and there were blows identified to the skull (probably inflicted after death). Also found in the room was a meat cleaver. There were noted parallel scratchings or scorings on the victim's back, inflicted by a knife. It was to be explained later by the appellant that these had been inflicted in order to release the victim's spirit into the after-life. Further, various symbols and writings had been written on the walls: these included pentagrams and references to Satan and to Krishna and to hell. In addition, a note headed "Chopin, Liszt" was found in the flat. On it, the appellant had, among other things, written – it is to be inferred as an aide-memoire for what he was going to do – "get nddy [Hindi for nude]. Makes one sit on right side of b. Kiss on top stab heart. Push really hard. Quick cut throat". It concluded "Chantras Krishna Rada".

12. There was evidence to the effect that after the killing the appellant had cleaned himself, put on new clothes and waited some time before going to the police station. He had also taken the victim's car keys and some cash from the flat, before, as was captured on CCTV, throwing the cash away in the street. He left a note on the door of the flat with a pentagram symbol and a message: "Do not enter, call 999 straight away".

13. Subsequent forensic examination did not establish any signs of sexual activity relating to the victim.

14. There were investigations at the appellant's family home. These revealed, in his bedroom, many pagan and other materials corresponding to those found and written at the flat in Moulsham Street.

15. The appellant had no previous convictions for offences of violence.

16. When interviewed in the presence of a solicitor and appropriate adult the appellant gave no answers to questions. The appellant (as was in evidence) told the appropriate adult, Mr Phillips, that he wanted a psychiatric assessment. Among other things he said that he had been having thoughts of killing people, in the sense of anyone, for the past couple of months. Mr Phillips, with the appellant's consent, told the police of all this.

17. In due course the sole defence advanced was diminished responsibility. It was not otherwise disputed that the appellant had deliberately killed the victim. On 22 July 2013 at Chelmsford Crown Court the appellant pleaded not guilty to murder but guilty of manslaughter. That plea was not accepted by the prosecution.

18. At the trial at Chelmsford Crown Court (before Judge Ball QC) an amount of unchallenged evidence was adduced by the prosecution, much of it being read or adduced as agreed facts. The evidence also included the oral evidence of the appellant's mother and of Mr Budge.

19. The mother described the very difficult and troubled childhood of the appellant. She was to say, however, that she had never known him to be violent: on the contrary, her fear had always been that he would be on the receiving end of violence. She was to explain that he had become obsessed with witchcraft and Hare Krishna. There had also been incidents of self-inflicted violence, including smashing his face with a rock, painting his face and cutting himself. There had been several attempts at suicide. She said that he kept asking for help but, in spite of medical interventions, his condition did not improve.

20. Mr Budge gave evidence about the keys and about his absence in France at the time. He explained that none of the knives, cleaver or hammers had been in the bedroom when he left his flat for France; and some of the items he did not recognise at all (the clear inference being that the appellant had brought them to the flat). He also gave evidence about a bag of cannabis, belonging to the appellant, found at the flat and about the presence of an empty bottle of port (full when he had left) and a bottle of vodka in the living room which was not his. He described the appellant, by reference to their relationship, as being more interested in risky sex than himself. He said that the

appellant had "a few problems" and very low self-esteem.

21. At trial the appellant did not give evidence himself. In due course, the judge gave an adverse inference direction to the jury. (In fact, his doing so, or at least his doing so in the terms that he did, has attracted a further ground of appeal.) The only evidence adduced by the defence was the expert evidence of a consultant forensic psychiatrist.

The expert evidence

22. The expert called by the defence was Dr. Gillian Mezey. She is a consultant and reader in forensic psychiatry based at St George's Hospital, London as well as at Springfield Hospital, London. She has held such post since 1991. She is s.12 approved. Her standing and expertise were obvious and were the subject of no challenge.

23. Dr Mezey prepared a detailed written report dated 12 July 2013. For this purpose she had, among other things, studied the statements then available and the full medical and psychiatric healthcare records of the appellant. She had had one lengthy interview with the appellant at HMP Chelmsford on 2 July 2013. Dr Mezey's oral evidence at trial was in accordance with her written report, supplemented in a number of respects.

24. The report summarised the background facts. It extensively reviewed the appellant's family and personal history, also recording at length the information provided to Dr Mezey by the appellant in interview. It recorded the appellant's use of alcohol and drugs. It contained a detailed section on the physical and mental health of the appellant and on his psychosexual history.

25. Dr Mezey's report also discussed at length the appellant's account of events leading up to the killing. He had said to her that he had been taking cannabis, cocaine and alcohol "almost continually" in the preceding 24 hours. He had spoken of the degrading episodes in his previous sexual encounters with the victim. He said that at the time when the victim arrived at the flat that night he knew he "had got to kill him". He spoke of putting a knife in the bedroom (without at that time mentioning any other knives or weapons). He described the two beginning to engage in sexual activity, with the victim "fisting" him. He described then stabbing the victim (saying he had only done so once to the chest) and then, when the victim was dead, scoring his back to "liberate [the victim] into the next world". He also described then showering, getting dressed, contemplating running away and thereafter scrawling the messages on the walls.

26. Overall, Dr Mezey concluded that the appellant's history and current presentation were consistent with Schizotypal Disorder and Emotionally Unstable Personality Disorder. On the issue of diminished responsibility, Dr Mezey among other things said this:

i) In her view, he was suffering from an abnormality of mental functioning that arose from Schizotypal Disorder and Emotionally Unstable Personality Disorder, both being recognised medical conditions.

ii) In her view, his mental disorder would have substantially impaired his ability to form a rational judgment and to exercise self-control at the relevant time; and, in

her view, that would have been a significant contributory factor in causing him to act in the way he did at the time.

27. Unsurprisingly, the Crown obtained its own expert opinion: from Dr Alan Smith, also a highly experienced and reputable consultant forensic psychiatrist. His report was dated 27 September 2013 and has been shown to this court. He too had studied the relevant records and had had a lengthy interview with the appellant. In the course of that interview, the appellant among other things told Dr Smith – as he had told Mr Phillips – that he had thoughts of killing someone (not necessarily Mr Simons) in the last two months. On the night in question he had stabbed the victim both in the front and in the back. He referred to having three knives, saying that he had brought them to the flat with him. He also referred to obtaining the two hammers from Mr Budge's toolbox. He explained that after the killing he decided to run away, taking all the money he could find and the victim's car keys, but then thought better of it. Dr Smith specifically agreed with Dr Mezey's diagnosis of abnormality of mental functioning in the form of Emotionally Unstable Personality Disorder and Schizotypal Disorder, which were recognised medical conditions. His assessment overall on the issue of diminished responsibility, although expressed in more qualified terms, was in line with that of Dr Mezey.

28. In the result Dr Smith was not called by the Crown to give evidence at the trial. His report was served as unused material. The defence did not seek to call Dr Smith.

29. We were not provided with a transcript of Dr Mezey's oral evidence at trial. It was, however, fully summed up by the trial judge. Miss Forshaw QC (who appeared for the appellant before us and at trial) estimated that her evidence-in-chief lasted for around two hours. Mr Jackson (who appeared for the Crown before us and at trial) cross-examined for, he estimated, no more than 45 minutes, perhaps less. Mr Jackson accepted that he had not been in a position to contradict Dr Mezey's evidence and indeed he frankly told us that he had not at trial sought to "challenge" it.

30. Dr Mezey made clear in her evidence-in-chief that the involvement of drink and drugs did not detract from her view on substantial impairment by reason of the abnormality of mental functioning. As she put it in her evidence-in-chief (as summed-up by the judge): "The drink and drugs inhibited him and made the killing easier, but the killing was driven by his mental disorder….The mental disorder was, I believe, a significant factor in causing him to kill".

31. She went on to say unequivocally, her stated reasoning being entirely in line with her written report, that the mental disorder would affect the appellant's ability to form rational judgments and would have a substantial impact upon that and upon his ability to exercise self-control. She made clear in her evidence-in-chief that the undoubted preparations and planning for the killing did not affect her diagnosis. She also stated in her evidence-in-chief that: "Core rationality is still retained by people with severe disorders…such people can present a facade of being entirely rational". She added, having further examined the appellant during the trial, that the appellant had an enduring disorder and long-term treatment would be needed.

32. The main focus of Mr Jackson's questioning, as we gathered, was to test Dr Mezey's evidence by asking her to comment on various factors (such as the obtaining of the keys, the presence of the three knives and the hammers and other items including the aide-

memoire – all indicative of a significant degree of pre-planning – and the subsequent conduct of the appellant after the killing but before going to the police station) which had not all been drawn to the attention of Dr Mezey by the appellant at the time of her initial interview with him. Mr Jackson did not further seek to challenge her answers when given to these additional points: and overall it is clear that these questions did not cause any modification to, or departure from, Dr Mezey's views.

33. In cross-examination Dr Mezey also said (as summarised in the summing-up) that she did not think the sexual activity with the victim was a "trigger" to the killing. She did not think that there was any trigger as such to the killing; rather it was a gradual build up. It had, as we have said, been suggested to her that the appellant's obtaining of the knives and hammers and so on and his subsequent conduct indicated planning and a capacity for rational thought. As to that she said, consistently with her evidence-in-chief: "The planning for the killing was a logical consequence of his illogical thought process. He has the illogical thought that he has to kill someone and then goes about planning it in a logical way…." The appellant was, she said, capable of setting up the situation to kill but that was not inconsistent with him experiencing profound mental health problems; he believed that killing was what he had to do. She said that "the planning was the product of his thoughts and his thoughts were the product of a disordered schizotypal mind". She repeated that in re-examination. She reiterated her opinion that his mental disorder was a significant contributory factor causing him to kill. His acts may have appeared to be controlled but were the product of an abnormal mind. She said that the appellant was "driven by an abnormal, out of control belief system at the point of killing".

34. We add that, at trial, it appears that there was no suggestion pursued with Dr Mezey that the appellant had been seeking to dupe Dr Mezey in what he had said to her. In fact she had in terms said in evidence-in-chief that she had gained no impression at all of faking or exaggeration on the part of the appellant. As we gather, Mr Jackson (no doubt mindful of Dr Smith's report and the other evidence) did not challenge that at trial.

The summing-up

35. No application was made to the judge at the close of the evidence that the charge of murder should be withdrawn from the jury.

36. The judge had conscientiously and rightly prepared written legal directions for the benefit of the jury and these, after being agreed with counsel, were duly placed before the jury and incorporated into the summing-up. The judge reviewed the evidence fully, including a detailed exposition of Dr Mezey's oral evidence, much of which he quoted direct. Indeed, he gave a repeated and expanded summary of her evidence after receiving a note from the jury, after they had retired, asking for copies of Dr Mezey's report.

37. The judge correctly directed the jury that the burden of establishing the defence of diminished responsibility rested on the defence. He pointed out that the appellant's mental condition and diagnosis were not in dispute. He also dealt with the meaning of the word "substantially" and went through the legal directions, supplementing them orally.

38. He then proceeded to direct the jury as to how they should approach the evidence of Dr Mezey. He said this:

> "Dr Mezey gave evidence before you that was uncontradicted by any other psychiatrist and, as you know, she is a psychiatrist of many years' standing and of some significant eminence. Her evidence is uncontradicted.
>
> But this case (and the issues in this case) are not decided by Dr Mezey. She is not returning a verdict. You are. Her evidence is given to you to assist you in areas where you can't be expected to have detailed knowledge or experience. She is an expert in identifying and diagnosing and treating psychiatric conditions. She has been doing so for 23 plus years now. You have to consider her evidence, weigh it, examine it in the context of all the other evidence in the case."

He then went on to say this (at page 13 of the transcript):

> "You are entitled to say, having regard to her evidence and expertise, that despite that, when you take all of the other material into account, you are not persuaded that Mr Brennan was substantially impaired. Focusing again on that word 'substantially', that is a matter of judgment and degree, isn't it? You might not consider or be persuaded that he was substantially impaired perhaps because there are significant aspects of his life in which he was able to conduct himself logically, coherently, normally, and so you might judge – I am not saying you should, and it is entirely a matter for you – but you don't have to buy into Dr Mezey's conclusions in their entirety to the degree that she suggests is appropriate. You might place greater weight on his ability to conduct his life in many regards coherently and normally. That is a matter for you, and no one else. But, plainly, you do not lightly disregard the conclusions of a highly qualified expert, as she undoubtedly is."

39. He then gave entirely appropriate directions on the relevance of drink and drugs, pointing out, very properly, that even if drink and drugs had a part to play still the question had to be asked whether the abnormality of mental functioning substantially impaired the appellant's "responsibility" (in the judge's word) for the fatal act. As we have said, he also, in his review of the evidence, incorporated an adverse inference direction by reason of the appellant having elected not to give evidence at trial.

40. The jury, on 3 December 2013, returned (by a majority) a verdict of guilty on the count of murder.

The submissions

41. Miss Forshaw criticised the continuation of the prosecution on the murder charge. She went on to submit that, even though she had made no application herself to the judge at

the close of the evidence, the judge should at that stage have withdrawn the case from the jury and directed an acquittal on the charge of murder. At all events, she said, the jury's verdict was not safe. She said that it could not logically be justified, and must have been driven by the jury's feelings of abhorrence given the brutality of the killing. Dr Mezey's evidence had not been contradicted nor had it been substantively challenged, even if her actual reasoning had been tested by some further questioning. Miss Forshaw was particularly critical of the judge's directions to the jury as recorded in page 13 of the transcript. She says that these were in effect an invitation to the jury to substitute personal opinions, in a potentially highly charged and emotive case of a savage homicide, on what was a matter of psychiatric evaluation. She pointed out that Dr Mezey had, as she was qualified to do, explained from the psychiatric viewpoint, and without contradiction, that people like the appellant could indeed make rational decisions and present a normal facade whilst suffering mental abnormality capable of substantially impairing their ability to form rational judgments or to exercise self-control. She submitted this was not an issue in which, as it were, the jury's "collective experience of the world" could, contrary to the judge's invitation, properly be brought to bear. She emphasised that the Crown had adduced no expert evidence itself in that regard or in any regard.

42. Mr Jackson maintained that the murder count was properly pursued by the Crown and left to the jury; and that the verdict was one properly open to them. He also emphasised that some of the matters relating to the extent of the planning, the deviousness (for example relating to the keys) and so on had not been made known to Dr Mezey at the time of the initial interview: albeit he accepted that he did not challenge further Dr Mezey's answers when such matters were put to her in oral evidence. He observed that there was evidence that elsewhere the appellant in other aspects of his life was apparently able to form rational thoughts. He said, in sum, that there were facts and circumstances present in the case over and above the psychiatric evidence which, notwithstanding the absence of any rebutting psychiatric evidence from the prosecution, entitled the jury to reject Dr Mezey's expert opinion and to convict of murder.

The legal principles and authorities

43. The problem that a case of this kind throws up derives from the fact that there are two relevant but potentially conflicting principles that are brought into play. The first principle is the general principle that in criminal trials cases are decided by juries, not by experts. Indeed experts are permitted by reason of their expertise to express *opinions* by way of evidence: but cases ultimately fall to be decided by juries, and they decide on the *entirety* of the evidence. The second principle, however, is that juries must base their conclusions on the *evidence*. That fundamental principle finds reflection, for example, in directions conventionally given to juries not to speculate and not to allow their views to be swayed by feelings of distaste or emotion.

44. There can, as we see it, be no room for departure from so fundamental a principle as the second principle. It reflects the very essence of the jury system and of a just and fair trial. But the first principle, whilst most important and undoubtedly descriptive of the general position, is also capable, as it seems to us, of admitting of degree of qualification in a suitably exceptional case. Clearly no difficulty arises (normally) where there is a dispute as to the expert evidence. The jury decides. But suppose, for example, a matter arises falling exclusively within the domain of scientific expertise; suppose, too, that all the well qualified experts instructed on that particular matter are agreed as to the correct

conclusion and no challenge is made to such conclusion. Can it really be said that the jury nevertheless can properly depart from the experts as to that conclusion on that particular matter: simply on the basis that it is to be said, by way of mantra, that the ultimate conclusion is always for the jury? We would suggest not. Where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so.

45. In the Bench Book previously issued by the Judicial Studies Board, the specimen direction then published with regard to expert evidence suggested, among other things, that juries were not bound to accept an expert witness's opinion – of itself, a correct and wholly unexceptional proposition – and were free to reject it: even if it was agreed or unchallenged evidence. This latter part may be queried; at all events as an unqualified general proposition. In our view, the position is more accurately stated in the standard directions in the Crown Court Bench Book subsequently issued by the Judicial Studies Board in 2010. That suggests a direction of this kind (after the usual directions and appropriate stress on the need for a jury to consider all the evidence) where the expert evidence on a particular topic is agreed:

> "Where, as here, there is no dispute about findings made by an expert you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason to reject them."

In our view, if we may respectfully say so, that is altogether a more acceptable approach. It is the more acceptable because it acknowledges that if unchallenged expert evidence on a particular point calling for such expertise is to be rejected by a jury then it must be rejected for *reason*.

46. In our view this kind of reconciliation between the two principles finds reflection, even if perhaps not always entirely uniformly, in the authorities.

47. That juries are not bound uncritically to accept unchallenged expert evidence is illustrated by cases such as *Lanfear* (1968) CAR 176. That juries are not free, on the other hand, uncritically to reject unchallenged expert evidence on a matter calling for scientific expertise is illustrated by cases such as *Anderson v The Queen* [1972] AC 100. The present case, in the event, falls to be decided in the particular context of uncontradicted and substantively unchallenged expert evidence where the issue is one of diminished responsibility. There are relevant authorities in this particular context.

48. However, before referring further to certain of these authorities we think it important to draw attention to the significant differences between the statutory provisions as contained in s.2 of the 1957 Act and the statutory provisions contained in s.2 after its amendment by s.52 of the 2009 Act. The original version is in these terms (in the relevant respects):

> "2. Persons suffering from diminished responsibility.
>
> (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or

injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

As amended, it is in these terms:

> "(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes or is a significant contributory factor in causing D to carry out that conduct."

49. The original provisions of the 1957 Act are broadly phrased and rather more obviously couched in terms of a value judgment, by the references to *substantial* impairment of mental *responsibility*. But the provisions as substituted by the 2009 Act are altogether more tightly structured: for example by removing the (undefined) reference to mental responsibility, even while retaining the concept of substantial impairment. As stated by Lord Judge LCJ in *Brown* [2012] 2 CAR(S) 27 (at paragraph 23 of the judgment) it appears that one purpose of the amendments was to ensure "a greater equilibrium between the law and medical science". The new wording gives significantly more scope to the importance of expert psychiatric evidence. This is a point well made by Professor David Ormerod QC in his most valuable paper on diminished responsibility dated June 2014 as published on the Judicial College website (to which counsel drew our attention and from which we would like to say we have generally derived considerable assistance).

50. That this is so is borne out by consideration of the actual provisions of the amended section. There are essentially four stages:

i) Was the defendant suffering from an abnormality of mental functioning? If so:

ii) Did it arise from a recognised medical condition? If so:

iii) Did it substantially impair the defendant's ability *either* to understand the nature of his conduct *or* to form a rational judgment *or* to exercise self-control (or any combination)? If so:

iv) Did it provide an explanation for the defendant's conduct?

51. The third stage involves, as did the former version of the section, reference to "substantial impairment". That does, we accept, involve a degree of evaluation potentially indicative of being a jury question (what the phrase actually connotes has recently been the subject of further discussion by a constitution of this court in *Golds* [2014] EWCA Crim 748). But overall the provisions of s.2 as amended are altogether significantly more structured than the former provisions, in particular by reference to "substantial impairment of mental responsibility" as contained in the original version of s.2 of the 1957 Act. As we see it, most, if not all, of the aspects of the new provisions relate entirely to psychiatric matters. In our view it is both legitimate and helpful, given the structure of the new provisions, for an expert psychiatrist to include in his or her evidence a view on all four stages, including a view as to whether there was substantial impairment. As Professor Ormerod explains in his paper: "Since the question of whether there is impairment of ability is a purely psychiatric question, it would also seem appropriate for the expert to offer an opinion on whether there is 'substantial' impairment". We agree. Moreover where the expert is able to and does express a view on all four matters we can see no legal or other objection to such expert, if willing and prepared to do so (as here), making explicit in evidence his or her opinion on what is called the "ultimate issue": the more so when such view will in any event probably have been implicit from his or her stated opinion on the four matters. It is difficult to see how the expression by an expert of such a view in a given case could contravene any principle of deference to the jury as the ultimate decision makers.

52. We turn, then, to the authorities. We think it necessary to refer to rather more than were actually cited to us.

53. In *Matheson* (1958) 42 CAR 145, the issue was diminished responsibility under the unamended version of s.2. All three medical experts called by the defence gave opinions in support of such defence. The evidence was not contradicted by any expert evidence called by the prosecution. The medical evidence was to the effect that the adult defendant had the intellect of a child and had a psychopathic personality. The victim was a 15 year old boy in a sexual relationship (for money) with the defendant. The killing was particularly brutal. After arrest, it may be noted, the defendant said that he had killed the boy as he knew he had just got his wages: indeed he was convicted of capital murder and sentenced to death on the footing that the murder was in furtherance of theft. On appeal, the defence argued that, in the light of the uncontradicted expert evidence, the jury must have allowed themselves to be influenced in their verdict by the appalling nature of the crime. The Crown argued (p.148) that taking into account the medical evidence "and taking into account the nature of the circumstances of the crime as a whole" the jury were entitled to reject the defence of diminished responsibility.

54. The conviction for murder was set aside and a verdict of manslaughter substituted. Lord Goddard LCJ, giving the judgment of the (five judge) court, said this at p.151:

> "While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court

> would not, and indeed could not, disturb their verdict, but if the doctors' evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence'."

He went on to say (and this has resonance with the present case):

> "Here it is said there was evidence of premeditation and undoubtedly there was, but an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do."

And at p.152, having indicated that the murder verdict could not be sustained, he said:

> "This decision, therefore, in no way departs from what has been said in other cases that the decision is for the jury and not for the doctors; it only emphasises that a verdict must be supported by evidence. If there is evidence and a proper direction, this court will not usurp the function of the jury, unless indeed there is evidence so overwhelming that the court comes to the conclusion that, though it might be said there was some evidence the other way, the verdict would amount to a miscarriage of justice. We base our decision on the ground that the evidence in this particular case did not support the conviction. But we recognise that there may be cases where, on the issue under section 2 of the Homicide Act 1957, evidence of the conduct of the accused before, at the time of and after the killing may be relevant considerations for the jury in determining whether the accused has discharged the onus of proving such abnormality of mind as substantially to impair his mental responsibility for his acts."

These remarks, we observe, connote that even where there is "some evidence the other way", still there may be instances where a jury may not safely or properly convict of murder. Indeed *Matheson* itself is to be taken as such a case.

55. *Byrne* (1960) 44 CAR 246 was a case where the experts were agreed that the defendant was a sexual psychopath: but were also agreed that, save when under the influence of his perverted sexual desires, he might behave normally. On appeal, a verdict of manslaughter was substituted for a verdict of murder (there having been misdirections in the trial judge's summing-up). The court said that the evidence was "all one way". The court emphasised that the crucial question was whether the abnormality of mind was such as substantially to impair the defendant's mental responsibility for the act. It was said (at p.253) by Lord Parker LCJ, giving the judgment of the court, with regard to abnormality of mind:

> "Whether the accused was at the time of the killing suffering from any 'abnormality of mind' in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is, no doubt, of importance, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there is other

> material before them which, in their good judgment, conflicts with it and outweighs it."

A little later on, he said as to "substantial impairment":

> "This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant but the question involves a decision not merely whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called 'substantial', a matter upon which juries may quite legitimately differ from doctors."

56. This last passage does not mean that in all cases where diminished responsibility is the issue a verdict of murder from the jury, when properly directed in a summing-up, is necessarily required to be accepted as safe. This is borne out by the case of *Bailey* (1978) 66 CAR 31. It was there expressly said that nothing in *Byrne* threw any doubt on the decision in *Matheson*. In *Bailey*, the expert evidence adduced by the defence in favour of diminished responsibility was uncontradicted by any evidence called by the Crown, although it appears from the judgment (p.31) that the defence expert witnesses had been "tested" at trial by leading counsel for the Crown as to their reasons for those conclusions. Among other things, Lord Widgery LCJ, giving the judgment of the court, said (at p.32) this:

> "This court has said on many occasions that of course juries are not bound by what the medical witnesses say, but at the same time they must act on evidence, and if there is nothing before them, no facts and no circumstances shown before them which throw doubt on the medical evidence, then that is all that they are left with, and the jury, in those circumstances, must accept it."

57. There was a different outcome in the case of *Walton v The Queen* [1978] AC 788 – a case in which, we note, the line of authorities reflected in decisions such as *Anderson* was not cited. In that case, there was uncontradicted medical evidence to the effect that the defendant was suffering from diminished responsibility. The Privy Council nevertheless rejected an appeal against a conviction for murder. It was stated (at p.793) by Lord Keith (giving the opinion of the Privy Council) after referring to various authorities:

> "These cases make clear that upon an issue of diminished responsibility the jury are entitled, and indeed bound, to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case… It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence."

Two points may be noted on that particular decision. First, the medical evidence adduced in that case was of a kind and from sources that could, as it was said at p.793, be regarded as "not entirely convincing". Second, Lord Keith was, it may be observed, careful to record that it was recognised that the jury "on occasion may properly refuse" to accept medical evidence – no entirely unqualified right on the part of the jury so to

refuse was acknowledged.

58. That was also the outcome in the case of *Eifinger* [2001] EWCA Crim 1855. In that case, on its facts, the court emphasised that the views of the doctors opining in favour of diminished responsibility were, as they agreed, entirely based on the defendant's uncorroborated statements made to those doctors as to his personal background (the jury, indeed, had sent a note asking why there was no evidence from Germany, where the defendant had been brought up). Further, the circumstances of the killing, in respect of which the experts had also based their opinions on the defendant's uncorroborated statements to them, also were very much in issue.

59. We think, trying to draw the various threads together, that the position arising where there is uncontradicted and unchallenged evidence of diminished responsibility finds a convenient, if broad, summation in the decision of a constitution of this court in *Sanders* (1991) 93 CAR 245. There the expert evidence called by the defence in favour of diminished responsibility again was uncontradicted. The conviction for murder was nevertheless upheld on the facts of that case. In giving the judgment of the court, and after reviewing a number of the authorities, Watkins LJ (at p.249) had said this of the applicable principles:

> "The first is that if there are no other circumstances to consider, unequivocal, uncontradicted medical evidence favourable to a defendant should be accepted by a jury and they should be so directed. The second is that where there are other circumstances to be considered the medical evidence, though it be unequivocal and uncontradicted, must be assessed in the light of the other circumstances."

60. We were referred to the more recent decision of a constitution of this court in the case of *Khan (Dawood)* [2010] 1 CAR 4, also a case of diminished responsibility. There too no medical evidence had been adduced by the Crown to contradict the evidence of the defence expert to the effect that the defendant met the criteria for diminished responsibility. It has to be said, however, that the case was a remarkable one on the facts: for there the defendant was both advancing a defence that he had not killed the victim at all (raising a defence of alibi) and simultaneously advancing a defence of diminished responsibility. He also gave evidence himself at trial, his credibility of course being very much in issue in those circumstances.

61. The court in *Khan* was prepared to accept that in principle a judge would, where the defence of diminished responsibility was raised by the defence but contested by the Crown, be entitled to withdraw the charge of murder from the jury at the close of the evidence: albeit the court indicated that those would be "very exceptional" or "very rare" cases (see paragraph 42 of the judgment delivered by Aikens LJ). However it was held, on the facts, that the case was not one in that category: there were "serious issues of fact for the jury to consider" which suggested that the appellant comprehended what he was doing in attacking the victim and that he had power to exercise control over his actions. It seems to us that, on the particular facts of that case, the court was applying the principles set out in *Sanders*.

62. We finally, in this review of the authorities, would refer to the unreported decision of a constitution of this court in *Pearce* [2000] WL 281235 to which Miss Forshaw drew our

attention. It is, we think, of some importance, although not cited in *Khan*. There, diminished responsibility was the only issue. Two expert consultant psychiatrists gave unequivocal evidence in support of such defence. The Crown adduced no expert evidence. The facts, as revealed in the judgment, were capable of indicating prior feelings of jealousy and revenge on the part of the defendant. They also indicated that the defendant had, after the killing, initially suppressed the true nature of the violence he had used and told lies in interview. He further had failed to summons the emergency services after the killing. There was also evidence that the defendant had appeared to family and friends to be "normal" prior to the killing, albeit the uncontradicted expert evidence – rather as in the instant case – was that the psychiatric state of the defendant was such that he could well have come across as being normal whilst in fact being seriously mentally ill. All these factual circumstances, at all events, were addressed by the defence psychiatrists in the course of their evidence.

63. The trial judge in *Pearce* had, among other things, included this passage in the summing-up on mental abnormality (and before turning to substantial impairment):

> "The doctors are there to help you. They are not there to decide the case themselves. But you, of course, have to act on the evidence and not act capriciously. If you believe that there is nothing which throws such doubt on the psychiatric evidence as to lead you to say: 'Well, we think they're probably wrong', then you should act on what they say about the defendant's mental abnormality."

That passage, in our view, was a wise and proper direction: albeit, and notwithstanding a summing-up generally sympathetic to the defence, the jury convicted of murder. At all events, Swinton Thomas LJ, giving the judgment of the court in quashing the conviction for murder and substituting a conviction for manslaughter, among other things said this:

> "26. It is, as we have indicated, submitted by [counsel] for the Crown that there was in this case other evidence apart from that of the psychiatrists upon which the jury could reject the defence of diminished responsibility. He relies upon the nature, extent and duration of the attack and the injuries suffered by the deceased. He relies on lies told by the appellant at interview, on evidence from witnesses as to the behaviour of the appellant prior to the killing and the evidence of the doctors who saw him at the police station. [Counsel for the prosecution] submits that the evidence of the doctors is not conclusive and the jury heard and saw all the other witnesses.
>
> 27. This case is, in our judgment, somewhat exceptional. Although the judge made it clear to the jury that there was no evidence to contradict the medical evidence given by the defence, there was in our judgment no evidence which could possibly justify a jury in coming to a conclusion other than that his responsibility for his actions in killing the deceased was substantially diminished. The matters relied on by [counsel for the prosecution] were considered by the psychiatrists who gave evidence and none of them, either singly or collectively, are inconsistent with the responsibility of this accused for his actions at the material time being substantially diminished. In our view

> the judge should, perhaps with hindsight, have so directed the jury.
>
> 28. Be that as it may, on the totality of the evidence in the case we are satisfied that that was the only proper verdict for this jury to reach on the evidence and that the verdict of guilty of the murder is one which is unsafe. Accordingly, we quash that verdict and in its place we substitute a verdict of guilty of manslaughter."

It seems to us that that approach must have relevance to the appeal before us. Indeed, if the arguments of Mr Jackson are right it is rather difficult to see how the court in *Pearce* could have approached matters or reached its conclusion as it did.

Withdrawal from the jury

64. We respectfully agree with the statement in *Khan* that the court does have power to withdraw a charge of murder from the jury, in such a context, at the close of the evidence. That is a reflection of *Galbraith* principles (see *Galbraith* (1981) 73 CAR 124): which principles are themselves, in one sense, an application of the fundamental principle that juries may only properly convict on evidence capable of justifying a conviction and a qualification of any asserted general principle that all criminal trials must be left to be decided by a verdict of the jury.

65. In his paper, Professor Ormerod, after reviewing the amended provisions of s.2, considers this issue in the section headed "How much work is left to the jury?". He offers as a concluding remark:

> "Looking closely at the cases from *Matheson* to *Khan*, it is possible to argue that it is *only* [our italics] where the medical evidence supporting the defence is uncontradicted *and* there is no other evidence rebutting diminished responsibility that murder ought to be withdrawn from the jury."

We certainly would agree that where that is the scenario then murder should be withdrawn from the jury. But, with respect, we are not inclined to agree with the (tentative) suggestion that withdrawal should be confined *solely* to that scenario. That, in our view, would be too prescriptive. What if there is *some* other evidence? That other evidence (which no doubt will comprehend "the other facts and circumstances" referred to in various of the authorities) must, as we think, be evidence which, looked at in the round, is at least capable of rebutting the defence. So to say is not, we think, to permit an otherwise impermissible judicial encroachment on the proper functions of the jury nor unduly to encroach on the burden of proof placed on the defence. Rather, it is to acknowledge that there may be cases where the "other evidence" is, for example, too tenuous or, taken at its highest, insufficient (set in the light of the uncontradicted expert evidence) to permit a rational rejection of the defence of diminished responsibility. Such an approach is, we think, consistent both with the approach taken and with the ultimate conclusions reached in cases such as *Matheson, Bailey* and *Pearce*.

66. It is therefore, in a diminished responsibility case where the expert evidence is

uncontradicted, to be left to the evaluation by the trial judge of all the circumstances of the case, where an application to withdraw the case of murder is made at the close of evidence. The judge will assess the position in the light of the uncontradicted expert evidence and in the light of any other evidence. It at all events seems unprincipled in cases of this type, where an application to withdraw is made, that murder should be left to the jury simply and solely because the prosecution wants it to be. A charge of murder should not be left to the jury if the trial judge's considered view is that on the evidence taken as a whole no properly directed jury could properly convict of murder.

67. It may well be the position, as said in *Khan*, that the exercise of this power to withdraw in a case of this kind will only be in exceptional circumstances (in saying that we do not ourselves intend to indicate any legal test of exceptionality: rather it is simply a description of the likely position). Each case, ultimately, must be decided on its own facts and circumstances. We add, however, that in the light of the new provisions of s.2 as amended, with its significantly different structure and effect, pursuit by the prosecution of a charge of murder in the face of a defence of diminished responsibility which is unequivocally supported by reputable expert evidence but which is not contradicted by any prosecution expert evidence should, we venture to suggest, become relatively uncommon. There may, of course, be cases where the defence expert evidence is tentative or qualified. Possibly too there may be cases where substantial inroads can be made into the defence expert psychiatric evidence by cross-examination, even in the absence of expert evidence adduced by the Crown. Otherwise, if there is reason to think that the opinion of the defence psychiatric expert(s) supporting a defence of diminished responsibility is or may be wrong in its conclusions or wrongly premised or inadequately reasoned or inadequately related to the facts or otherwise suspect then it is surely not unreasonable (at all events in most of such cases) to expect the Crown to adduce its own expert evidence in order properly to make such points for the jury's evaluation. Accordingly, where the Crown proposes to contest a defence of diminished responsibility the new provisions set out in s.2 as amended should be taken as an encouragement for the Crown to adduce its own expert evidence to support its stance.

68. We also add that if in any particular case there are other facts or circumstances which might cast a different light on otherwise uncontradicted defence expert medical evidence on diminished responsibility and the matter is to be left to the jury, one would expect those facts and circumstances to be highlighted by prosecuting counsel in discussion with the judge prior to closing speeches and in due course specifically identified to the jury by the judge in the summing-up: as capable of providing a rational basis on which the jury could decline to accept the expert evidence called by the defence if that evidence has not otherwise been contradicted or doubted by any expert evidence called by the Crown.

Conclusion

69. As we have said, no application for the charge of murder to be withdrawn was made to the judge at the close of the evidence. But applying the approach to be gathered from the authorities, and placing it also in the context of s.2 as now amended by the 2009 Act, we were and are of the view, given the particular circumstances of this case, that the conviction for murder in the instant case was not safe and must be quashed.

70. In the present case, the surrounding circumstances were, it would appear, ultimately not in real dispute at trial. We asked Mr Jackson to identify the matters ("other circumstances") which he nevertheless said might be capable of displacing the uncontradicted opinion of Dr Mezey. He relied, as we have already indicated, upon the admitted evidence of planning and pre-meditation (not all of which, he pointed out, had been fully placed before Dr Mezey in the initial interview); the admitted deviousness of the appellant in securing the keys to the flat; and his admitted behaviour after the killing, both in cleaning up and then stealing items with a view to escaping before changing his mind and going to the police. But, as we have also indicated, all these matters were in terms addressed by Dr Mezey in the course of her evidence (just as corresponding points had been addressed by the experts in their evidence in *Pearce*). Dr Mezey had explained unequivocally and rationally why in her opinion they did not displace the defence of diminished responsibility. And, to repeat, no expert was called by the Crown to say to the jury that such matters might not be consistent with diminished responsibility under s. 2 as amended by the 2009 Act.

71. It is also a point of comment that the judge did not himself in his summing-up really identify to the jury matters which could constitute circumstances casting a different light on the uncontradicted evidence of Dr Mezey or giving rise to a basis whereby the jury could rationally refuse to accept her opinion. As to the above cited passage at page 13 of the summing-up, in which the judge told the jury that they did not need to "buy into" Dr Mezey's conclusions in their entirety, we think that there is force in Miss Forshaw's complaints. For instance, to suggest to the jury that they might place greater weight on the appellant's ability to conduct his life in many respects coherently and normally seems to us to be close to an invitation to the jury, as lay people, to enter into an essentially psychiatric domain where Dr Mezey, as a qualified expert, had provided a clear and uncontradicted and unchallenged expert explanation directed to that very point.

72. We do not propose to say more. Overall, in our judgment this case falls within the ambit of decisions such as *Matheson, Bailey* and *Pearce*: and the more so, if anything, given that the case falls to be determined by reference to s.2 as now amended by the 2009 Act. Accordingly, the appeal has to be allowed and a verdict of manslaughter substituted.

Other matters

73. That conclusion makes it unnecessary to deal with Miss Forshaw's two other grounds of appeal which related, first, to the adequacy of certain aspects of the summing-up on diminished responsibility and, second, to the judge's giving an adverse inference direction, or at all events one in the terms which he did, by reason of the appellant not giving evidence at trial. It also becomes unnecessary to comment on the minimum term of 22 years set by the judge in sentencing the appellant, in respect of which leave to appeal had also been granted by the single judge.

74. When we announced our decision at the conclusion of the hearing, we gave directions for the obtaining of reports from two appropriately qualified expert psychiatrists, as well as an updated prison report, with a view to assessing further the issue of dangerousness and receiving recommendations as to the ultimate disposal. The court must at this stage have in mind the possibility of a life sentence; a hospital and restriction order; a hybrid order; or such other sentence as may be appropriate. A further hearing is to be convened

before this court for sentencing purposes once this information has been obtained.