[2012] UKPC 15
Privy Council Appeal No 0109 of 2009

JUDGMENT

Marcus Jason Daniel (Appellant) *v* The State (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Clarke
Lord Dyson
Lord Sumption
Lord Reed

JUDGMENT DELIVERED BY LORD DYSON ON

23 May 2012

Heard on 8 March 2012

Appellant
Julian Knowles QC
Ms Michelle Butler

(Instructed by Simons Muirhead & Burton Solicitors)

Respondent
Peter Knox QC
Aidan Casey

(Instructed by Charles Russell LLP)

LORD DYSON:

1. On 14 December 2005, the appellant was convicted at the Port of Spain Assizes of the murder of his 16 year old cousin, Suzette Gibson, on 23 January 2002. He was 25 years of age at the date of the offence and was sentenced to death. He was a man of previous good character. His co-accused, Osei, who was only 17 years of age at the time of the offence, was sentenced to detention at the Court's pleasure. The appellant's appeal against conviction was dismissed by the Court of Appeal of Trinidad and Tobago (Hamel-Smith CH(Ag), John and Weekes JJA). His case is that his conviction is unsafe because fresh evidence from three expert witnesses (Professor Eastman, Dr Green and Dr Gray) (i) demonstrates that the defence of diminished responsibility was open to him at the trial and should have been (but was not) deployed before the jury and (ii) casts doubt on the voluntariness and therefore the admissibility of the statement that he made to the police under caution. The submissions addressed to the Board have been mainly directed to the diminished responsibility issue.

2. The principal evidence for the prosecution was contained in the appellant's statement in which he admitted the killing. The facts according to this statement were as follows. On Tuesday 22 January 2002, he had arranged with Suzette to take her for a drive at 7.30 pm on the following day before she went to her dance class. At 6.30 pm on 23 January, he borrowed a car from Sheldon Linton. He had spent much of the afternoon drinking black label rum and playing rock music. He picked up Suzette and his friend Osei and they drove off to Blue Basin, a place which had no street lights or houses nearby. They stopped and the appellant continued drinking and "getting into rock music". He started touching Suzette. She pushed his hand away. At this point, the "demon thing" rose up inside him and he choked her for about one and a half minutes. He then let go and Osei also choked her. The two of them pulled her out of the back door of the car. He blocked her mouth and slit her throat. She fell to the ground, whereupon he stabbed her in the chest and stomach and pushed her into a drain before slitting the fingers of his right hand. He and Osei then drove off. At about 9 pm, they returned the car to Sheldon Linton and went home. Suzette had been expected home at 9.15 pm. When she did not return, her father went off in search of her. He went to the appellant's father's house where he saw the appellant and Osei. The appellant told him that he had seen Suzette at about 3 pm that afternoon and that later he had gone to look for her without success. He explained the bandages on his fingers by saying that he had been attacked in a fight in a phone booth. The appellant agreed to lend Mr Gibson his car and, with Osei, to help him look for Suzette.

3. At 12.45 am the following morning (Thursday, 24 January), the three of them drove to the West End Police Station where Mr Gibson reported the disappearance of

his daughter. They then continued their search for a while. In the meantime, Sheldon Linton had taken the car that he had lent the appellant to the police station because he had noticed what looked like blood stains in it.

4. The appellant and Osei later returned to the police station. Sergeant Ollivierre questioned Osei on his own. Osei told the officer that it was the appellant alone "who kill the girl" and offered to take the police to her body saying "Is Marcus who take a knife and slit she throat". He took the police to the place where Suzette's body was lying and then to Brunton Avenue where he said that he had thrown the two knives (one of which he said the appellant had used to kill Suzette, the other of which was his own). The knives were about 10 to 12 inches long. Osei then took the police to the appellant's father's house and pointed to an area in front of the house where he had seen the appellant bury some items which belonged to Suzette.

5. In the evening of 24 January, Sergeant Ollivierre took a statement from the appellant under caution. The interview started at 10.50 pm. At 11.34 pm, Sergeant Ollivierre was told that the appellant's mother had arrived and wanted to be present during the taking of the statement. She was taken to see the appellant and offered him food and clothing. But he told her that he did not want anything to eat and did not want her to be present for his statement. He resumed making his statement and finished at 12.35 am the following morning. The gist of what he said has already been summarised above.

6. At 9.15 am on 25 January, a post mortem was carried out on Suzette's body. This revealed a 7.5 cm incised slash on the front of the neck which cut through the windpipe, the thyroid gland and the major blood vessels; multiple stab wounds and bruises from the face and down the upper part of the body; and multiple incised wounds of the hands and right wrist consistent with defensive wounds. These multiple stab and incised wounds were the cause of death.

7. On 26 January, the appellant and Osei were charged with murder. At the trial, the appellant's attorney, Miss Elder QC elicited from prosecution witnesses that the appellant had enjoyed a close friendship with Suzette. It was not suggested by anybody that the friendship was other than platonic. The appellant elected to give evidence. He said that he had a very close platonic relationship with Suzette. He did not intend to kill her. He told the police that "it was a demon inside my head". He said: "I did not know what I was doing. I was seeing a dark object in front of me and I did not know what it was. I was not seeing or hearing Suzette in front of me". He did not know that he was stabbing Suzette. He had smoked "Blacks" during the afternoon of 23 January. Blacks are marijuana cigarettes rolled with crack cocaine. He had never smoked them before. He was "very high" on drink and drugs. When Suzette started pushing his hand away and slapping him, he did not become annoyed, but it was at that moment that "the demon thing raise in me". He had not mentioned Blacks

in his statement to the police, because he did not want them to ask questions about it. He had not mentioned a dark object to them, but he did see a "dark object" that night and the dark object was the demon. He said that he did not tell Suzette's father what had happened to his daughter and drove around with him looking for her because he was "too scared and confused at the time". This was also the reason why he picked up his knife and cut himself on seeing Suzette's lifeless body on the ground.

8. Such were the concerns about the state of the appellant's mental health following the killing that he was remanded by the Magistrates' Court to St Ann's hospital at his first court post-charge appearance on 28 January 2002. He spent two months being treated there.

9. The issue for the jury at the trial was whether the appellant had the necessary intention for murder. His defence was that he did not because he was so intoxicated by drink, drugs and heavy rock music that he did not know what he was doing. There is no criticism of the judge's summing up.

Consideration of diminished responsibility pre-trial

10. The issue of diminished responsibility had been considered by those advising the appellant during the course of the preparation of his defence. Several psychiatric reports had been obtained from two Trinidad-based consultant psychiatrists. Dr Ghany's first report is dated 14 February 2002 and was based on an interview on 30 January 2002. Dr Ghany concluded that the appellant was fit for trial as he was "not mentally ill but has a personality disorder with ... psychopathic features", including the "inability to form normal relations with women, fantasies of sexual violence, a desire to dominate the victim, lack of remorse for inflicting pain on her and perhaps getting some measure of extreme power and sexual satisfaction from inflicting pain injury on her." He concluded that these features were "atypical of the sa[d]istic murderer. His sa[d]istic tendencies were reinforced by drinking and listening to satanic music". On 20 March 2002, Dr Ghany wrote a second report in which he suggested that the appellant was now "malingering". He noted that the appellant said that he could not get rid of the rock music in his head. He had been observed closely on the hospital ward and was seen talking normally to staff and patients. He had been assessed by the full team and his behaviour was considered to be "psychogenic" in origin.

11. On 5 December 2003, the appellant was seen by Dr Hutchinson to whom he gave a somewhat different account of the killing. He said that, on arriving at Blue Basin, he took a drug called THC. He had never taken this drug before. He said that he went into a "kind of semi-conscious state". He saw threatening shadows moving toward him. His brain was pounding and "going to explode". When he came out of

this state (which lasted for about 15-20 minutes), he found his cousin lying dead on the ground with her throat slit. Dr Hutchinson concluded that (i) this suggested a THC induced dissociative phenomenon in which, in a state of high sensory stimulation, the brain dissociates the conscious experience of the event from the affective or emotional response; (ii) while there were antisocial traits, it seemed more likely that he had a borderline personality disorder; (iii) antisocial personality disorder was unlikely because the appellant's behaviour did not deliberately set out to cross the boundaries of social and moral norms and he genuinely regretted what had happened to his cousin; (iv) the appellant's inability to explain his love for substance abuse and the excesses of rock life suggested that they served a vital purpose in maintaining his mental and social stability, such that he required long term and intense psychotherapy; (v) the circumstances surrounding the killing seemed to be related to the use of a drug and its effects on his behaviour which had to be seen in the context of an already suggestible mind that was intoxicated from the ingestion of alcohol and made more amenable to the commission of extreme acts because of the influence of music; and (vi) he was "not sure that [the appellant] can be held entirely accountable for the events that led to the death of his cousin".

12. The appellant was seen again by Dr Hutchinson on 29 April 2004. In a second report dated 30 April 2004, the doctor noted that the appellant had changed his account of events. He now claimed that he wanted to become the member of a gang which made sacrifices to Satan and that to justify his credentials, he had to kill a virgin, a goat or a sheep. He decided to kill his cousin because it was known that she was a virgin. He said that he was accompanied on 23 January 2002 by a man called "Chuck" and that Chuck had inflicted the fatal wounds on Suzette. In the light of this changed account, Dr Hutchinson amended his earlier diagnosis and said that (i) it seemed more likely that the appellant had a mixed personality disorder that also included traits of an antisocial personality, "marked" impulsivity in certain areas (including sex), self-mutilative behaviour, affective instability, chronic feelings of emptiness and identity disturbance; and (ii) he had a lack of empathy for Suzette and Osei, a pattern of irresponsible behaviour and an inability to describe the incident consistently "which one can describe as manipulative". He concluded:

> "However, it is not possible to make a case for insanity or diminished responsibility for the alleged commission of this murder as these personality disorders do not constitute an abnormality of mind that could support such a position. In fact given his latest account, Jason knew clearly what was likely to transpire when he picked up his cousin and at several stages could have derailed the events if he so chose. In fact, he admits to this but could not stop himself from becoming involved in her death."

13. Finally, Dr Ghany wrote a further letter on 14 November 2005 in relation to the appellant's admission to hospital on 9 November 2005. On admission, he complained

of hearing voices and having visions and odd movements of the body lying in bed. Dr Ghany's opinion was that these symptoms had no psychiatric or medical foundation and reflected "tension due to his impending trial".

14. There was, therefore, material in Dr Hutchinson's first report which could have formed the basis of a defence of diminished responsibility. The reason why in his second report he advised that it was not possible to advance a case of diminished responsibility was that the appellant had given an account of the circumstances of the killing which was materially different from that which he had given earlier. The appellant was later to tell Professor Eastman that the story about the Satanic killing of a virgin was untrue and that his cell mates in prison had told him that, if he told the truth, he would be convicted so that he should make up a story for his defence. Mr Knox QC submits that it is to be inferred that the decision not to run the defence of diminished responsibility must have been taken for tactical reasons. He says that Miss Elder is an experienced leading counsel. She must have seen all the reports (indeed, at trial she tried to get in a reference to Dr Ghany's first report without having to call him). She must have decided that the reports would undermine the appellant's defence that he did not have the requisite intent to be guilty of murder. We shall return to this issue after considering the fresh evidence that the appellant seeks to adduce in support of this appeal.

The fresh evidence

15. Professor Eastman is a distinguished forensic psychiatrist. He examined the appellant and his parents in November 2008. The appellant gave him an account of how the killing had taken place, saying "it's crazy…I had cannabis mixed with crack cocaine….the music was playing….I was hearing 'Slipknot' [rock music]….telling you to kill….a weird person singing a song….very fast, in a rage….I started to feel a rage building up and lost control of myself….taking off the lyrics". He said that he pushed Suzette "getting in a rage from the music" and she slapped him once or twice. A struggle ensued in which he pushed her as she choked. They both then went to the car where in a rage he took a knife from "Sack" and waved it around. He did not intend to hurt her. He next saw her on the ground. He was very sorry about what had happened and had not intended to do it.

16. Professor Eastman noted that the appellant's parents had started to worry about him when, at the age of 15 or 16, he started to drink. They said that about two years before the killing, his drinking increased and he started taking drugs and listening to rock music. On three occasions he blacked out because of drink. On 23 January 2002, he had seemed his normal self.

17. The conclusions of Professor Eastman were that: (i) the appellant suffers from a borderline personality disorder; (ii) apart from Dr Ghany's report, there was nothing to suggest that his personality disorder includes "anti-social" or "sadistic sexual aspects"; (iii) the appellant satisfies the criteria for alcohol and substance dependence and there is evidence that he is likely to have suffered from blackouts which are common in those who abuse alcohol severely; (iv) there is evidence to suggest that the appellant's abnormal mental states arising from drug ingestion went beyond mere intoxication and amounted to drug-induced psychosis: this is reinforced by the nature of his personality disorder, since individuals suffering from it are substantially more vulnerable to adverse psychotic reactions to drug ingestion; (v) the appellant developed an interest in, and dependence on, rock music as a response to or expression of his personality disorder: an individual with a borderline personality disorder will lack a stable sense of identity and is, therefore, likely to be prone to "losing the boundary" between lyrics (including violent lyrics) and self, especially when combined with drug ingestion, whether resulting in intoxication or psychosis; (vi) the appellant's personality disorder can properly amount to an "abnormality of the mind" in terms of a potential defence of diminished responsibility: it seems more likely than not that he was in a psychotic state at the time of the offence, even if that state was induced by drugs and his personality disorder would have made him more vulnerable to entering such a psychotic state under the influence of drugs; (vii) if the court were to determine that the correct narrative of the events involved the deliberate exercise of sadism, that would clearly weigh against the arguments that Professor Eastman put forward (which medically suggested that there was a robust medical basis for diminished responsibility).

18. Dr Green is a distinguished clinical psychologist who interviewed the appellant in May 2008. The appellant gave an account similar to the one he gave to Professor Eastman six months later. Dr Green concluded of the appellant that (i) he suffers from a borderline personality disorder and this "had a direct impact on his behaviour at the time of the offence"; (ii) he did not have an extensive history of violence, but had attempted to cope with his emotions through "more avoidant means of isolating himself, self-harm and alcohol consumption"; (iii) he may also meet the criteria for Alcohol Dependence Disorder and may have experienced a state of drug-induced psychosis at the time of the offence, but these features needed to be assessed by a forensic psychiatrist; and (iv) the appellant did not hold "anti-social or pro-offending attitudes" or enjoy violence and he was "not essentially delinquent in his behaviour."

19. Dr Gray is a clinical psychologist. He administered a range of psychological tests to the appellant on 25 October 2007. These suggested that the appellant had a particularly poorly developed executive functioning ability. He presented with a potentially significant drug and alcohol history which might have implications for his level of cognitive and social functioning.

20. Mr Knox makes three points. First, he submits that the appellant should not be allowed now to raise the issue of diminished responsibility and adduce in evidence the reports of Professor Eastman, Dr Green and Dr Gray. He says that the decision not to run the defence of diminished responsibility at trial must have been made for tactical reasons. Secondly, the new reports do not support a realistic defence of diminished responsibility. Thirdly, they are in any event unreliable because they depend on the appellant's own account of his previous history and the killing and do not take account of (a) the unchallenged and unchallengeable prosecution evidence, which showed that this was a carefully planned and executed murder, (b) the jury's verdict, which rejected his evidence that he lacked the relevant intention or (c) the evidence of those who knew him well about his previous history.

Tactical decision not to run diminished responsibility

21. It is well established that one of the factors which is likely to weigh heavily against the reception of fresh evidence in an appeal is "a deliberate decision by a defendant whose decision-making faculties are unimpaired not to advance before the trial jury a defence known to be available": *R v Erskine and Williams* [2010] 1 WLR 183 at para 90, quoting *R v Criminal Cases Review Commission, Ex p Pearson* [1993] 3 All ER 498, 517. Mr Knox submits that the decision not to run diminished responsibility was taken for tactical reasons in view of the highly damaging nature of the reports. A plea of diminished responsibility would have led to the reports of Dr Ghany and Dr Hutchinson being put in evidence and they would have undermined the appellant's main defence of lack of intent. Save for Dr Hutchinson's first report, they would have contradicted the appellant's evidence as to how the killing took place.

22. The Board does not accept Mr Knox's submission. The reports of Dr Ghany and Dr Hutchinson did not provide strong support for a defence of diminished responsibility. It is true that in his first report, Dr Hutchinson identified features which were "consistent with borderline personality disorder". But his overall conclusion was expressed in tentative terms: "I am not sure that he can be held entirely accountable for the events that led to the death of his cousin". He then changed his mind in the light of the appellant's changed account of the circumstances of the killing. The contrast between the terms of both of Dr Hutchinson's reports and, in particular, the terms of Professor Eastman's report is striking. Mr Bindra Dolsingh, who conducted the appeal in the Court of Appeal, has explained that Miss Elder told him that the issue of diminished responsibility was not raised at trial because it was not supported by the psychiatric reports that were then available. The Board sees no reason to doubt this explanation. The decision not to explore further the possibility of a defence of diminished responsibility may have been mistaken, especially since Dr Hutchinson's change of mind was based on the appellant's remarkably changed account of the circumstances of the killing. By the time of the trial, the appellant had abandoned the account of events which had caused Dr Hutchinson to change his opinion. But there is no basis for holding that a deliberate tactical decision was taken

not to run the defence of diminished responsibility because it would (or might) undermine the principal defence of lack of intent.

23. In any event, even if the Board were satisfied that such a tactical decision was taken, it would not refuse to receive the fresh evidence if it thought that the evidence supported a defence of diminished responsibility which had real prospects of success. As was said at para 90 in *Erskine*: quoting *R v Criminal Cases Review Commission, Ex p Pearson* [1993] 3 All ER 498, 517. "But even features such as these [including a deliberate decision not to advance a defence known to be available] need not be conclusive objections in every case. The overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed, and not for psychological failings to which they may be subject." Those salutary words are of particular importance in a case where an appellant has been convicted of a charge as serious as murder. It is, therefore, necessary to consider whether there is a real possibility that the fresh evidence would support a successful appeal in this case.

Does the fresh evidence disclose a potential defence of diminished responsibility?

24. In summary, the effect of the fresh evidence is as follows. First, Professor Eastman and Dr Green are unequivocal in concluding that the appellant suffers from a borderline personality disorder. Secondly, Professor Eastman says that was "a direct causal connection between features of his personality disorder and the offence". Dr Green says that it is "probable" that the appellant's mental health condition "had a direct bearing on his behaviour at the time of the index offence". Thirdly, Professor Eastman says that the appellant "satisfies the criteria for alcohol and substance dependence" and Dr Green raises the possibility that this might be the case. Fourthly, Professor Eastman says that it is "more likely than not" that the appellant suffered a form of "psychosis" at the time of the killing as a result of his drug and alcohol consumption and that this went beyond mere intoxication. Dr Green says that "it is possible that Mr Daniel may have experienced a state of Drug Induced Psychosis at the time of the index offence".

25. Section 4A of the Offences Against the Person Act (as amended) Chapter 11.08 provides:

> "(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 murder.

> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder. ”

It will be seen that this is in the same terms as the (now repealed) section 2 of the England and Wales Homicide Act 1957.

26. The first thing that the defendant must therefore prove is that he or she was in an abnormal state of mind at the time of the killing. In *R v Byrne* [1960] 2 QB 396, 403 Lord Parker CJ said of the phrase “abnormality of mind”:

> “It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.”

27. The term “abnormality of mind” is capable of encompassing the mind’s capacity (i) to perceive one’s acts or omissions; (ii) to evaluate whether one’s acts or omissions are right or wrong; and (iii) to control one’s acts or omissions: see para 7.28 of the Law Commission Consultation Paper No 173 “Partial Defences to Murder” (2003).

28. Mr Knox makes the preliminary submission that there is no scope for the defence of diminished responsibility on the facts of this case because the assault by the appellant on Suzette was a carefully planned and executed murder. He identifies a number of features of the case in support of this submission. These include that (i) when the appellant and Osei picked up Suzette in the car, they both had knives; (ii) they drove off to an isolated spot in Blue Basin; (iii) the appellant gave a false explanation as to how his fingers had been slit; (iv) after the killing, he drove Suzette’s father around pretending to look for Suzette; and (v) there was no suggestion from the witnesses who saw him shortly before or after the killing that he was behaving unusually or in an abnormal state of mind. But the case was not presented to the jury by the prosecution as a carefully planned murder. The suggestion that this was a premeditated murder was not put to the appellant at the trial. It was not considered by the jury. For that reason alone, it would not be right to decide this appeal on the basis that the murder was premeditated. In any event, the features on which Mr Knox relies provide no more than a slender basis for a possible inference. That is an insufficient reason for rejecting diminished responsibility without reference to the fresh evidence.

29. As regards the fresh evidence itself, Mr Knox submits that it does not disclose a defence of diminished responsibility which would have any real prospects of success. His first point is that the overwhelming inference from the primary evidence and the jury's verdict is that the appellant was not in an abnormal state of mind at the time of the killing because (i) he knew what he was doing, (ii) he knew that what he was doing was wrong (hence his cover up later), and (iii) he was able to exercise will power to control his physical acts. The defence of diminished responsibility is not available in such a situation.

30. Mr Knox places much reliance on the jury's verdict. The appellant's defence at trial was that he did not have the requisite intent for murder. He said "I did not intend to kill Suzette. Told police it was a demon insider my head. I was not seeing Suzette in front of me" (p 81 of the record); "I did not know I was stabbing Suzette" (p 86); "I did not become annoyed" (p 88). In her summing up (p 127), the judge directed the jury that they had to be sure that the appellant had the requisite intent. She said:

> "If you think that because he was so affected [by drink, drug and heavy rock music], he did not intend or may not have intended to cause the harm to her, serious injury to her, grievous bodily harm or to kill her, then you must acquit him of the charge of murder
>
> But if you are sure that despite his being affected, as he said, by drugs, drink and/or music, he intended to stab her….then this part of the case is proved against him for a drunken, drugged intent, sweetened even with hard rock music, with lyrics even to kill is still an intention for murder."

31. The Board does not consider that the rejection of the defence of lack of intent at the time of the killing carries the implication that the jury were sure that the appellant was able at that time to form a rational judgment as to whether his acts were right or wrong or had the ability to exercise will power to control his acts. In view of the number and severity of the knife injuries inflicted on Suzette, it would have been surprising if the jury were not sure that the appellant had intended to kill or cause really serious harm. But they were not asked to decide whether the appellant knew that what he was doing was wrong or whether he was able to exercise will power to control his physical acts. In these circumstances, the Board is of the view that no relevant inferences can safely be drawn from the jury's verdict.

32. The second point made by Mr Knox is that the fresh evidence does not disclose a relevant disease or inherent cause on the basis of drink or drugs. He submits that, even if the appellant was intoxicated (as he said in evidence) and even if this intoxication amounted to an abnormality of the mind, it did not result from any relevant disease or inherent cause. The general rule is that abnormality of mind

arising from transient intoxication from alcohol (and by necessary extension drugs) is irrelevant: see *R v Gittens* [1984] QB 698, 703. But there is an exception to this rule when the defendant's consumption of alcohol (or taking of drugs) leading to intoxication was "the involuntary result of an irresistible craving for or compulsion to drink": *R v Stewart* [2009] 1 WLR 2507, para 31. Mr Knox submits that the evidence at trial does not support the notion that the appellant was a drug addict or an alcoholic whose drinking or taking of "Blacks" was the involuntary result of an irresistible craving or compulsion. There was nothing to suggest that he had a craving for drugs. It follows that the intoxication did not arise as a result of the disease or inherent cause of alcoholism or drug addiction and is irrelevant.

33. The Board acknowledges the importance of the principle that self-induced intoxication cannot avail a defendant unless the consumption of alcohol or the ingestion of drugs is fairly to be regarded as the involuntary result of an irresistible craving or compulsion. But the question whether the appellant was affected by such a craving or compulsion at the time of the killing was not explored in evidence at the trial. The jury were asked to consider whether alcohol and drugs may have undermined his ability to form the requisite intent, but that is as far as it went. Professor Eastman said that there was evidence to suggest that the appellant's abnormal mental states, arising particularly from drug ingestion:

> "went beyond mere intoxication amounting to psychosis per se. This is suggested by some of his descriptions of his states at various times after having taken drugs. The conclusion that he, at times, suffered from drug induced psychosis, rather than mere intoxication, is reinforced by the nature and fact of his personality disorder, in that individuals with such disorder are substantially more vulnerable to adverse psychotic reactions to drug ingestion."

34. Later in his report, Professor Eastman said that it seemed "more likely than not" that the appellant was in such a psychotic state at the time of the killing. As already stated, Dr Green said that it was "possible" that the appellant experienced a state of Drug Induced Psychosis at that time.

35. This evidence suggests that alcohol and/or drugs may have caused the appellant to be in a psychotic state at the time of the offence. There was also evidence that he satisfied the criteria for alcohol and substance dependence, although Professor Eastman believed that such dependence was "substantially 'secondary' to his underlying personality disorder in its causation." As he said, it was for the court to decide whether the appellant suffered "an irresistible impulse to take the first drink or drug of the day". But, he said, there appeared to be "strong evidence that the appellant was heavily dependent upon both alcohol and drugs".

36. The third point made by Mr Knox is that the fresh evidence does not disclose a relevant cause or disease on the basis of borderline personality disorder. The term "borderline personality disorder" was introduced by Adolph Stern in the United States in 1938 to describe a group of patients who fitted neither the psychotic nor the psychoneurotic, but who suffered from a disorder which "bordered" on other conditions. According to National Clinical Practice Guideline Number 78 (published by The British Psychological Society and The Royal College of Psychiatrists) the disorder is indicated by five (or more) of nine criteria which include (i) identity disturbance: markedly and persistently unstable self-image or sense of self (Professor Eastman said that a "core" feature of borderline personality disorder is "lack of a stable sense of identity"); (ii) impulsivity in at least two areas that are potentially self-damaging; (iii) recurrent suicidal behaviour or self-mutilating behaviour; (iv) affective instability due to a marked reactivity of mood; and (v) inappropriate intense anger or difficulty controlling anger.

37. It has been held that psychopathic personality disorder is not a basis for diminished responsibility: see *Galbraith v HM Advocate* 2002 JC 1. Mr Knox submits that the same should apply by analogy to borderline personality disorder. This is because, he says, it is essentially a disorder which leads to increased impulsivity, anger and the like which the law should not encourage. As noted in *Galbraith* at para 51:

> "The law responds in this way [recognising diminished responsibility], however, because it recognises that the individual is to be pitied since, at the relevant time, he was not as normal people are. There was unfortunately something far wrong with him, which affected the way he acted. By contrast, the law makes no such allowance for failings and emotions, such as anger and jealousy, to which any normal person may well be subject from time to time. They do not call for the law's compassion. Rather, we must master them or else face the consequences. '…it will *not* suffice in law for the purpose of this defence of diminished responsibility merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self-control. The world would be a very convenient place for criminals and a very dangerous place for other people if that were the law' (*HM Advocate v Braithwaite* 1945 JC 55, 57-58 per Lord Justice-Clerk Cooper)."

38. It will be seen that the statutory test of abnormality of mind reflects the difficulty in attempting to describe with precision the boundary between the normal and the abnormal. Para 7.30 of the Law Commission Consultation Paper put it like this:

> " 'Abnormality of mind' is no more and no less than a state of mind 'so different' from the normal that the reasonable person would describe it as 'abnormal'. The formulation does serve an important function, however, even though it is a very imprecise test. Mental states such as anger, jealousy, temper, exasperation, feeling depressed, love and compassion are emotions and propensities, often ephemeral, to which all ordinary people are susceptible. The reasonable person would not classify them as abnormal, even when such emotions are heightened."

39. Professor Eastman said that he had seen nothing to suggest that this was a case of simple "anti-social" (in other words "normal") personality disorder. He had little doubt that the appellant suffered from severe borderline personality disorder. Dr Green was of the same view as was Dr Hutchinson on the basis of the account originally given by the appellant. In his second report, Professor Eastman said:

> "However, unless there was evidence accepted by the jury to suggest that the defendant, with the co-defendant, set out to kill the victim, or to have sex with her and then to kill her, then any 'metamorphosis' of that intention into the fact of killing her can, in my opinion, be reasonably explained by the presence of 'abnormality of mind.'"

40. The Board is of the view that this evidence, if accepted, would provide a credible basis for a defence of diminished responsibility. Professor Eastman and Dr Green are both experienced and distinguished practitioners. Professor Eastman's overall conclusion in his first report was that:

> "Although I am not in any way an expert on the psychological effects of 'heavy rock music', particularly in the context of a culture which is not my own, I believe it very likely that there was a direct interaction between the appellant's unstable personality structure, his ingestion of drugs and alcohol and his psychological response to rock music, particularly when intoxicated, in terms of precipitating a severely abnormal mental state at times, including likely at the time of the index offence."

41. Unless the credibility of these opinions is undermined because they depend on accounts given by the appellant which are themselves clearly unreliable in material respects, it seems to the Board that the interests of justice require that the fresh evidence is admitted. Mr Knox does indeed submit that the reports appear to be based on the appellant's account that he did not know what he was doing at the time of the killing and did not intend to harm Suzette and yet the jury rejected the defence of lack of intent. Mr Knox makes the further points that the reports do not appear to have

taken into account (i) the totality of the evidence (which he submits shows that this was a premeditated murder) and (ii) the evidence of the appellant's friends at trial that he did not have a drink problem and the fact that his parents did not notice that he was "abnormal" when he left home on 23 January 2002.

42. But for the reasons given at para 28 above, the premeditated murder theory cannot be accepted and the opinions expressed in the reports were not based (or at least not primarily based) on the fact that the appellant did not know what he was doing or that he did not intend to harm Suzette. Further, Professor Eastman made it clear that he expressed no view as to which description of events relating to the offence given by the appellant at various times was correct. Finally, in his second report, Professor Eastman said that the fact that his parents did not notice that he was "abnormal" when he left home on the fateful day was "not inconsistent with him having become psychotic by the time of the killing, in response to drugs and as a reflection of his personality vulnerability to psychosis (by virtue of his personality disorder)."

Conclusion

43. This is a most unusual case. The appellant was a man of previous good character who, for no apparent reason, killed his cousin with whom he seems to have had a close platonic friendship. He inflicted multiple stab wounds on her in a sustained and violent attack. He then slit some of his own fingers. Self-mutilation is one of the classic indicators of borderline personality disorder. The fresh evidence raises a credible defence of diminished responsibility based on borderline personality disorder and alcohol and drug induced psychosis. It should have been raised at trial. The interests of justice require that it be considered now. It may be that, when tested by cross-examination and any medical evidence that the State decides to adduce, it will be seen that the fresh evidence does not support the defence. In the result, for the reasons that we have given, the case must be remitted to the Court of Appeal for them to hear the evidence (and any further evidence that may bear on the issue) and then decide how to dispose of the appeal.