IN THE COURT OF APPEAL OF BELIZE, A.D. 2018

CRIMINAL APPEAL NO.12 OF 2014

JASON BRUCE LAWRENCE APPELLANT

v

THE QUEEN RESPONDENT

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BEFORE:

The Honourable Mr. Justice Sir Manuel Sosa	- President
The Honourable Mr. Justice Samuel Awich	- Justice of Appeal
The Honourable Mr. Justice Murrio Ducille	- Justice of Appeal

Mr. Yohhahnseh Cave for the Appellant
Ms. Sheiniza Smith, Senior Crown Counsel, along with Mr. Cecil Ramirez, Senior Crown Counsel, for the Respondent

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November 17th, 2017 and 22nd June, 2018.

MAJORITY JUDGMENT OF AWICH JA AND DUCILLE JA

DUCILLE JA

[1] On May 22, 2014, the Appellant, was convicted of the murder of Mercedes

Carrillo (the Deceased) after a trial before a judge and jury. The Prosecution not having applied for the death sentence, the learned trial judge imposed a sentence of life imprisonment upon the Appellant. The Appellant filed a number of Grounds of Appeal, and later submitted an application to introduce fresh evidence before this court. The Respondent did not resist the application. The oral argument before us was solely concerned with that fresh evidence, and although counsel for the Appellant assured us that he relied upon the Appellant's other written submissions, he did not argue them before us.

Background facts

[2] The case for the prosecution was that the Deceased died from hypovolemic shock as a result of multiple stab wounds inflicted by the Appellant. The Appellant and the Deceased had a romantic relationship for about eight years. During part of that time, the Appellant lived with the Deceased and her three children at an address in Burrell Boom Village. Two of those children, Diana Carrillo and Christopher Carrillo, gave evidence at the trial.

[3] Diana's evidence was that sometime around 11:30 p.m. to midnight on December 3, 2009, she was awakened by her little sister yelling. Diana ran out of her room and saw the Appellant attempting to push his way into the Deceased's room with the aid of a wooden chair. She and Christopher eventually managed to take the chair away from the Appellant who was, nonetheless, able to get into the Deceased's room. The Appellant began to punch the Deceased about the body. Diana and Christopher tried to pull him away but were unsuccessful. Diana ran to her phone and called 911, but the police never came. However, while Diana was still on the phone, the Appellant came to the door of her room, told her that he loves her mother, and asked her not to call the police. The Appellant then left the house.

[4] Diana called her boyfriend, Daniel Pariente, then went to the dining table

to start studying. She was still on the phone talking to him about an hour later, when the Appellant returned and knocked on the door. None of the occupants of the home opened it. The Appellant then broke open a hole in the door through which he entered the home. He began to curse the Deceased and pulled out a knife and stabbed her. The children tried to help the Deceased. Diana grabbed a knife from the kitchen and stabbed the Appellant in the shoulder. Christopher struck the Appellant with a guitar. Both children succeeded in pulling the Appellant away from their mother and then ran to hide in the bathroom. Diana peeped through the door after about thirty seconds and saw the Appellant holding his head, while her mother knelt on the floor near the door.

[5] Diana then ran out of the bathroom and grabbed the knife that was used to stab her mother which was on the kitchen table at the time. She knelt beside the Deceased who was moaning, while Christopher stood in front of them with the guitar. The Appellant then picked up a machete that was in the kitchen. However, he put it on the table, saying that if he can't have her, nobody else can have her and that he would kill for her.

[6] Diana asked the Appellant to take the Deceased to the hospital. He complied, actually helping the children by dragging the Deceased to the car. The Appellant lifted her into the passenger seat. Diana got into the back seat. She brought both knives, the one used to stab the Deceased and the one she had used to stab the Appellant. She placed them on the floor of the car. At the hospital, the Deceased and The Appellant were both treated in the same room, but the Deceased had to be taken to surgery, where she died.

[7] Under cross-examination, Diana disclosed that earlier that day, the Appellant and the Deceased had picked her up from her boyfriend's house. During the drive home, the Appellant appeared to be in a bad mood. She said that the incident that resulted in her mother's death was not the first time that the Appellant and the Deceased had had a domestic dispute. She also said that the Appellant was very jealous and that her mother could not speak to anyone without him getting upset.

[8] Christopher's evidence about what transpired in the house was much the same as his sister's. He described hitting the Appellant on the back with the guitar, and said that although the Appellant appeared "normal", the blows on his back "didn't seem to create any effect on him absolutely at all." Under cross-examination, Christopher stated that earlier on the day of the incident, he was in his mother's car with his mother and the Appellant. He said that the Appellant was drinking Campari from a bottle while he was driving the car. The Deceased became annoyed and took the bottle away from the Appellant. Christopher also said that he knew that the Appellant used to smoke cannabis and drink liquor. Christopher described arriving at home and eating fried chicken with the Appellant and the Deceased and that everything appeared to be normal.

[9] As a result of what he heard during his telephone conversation with Diana, Daniel Pariente went to the police station for help. Constable Japheth Young accompanied Daniel to the hospital. They actually followed the car driven by the Appellant. When they all arrived at the hospital, Constable Young noted that the Appellant was in need of medical attention, and also that he was not acting like a normal person; he seemed high. His voice was slurred, his eyes red and half-closed and he seemed sad and sorry. However, the constable did not notice that the Appellant smelled of alcohol or marijuana. The Appellant was treated for his injuries and was later arrested and charged with murder.

[10] The Appellant's brother, Dale Guzman Thompson, also gave evidence that sometime between midnight and 12:30 am on December 4, 2009, the Appellant came to his home and asked for an axe to break up his girlfriend's vehicle. He also said that the Appellant smelt as if he had been drinking and smoking cocaine. He appeared nervous and anxious. Thompson went back to bed and later, when he awoke, he discovered that the Appellant had gone.

[11] The Appellant gave an unsworn statement from the dock. He described going to his brother's apartment and asking for an axe. He stated that he never intended to kill the Deceased. He just wanted to damage her car. He said he had taken two to three hits of crack after the fight he had with his girlfriend, and also that he was drinking

Campari and having a little bit of marijuana in between. He said that he then went to his other brother's apartment in the adjoining room. He lit a candle and saw a knife beside the candle, then he lay on the bed and prayed for almost half an hour. He said that he didn't get through, that the devil got the best part of him. He then got up and returned to his girlfriend's apartment and asked her for his documents, passports and social security. She spoke to him through the window and told him that the police were on the way the Appellant said that statement got to him. "Oh, all right police is on their way. I gave the police some work to do then."

[12] The Appellant then described punching a hole through the door with a cement block, storming in and inflicting stab wounds on his girlfriend. When he finished, he said he could not believe what he had done. He then put the Deceased in the car with the children's assistance and drove to the hospital. He described driving at almost 110 miles an hour on the highway. He said that he was sober enough to handle the highway. He also said that he could have escaped but he knew that he was guilty. He was also in pain from the stab wounds on his back, so he parked the car and went to the trauma room at the hospital.

[13] The Appellant described sitting in the car and staring at the steering wheel and thinking. He said that he couldn't cry because he was numb or abnormal due to the influence of alcohol and drugs. He said that he was high, and he really loved his girlfriend and never intended to kill her. However, he got so angry that night that he couldn't hold himself back. The Appellant then started to say that he had committed an offence in prison and the learned trial judge stopped him with a warning about prejudice. However, the Appellant continued, recounting that at the current time in prison, he was put on psychiatric medication due to "psychiatric effects."

The Summation

[14] The learned trial judge started his summation with some general directions including the respective duties of judge and jury and the burden of proof. He then recited part of section 117 of the Criminal Code and informed the jury that "[i]n this case,

there is the issue of extreme provocation. The matter of partial excuse does not arise." This was an unfortunate error on his part since the section as worded states

> *"117. Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned."*

The learned trial judge omitted the words "as in the next following sections mentioned" and in doing so also omitted the qualifying words of sections 119 to 121, which deal with extreme provocation, causing harm and unlawful assault or battery.

[15] The learned trial judge proceeded to give the jury adequate instructions on specific intent and the elements of a murder charge. He pointed out that the Appellant was not denying that he stabbed her, but that the jury would have to determine whether he had the specific intent to kill her. The learned trial judge reminded the jury of the parts of the Prosecution evidence from which they could draw the inference that the Appellant had the required intention, and also drew the jury's attention to the Appellant's behavior at the time of the killing and thereafter. The learned trial judge told the jury that the Appellant's penitence after the act must be taken into account, that he may have merely intended to harm but had been carried away in the heat of the moment. He said that if that was the case, that would be manslaughter. The learned trial judge also quoted form the Appellant's dock statement: "I was sorry for what happened. I didn't know what I was doing. I was under the influence of drugs and alcohol."

[16] The learned trial judge then gave directions on expert evidence and self defence, then reminded the jury of Diana's and Christopher's evidence. He then spent some time going over the possibility of an alternative verdict of manslaughter, and the defence as contained in the Appellant's unsworn statement. He also gave some directions on intoxication and reminded the jury that "[the Appellant's] main defence … hinges on intoxication which brings out the issue of lack of intention to kill."

The Grounds of Appeal

[17] The Appellant filed Notice of Grounds of Appeal on October 5, 2015 containing the following grounds:

i. That the learned trial judge misdirected the jury as to the legal effects of the Appellant's unsworn statement, and the manner in which the jury ought to treat or approach it in law;

ii. That the learned trial judge misdirected the jury on the defence of intoxication, insofar as the trial judge's directions on intoxication were inadequate on the effect of intoxication on intention to kill;

iii. That the learned trial judge misdirected the jury on several matters in his final statements, the misdirections were to such an extent that it confused the jury, leading to a miscarriage of justice and deprived the accused of a fair trial;

iv. That trial counsel for the Appellant failed in his duty to raise the defence of diminished responsibility on the Appellant's behalf thereby depriving the Appellant of a fair trial;

v. The mandatory minimum sentence of life imprisonment on a conviction for murder is unconstitutional.

This appeal came on for hearing on November 1, 2016, when the Appellant sought leave to tender fresh evidence in the form of a report from Dr. Latham, a forensic psychiatrist who had conducted an examination of the Appellant on January 22, 2016, more than six years after the events in question.

The issues

[18] Three issues arise for discussion based on the Grounds of Appeal and the application to introduce fresh evidence. The first is whether to grant that application, which will be discussed along with diminished responsibility, since there will be some overlap in the discussion. The second concerns whether there was misdirection on the legal effect of the unsworn dock statement. The third concerns the sentence.

The fresh evidence

[19] Dr. Latham's report (the Report) was based on a two and a half hour interview with the Appellant, transcripts of the evidence, dock statement and summing-up in the trial court and limited medical notes from January 26, 2009 to September 28, 2012. Those notes included an interview with a psychiatric nurse, Mr. Somerville. There was also a report from Dr. Michael Medina, a medical doctor with a Master's degree in Psychology, who interviewed the Appellant for an hour and a half on November 26, 2015. Dr. Latham also reviewed the relevant sections of the Belize Criminal Code.

[20] Dr. Latham was proceeding on the following instructions:

1. What Mr. Lawrence's history of mental health problems is.
2. Whether he has received any diagnoses of mental disorder.
3. Whether Mr. Lawrence continues to abuse drugs and alcohol and any treatment he is receiving.
4. His current mental state and diagnosis.
5. Any prognosis and treatment recommendations.
6. Whether or not Mr. Lawrence's mental state at the time of the offence would have led to any legal defence to murder.

    a. Whether any psychosis referred to in the prison notes developed before or after his arrest, conviction or incarceration.

    b. Whether and to what degree it can be said there was a mental health condition prior to the offence and whether it was

        I. Operating at the time of the offence either alone or in combination
        II. with other factors and/or triggered by other factors such as intoxication and/or jealousy.

III. If the psychosis observed by the prison psychiatric services was induced or triggered by alcohol or drug abuse.

IV. Whether any current psychiatric conditions continue to be exacerbated by alcohol or drug abuse.

[21] Dr. Latham's interview with the Appellant disclosed certain aspects of the Appellant's family history, childhood and development. His mother left to work in the United States when he was approximately 1½ years old. The Appellant only started to communicate with his mother when he was twenty-four or twenty-five. He got to know his father when he was 34, but his father does not want to speak to him. He was brought up by his grandmother and a great aunt, and appears to have had a comfortable existence until he was raped in prison when he was fifteen or sixteen. After this he became involved in more crime, such as burglaries and stealing a car. He admitted serving up to thirty sentences for other offences: theft, possession of marijuana, possession of crack cocaine. The Appellant held several legitimate jobs concurrent with his criminal behavior.

[22] The Appellant described his alcohol and drug use, starting with marijuana and alcohol at the age of fifteen. He later used crack cocaine and that use increased with time. He thought that sometimes the crack was laced with methamphetamines because he would hear voices, hallucinate and feel paranoid about things. He also spoke of a period when he would carry a weapon to protect himself because he was frightened of people being after him. Dr. Latham also thought that the Appellant showed some symptoms of alcoholic dependence.

[23] The Report then detailed the Appellant's psychiatric history, starting from 2004 or 2005 when the Appellant was in prison. He was treated with antipsychotic medication and thereafter saw a doctor in the community who prescribed medication which the Appellant took occasionally but not consistently. The Appellant felt that the relationship with the Deceased helped him to feel stable, although, during that time, he did get into

trouble for small offences on two occasions. At the time of the interview, the Appellant was on Risperidone (antipsychotic medication) and Carbamazepine (mood stabilizing medication).

[24] The Appellant described his relationship with the Deceased and her children. He related that although the children accepted him, Diana was afraid of him because she thought he was a bad person. He slapped her occasionally. He started to use crack cocaine again after a prison stay in 2007. He said that even though he was a "God fearing child who believed in God … the devil got into him." He described this as "like a roaring lion going through his mind" or "a pain in his head and teeth." The Report states that

> *"He maintained that the devil was in contact with him and it was like having flying darts or spiritual darts targeting him. When he watched the movies he would see people with lines of drugs and although he was not a "TV type person" felt this was referring to him. He felt that he had walked with Jesus for only eight months of his life when he stopped all drink and drugs but he subsequently had a spiritual affair with the devil. He said it was just a feeling. He never saw the devil."*

He spoke of his jealousy because the Deceased was having other relationships. He deduced this because the Deceased would receive unknown phone calls and would joke with him about them. Dr. Latham was of the view that this belief of the Appellant's may have been a delusional belief, although the Appellant claimed that "[the Deceased] would use voodoo to try and get rid of one of her partners whom she had had a relationship with whilst he was in prison." Further, "[h]e continued to use drugs and he described that his situation was "not good" by 2009.

[25] The Report then describes the Appellant's account of the events that transpired on the night that the offence took place as follows:

> *"The night before the alleged offence Mr. Lawrence used crack cocaine and was*

drinking alcohol all night. The following day Mercedes had driving work for him to do. He felt upset and needed some sleep but she did not want to hear that and convinced him to be around and to drive. He was in a bad mood because he had not slept all night. She came to him and convinced him to go with her. She offered to buy him something.

She did not have any other males in the house and she needed his help because they were in a new apartment. He said that he went back to her home and he was driving backwards and forwards during the day. He described that the children were playing volleyball in the early evening and he did not get back till 11 or 12 in the evening.

He described lying on the floor and Mercedes lay beside him and lit a cigarette. They were both going off to sleep. At approximately 12 midnight Mercedes' phone rang and he said, "Who could be calling?" He told her not to answer it but she went and answered it. The house was silent. When she answered it he heard the tone of the conversation. She was talking in a very "sweet way". He could not recall what she was saying but that she was clearly in love with this person. This really got to him. She had locked the door to the room she was in. He went into the bathroom he jumped across the wall and heard the conversation.

He described that he just exploded. The baby started screaming. Mercedes was in the closet talking on the phone. He started "punching her up". The other two children came in and defended their mother. He grabbed a chair to throw it and the chair was removed from him by them. He punched her but eventually left the house. Mr. Lawrence maintained that he had not used any crack during the daytime and that the last time he had used crack was 4.30 or 5 am the day before when he had also been drinking alcohol. He was clear that he had not used any crack or alcohol that night although he noted that this contradicted what he said in Court. He later confirmed that he had drunk some Campari.

After the fight, when he left the house he recalled that he was called crackhead and lots of stupid things as he left, by Mercedes. He went to the home of his brother and explained that he wanted to have his axe. This was at approximately 12.15 or 12.30am. When he asked him what he wanted it for he told his brother

that he wanted the axe to chop up her car and to take it out on her car. His brother did not want to give him the axe but offered him a place to sleep. He went into his other brother's room in the house and lit a candle. When he lit the candle he saw a knife. He recalled thinking, "What kind of craziness is this don't make the devil take me over." He heard the devil say, "Go kill the bitch, get rid of she, don't give a fuck". He tried to resist and said I can't do this but he described that the devil convinced him.

He picked up the knife and he recalled praying for 25 minutes. He jumped up and the devil said, "Fuck that". Half way back to Mercedes' home he recalled changing his mind and thinking that he was not going to do anything but just wanted his documents including his passport. At the point he knocked on the door he said that he intended to just ask for his documents but Mercedes told him the police were coming. At that point he said he thought, "Alright, fuck that I'll give the police some work to do." He removed a cement block from the well and broke the door. He reached in and opened the door and pulled the knife from his belt. He described that she ran into him instead of running away. He was clear that he never meant to kill her but he was angry because he did not like her cheating on him. He said he was very tired of the life he was living; "I just got very tired".

He noted that Mercedes never denied him money for drugs and that he would intimidate her for it. He was clear that he just "blew his roof top" when she mentioned the police. He grabbed the cement block and told me that as he did that he thought, "I am going to stab her." I asked him about the statement he was said to have made: If I can't have her, no-one can have her, I will kill her. He recalled saying that when he was driving her to hospital and was clear that he did say it. I asked him whether this was why he killed her and he said it was. He was also clear that he was not high on drugs when he killed her but he had been sipping from a flask of Campari earlier that evening. He did not believe that he was drunk.

Mr. Lawrence was adamant that he could remember all the events on that night. He recalled earlier on the evening, driving hard into one of the sleeping

policeman in Belize City. He was able to recall being hit with the guitar when he was stabbing Ms. Carrillo. He recalled the drive to hospital and his feelings that he really wanted her to live. He recalled that Mercedes was talking a little and saying that she was going to die."

[26] The Report then described the Appellant's mental state at the time of assessment as follows:

"He seemed relatively cheerful and was animated. He maintained he had no symptoms and did not hear any voices. There was some evidence of strongly held religious beliefs but these did not appear to be delusional. He maintained that he did hear the voice of the devil. We discussed various possible delusions that are commonly experienced by people with psychosis and he denied any of those now. He felt he did not have anything in common with people with mental illness. Mr. Lawrence had no thought insertion, withdrawal or broadcasting and no suicidal thoughts … He was clear that he does not know why he needs to take medication but that he does get angry and aggressive when he is not on medication and accepts medication for this reason. He was orientated and appeared to have a consistent recollection of his own life and the offence."

[27] The Report also recounted an interview with a Mr. Somerville, a psychiatric nurse, who stated that the Appellant "could become very disturbed when he is not taking medication and has a good response to it when he is." Also, that "most of his problems in prison were related to his unmanageable behavior caused by his psychosis." And that "he does believe that he is God at times."

[28] The Report lists Medical Notes apparently dating from November 2009 (before the incident in question) to September 2012 in which the Appellant is described as "delusional", "believing he was Christ", and having auditory hallucinations. There was a diagnosis of drug-induced psychosis. It is not clear who made these notes as Dr. Latham did not say. However, there was a report prepared by Dr, Michael Medina dated

November 26, 2015, in which a diagnosis of developmental trauma was made. Although this is not stated in the Report, it is interesting to note that Dr. Medina says in his own report that "[the Appellant] denies hearing things that are not there. He denies seeing things that are not there. He denies that others follow him or spy on him… He admits getting angry easily but says he is more able to control his anger with the medication." This was less than two months before the interview with Dr. Latham by which time he seemed to adopt all of these symptoms. He told Dr. Latham that he "would hear voices, hallucinate and feel paranoid about things. He also spoke of a period when he would carry a weapon to protect himself because he was frightened of people being after him."

[29] Dr. Latham stated that the Appellant is "very likely to have met the threshold for stimulant use disorder and possibly alcohol use disorder." Also, that because of the long periods of treatment, it was "likely that [the Appellant did] have an underlying psychotic mental illness – schizophrenia." Dr. Latham acknowledged that the Appellant's mental state at the time of the offence was "difficult to estimate because of the time that has passed since the offence" and also because "the degree of any intoxication at the time of the offence was disputed at the trial and remains a matter that is not absolutely clear. At the time of his trial [the Appellant] indicated that he had used crack cocaine in the 90 minutes before the offence but said this had not happened to me when I interviewed him. It is not possible to say which account is more reliable." Dr. Latham also stated that the Appellant was likely to have had some psychotic symptoms at the time of the offence. He based his opinion on the fact that the Appellant was known to have had such symptoms both before and after the offence. Additionally, Dr. Latham detailed three possible scenarios: (i) intoxication causing temporary symptoms of psychosis; (ii) substance-induced psychosis, also temporary but lasting longer than intoxication-induced psychosis; and (iii) underlying psychotic mental illness worsened by use of drugs. Dr. Latham eventually concluded that the Appellant was "likely to have had some psychotic symptoms at the time of the offence." He based his opinion on the fact that the Appellant was receiving treatment both before and soon after the offence and continuing, as well as the Appellant's "vivid" recounting of his experience of the devil, which was "likely to have been a true hallucination."

[30] The Report also concludes that the Appellant" knew what he was doing and that what he was doing was wrong … albeit he might have been in a state where he was not considering these at the time because of his overwhelming anger." Additionally, "there was an abnormality of mind at the time of the killing. This is likely to have been a psychotic state with the specific experience of auditory hallucinations of the devil … The overall effect of this abnormality of mind is that he was likely to have been more impulsive, angrier and with a lower threshold for violence with some drive towards violence from his experience of 'the devil'. The hallucination of the devil speaking to him provided the initial drive to return to Ms. Carrillo's home and is likely to have been influential in his decision to act. Although his explanation of why he finally stabbed Ms. Carrillo does not imply that he blames the voice of the devil it is nevertheless highly likely to have been influential." Further, "it [is] very likely that the abnormality of mind was a necessary part of his overall mental state that led to his actions. This opinion does not neglect the potential relevance of his jealous feelings and the anger that resulted".

[31] This court is in the fortunate position of having guidance from one of its earlier decisions on the admissibility of fresh evidence. This is the case of **Lavern Longsworth v The Queen**, Criminal Appeal No. 21 of 2012, where Hafiz-Bertram JA specified the principles and the test to be applied for acceptance of the fresh evidence. In that case, as in the instant case, the fresh evidence was intended to establish a defence of diminished responsibility. In **Longsworth**, the appellant threw an accelerant on her common law husband then threw a lit candle at him. He suffered severe burns and died as a result of his injuries. There was evidence from the statement of the husband as well as the appellant that she immediately poured water on the husband in an attempt to douse the fire. The appellant was convicted of murder. On appeal, she sought to introduce fresh evidence that she was suffering from Battered Woman Syndrome, a type of Post-traumatic Stress Disorder. The court granted the applications to introduce fresh evidence on the grounds that

(1) The fresh evidence was capable of belief as it was the evidence of an experienced and distinguished professional in the field of forensic psychiatry, who had a particular specialism in the psychological effects of domestic violence on its sufferers.

(2) The fresh evidence was relevant to the issues that were before the jury in respect of all of the defenses that were left to them by the trial judge. Moreover, the fresh evidence had further significance in that it raised a potential defence of diminished responsibility.

(3) The fresh evidence would have been admissible at trial.

(4) The attorney who represented the appellant at trial had been asked for the reasons why no medical evidence was presented during the course of the trial.

(5) If the fresh evidence had been presented at trial, the jury may have decided differently and acquitted the appellant or found her guilty only of manslaughter.

(6) The fresh evidence would have provided the appellant with material before the jury that supported a defence of diminished responsibility.

(7) The fresh evidence casted doubt as to whether the verdict was reasonable or can be supported by the evidence, or has otherwise resulted in a miscarriage of justice under section 30(1) of the Court of Appeal Act. It was therefore, necessary in the interest of justice that leave be granted to adduce the fresh evidence.

[32] In arriving at its decision, the court considered the cases of **R v Pendleton** [2001] UKHL 66, [2002] 1 Cr App R 34 and **Robert Smalling v The Queen** [2001] UKPC 12. In **Pendleton**, Lord Bingham of Cornhill stated that

"When considering an application to receive the fresh evidence of a witness, the court will have before it a written statement of the evidence which the witness will give: see from 6, prescribed by r 3 of the Criminal Rules 1968... If the statement does not appear to the court on reading it to be even capable of belief, there will be little purpose in proceeding further. The statement may be obvious nonsense.

Similarly, if it does not appear to the court when it reads the statement that it might, even if fully accepted, afford any ground for allowing the appeal, (that is, for thinking that the conviction may be unsafe) there will again be little point in proceeding further. It is obviously relevant to consider whether the fresh evidence would be admissible at the trial ... The Court of Appeal will always pay close attention to the explanation advanced for failing to adduce the evidence at the trial, since it is the clear duty of a criminal defendant to advance any defence and call any evidence on which he wishes to rely at the trial. It is not permissible to keep any available defence on reserve for deployment in the Court of Appeal. Thus the practice of the court is to require full explanation of the reasons for not adducing the evidence at the trial. ... It is however clear that while the court must, when considering whether to receive fresh evidence, have regard in particular to the matters listed (statutory requirements) ... the court has an overriding discretion to receive fresh evidence if it thinks it necessary or expedient in the interests of justice to do so."

[33] Hafiz-Bartram JA adopted this rationale, holding that Section 20 of the Court of Appeal Act gives the Court a discretionary power to receive new evidence or 'fresh evidence' on appeal, if it thinks it necessary or expedient in the interest of justice. It is applicable to both civil and criminal appeals. In Part IV of the Act, which deals with criminal appeals, at section 33, it provides for supplementary powers of the Court. It states:

" For the purposes of this Part, the Court may, if it thinks it necessary or expedient in the interests of justice-
(a) exercise any or all of the powers conferred by section 20 on the Court (other than those contained in paragraph (d)) but in the application of section 20 to an appeal in any criminal cause or matter, for the words "any party" and "that party" in paragraph (c), there shall be substituted the words "the appellant";

Section 20 provides, in pertinent part, that

"the Court may, if it thinks fit …

b) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court whether or not he was called at the trial, or order the examination of any such witness to be conducted in manner provided by rules of court before any judge of the Supreme Court or before any officer of the Supreme Court or other suitably qualified person appointed by the Court for the purpose, and at any place and allow the admission of any deposition so taken as evidence before the Court."

In **Smalling**, Lord Bingham of Cornhill noted that

"There are various matters to which … the Court of Appeal may think it right to have regard in considering whether to receive fresh evidence from Dr. Gallwey or any other psychiatrist on whom the Crown might wish to rely: whether the evidence appears to be capable of belief; whether it appears to the court that the evidence may afford a good ground for allowing the appeal; whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; whether there is reasonable explanation for the failure to adduce the evidence in those proceedings."

[34] In **Lundy v R** [2013] UKPC 28, [2014], it was stated that

"... the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of

justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh."

Lundy had appealed against his conviction for the murders of his wife and young daughter. The "fresh" evidence sought to be tendered on appeal was scientific in nature and was in direct conflict to other scientific evidence that had been led in the trial court.

Is the evidence credible?

[35] There is a long line of cases linking credibility to eminence of an expert in his or her particular field. (*See e.g.* **Marcus Jason Daniel v The State** [2012] UKPC 15; **Lundy v The Queen** [2013] UKPC 28). However, credibility does not depend solely on the qualifications of the expert. In **Daniel**, Lord Dyson stated that "[u]nless 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." His Lordship was clearly acknowledging that, in applying this part of the test for admissibility of fresh evidence, the qualification of the expert without more will not suffice.

In the instant case, the fresh evidence was in the form of the Report from Dr. Latham, who, like Dr. Mezey in **Longsworth** is a Forensic Psychiatrist and distinguished in his field. Dr. Mezey interviewed the appellant in that case, the appellant's sister, the appellant's niece, and the former Chief Magistrate who was an acquaintance of the appellant. Dr. Mezey was able to come to a definite diagnosis that the appellant was suffering from Post-traumatic Stress Disorder and Battered Woman Syndrome in particular.

[36] Unlike Dr. Mezey, Dr. Latham based the Report on one interview with the Appellant, one with a psychiatric nurse, partly illegible medical records, and a report from Dr. Medina, another medical practitioner, who although possessing a Masters degree in psychology, is not a psychiatrist. Additionally, he accepted as fact certain statements from the Appellant, which are clearly unreliable, such as the Appellant's denial of using crack during the ninety minutes before the offence took place. This was in direct conflict to his unsworn statement at the trial. Similarly, Dr. Latham accepted as

fact that the Appellant heard voices, saw things that weren't there and had paranoid episodes, all of which the Appellant had been asked about and had specifically denied during his interview with Dr. Medina. Dr. Medina's interview with the Appellant had occurred sufficiently close to the interview with Dr. Latham for it to be likely that the Appellant was influenced in his answers by the questions he remembered from the former interview.

[37] In light of these considerations, it cannot be said that the evidence was credible in all respects. This is not to disrespect either Dr. Latham's credentials or eminence in his field. Merely, we conclude that his opinion was partly based on the Appellant's statements which were unreliable. If one is to follow the **Lundy** test, the scrutiny of the new evidence might well be at an end, and the application denied for lack of credibility. However, we choose to scrutinize further.

Is the evidence fresh?

[38] The second arm of the **Lundy** test requires that the evidence must be fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. Counsel for the Respondent, by way of written submissions, made much of the difference between "fresh evidence" and "new evidence." With respect, we find that the distinction may have more relevance for civil appeals, but is immaterial for the purpose of criminal appeals. In **Longsworth**, for example, Hafiz-Bertram JA, clearly not acknowledging the distinction, spoke of "[s]ection 20 of the Court of Appeal Act giv[ing] the Court a discretionary power to receive new evidence or 'fresh evidence' on appeal, if it thinks it necessary or expedient in the interest of justice.

[39] In the current case, medical records attesting to the Appellant's mental health issues were in existence at the time of trial. In addition, the Appellant himself, in his dock statement, spoke of having "psychiatric effects." The fact that a forensic psychiatrist might not have been available in the country at the time merely speaks to the higher quality of that type of evidence. Mr. Selgado, who was the Appellant's attorney at trial, provided a letter, not an affidavit, explaining that he was aware that the

Appellant had “some type of mental illness.” He stated that he had raised the issue with both Prosecutor and judge, but the transcript from the trial is silent on this point. Be that as it may, the current position is that there is no reasonable explanation as to why this type of evidence was not led by the defence at trial, or why the Appellant or his counsel did not seek the assistance of the learned trial judge is retrieving those records. It would appear that the application fails Part 2 of the **Lundy** test also.

The safety of the conviction

[40] The third arm of the **Lundy** test states that the evidence should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. In this case, unlike **Longsworth**, Dr. Latham’s opinions are prefaced by phrases such as “Mr. Lawrence is very likely to have had…” We respect the doctor’s caution, particularly in light of the fact that even though he states that “[i]t is likely that Mr. Lawrence does have an underlying psychotic mental illness – schizophrenia”, he also states that his opinion is based on the long periods of treatment that he has required even when it seems unlikely that he is using drugs consistently.” Also, “[t]he diagnosis of schizophrenia in Mr. Lawrence’s case is somewhat difficult to address because he is not currently describing symptoms…” Further, “Mr. Lawrence’s mental state at the time of the offence is more difficult to estimate because of the time that has passed since the offence.” In any event, the jury did hear the Appellant say that he had “psychiatric effects” and there was evidence from the Appellant’s brother, Christopher Carrillo and Officer Young that the Appellant was not acting normally on the night in question. The jury obviously still found that the Appellant was able to form the specific intent to kill. Another distinguishing factor in this case is that at the time of trial in **Longsworth**, there was no psychological or psychiatric evidence available in relation to the appellant’s mental state. In the current case, the learned trial judge was put on notice from the Appellant’s dock statement that there may have been a diminished responsibility issue. However, he did not address it except to tell the jury, erroneously, that “[t]he matter of partial excuse does not arise.” It is probable that that statement in itself, renders the conviction unsafe.

Possibility of a miscarriage of justice

[41] The final limb of the Lundy test is that if [the court] considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh." The **Longsworth** court referred to **R v Erskine and R v Williams** [2009] 2 Cr App R 31, where it was stated that

> *"...where it is proposed to raise diminished responsibility for the first time on appeal, the court is examining the Appellant's mental state at the time of the killing in accordance with s 2 of the Homicide Act 1957. It should normally be necessary to refer the court to no more than the terms of s 23 of the 1968 Act, and the approach suggested in* ***R v Criminal Cases Review Commission ex parte Pearson*** *[1999] 3 All ER 498, 1 Cr App Rep 141 at p 164, [1999] Crim LR 732:*
>
> > *"Wisely and correctly, the courts have recognised that the statutory discretion conferred by section 23 cannot be constrained by inflexible, mechanistic rules. But the cases do identify certain features which are likely to weigh more or less heavily against the reception of fresh evidence: for example, 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; evidence of mental abnormality or substantial impairment given years after the offence and contradicted by evidence available at the time of the offence; expert evidence based on factual premises which are unsubstantiated, unreliable or false, or which is for any other reason unpersuasive. But even features such as these 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."*

[42] In the present case, this court is of the view that a miscarriage of justice may occur if the evidence contained in the Report is excluded. There is no doubt from the evidence at trial and the unsworn statement from the dock that the Appellant's mental state over and above intoxication should have been addressed. We therefore exercise our discretion to admit the Report and go on to consideration of the other issues raised by the Appellant's Grounds of Appeal.

The unsworn statement

[43] In **Alvin Dennison v R** [2014] JMCA Crim 7, the trial judge was held to have "substituted her own opinion of the weight to be attached to the applicant's unsworn statement for that of the jury" where she reminded the jury repeatedly that the appellant's unsworn statement was "not evidence" and had "less weight than if he had sworn on the Bible" and "less weight than if he had sworn or affirm [sic]."The **Dennison** court reviewed several earlier authorites on the subect of unsworn dock statements, some of which are set out here. The court started with **R v Frost & Hale** (1964) 48 Crim App R 284 where Lord parker CJ said that ""In the opinion of this court, it is quite unnecessary to consider what is really an academic question, whether [the unsworn statement] is called evidence or not. It is clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand, it is evidence in the sense that the jury can give to it such weight as they think fit...it is quite clear to-day that it has become the practice and the proper practice for a judge not necessarily to read out to the jury the statement made by the prisoner from the dock, but to remind them of it, to tell them that it is not sworn evidence which can be cross-examined to, but that nevertheless they can attach to it such weight as they think fit, and it should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty."

[44] In **Director of Public Prosecutions v Walker** (1974) 12 JLR 1369, the Court stated that

> *"the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross- examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."*

[45] In **R v Hart** (1978) 27 WIR 229, Kerr JA said that

> *"[i]t is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has 'no evidential value whatsoever' – and all this after telling them at the outset that their verdict must be according to the evidence."*

In that case, the trial judge had told the jury:

> *"…an unsworn statement from the dock has no evidential value and cannot prove facts not otherwise proven by evidence. Its potential effect is persuasive, in that it might make you Mr. Foreman and members of the jury see the proven facts and inferences to be drawn from them in a different light; so that when you come to*

consider the statement made by the accused man, he cannot prove anything in his statement. If there is evidence given on any particular point, then his statement may be used to explain it, to understand it, you see it in a particular light, but the statement is not evidence, it cannot prove any fact. So anything that is introduced in his statement that is not in evidence anywhere, has no evidential value whatsoever."

[46] In **R v Robert Morris** (SCCA No 24/1998, it was held that

"[h]aving correctly instructed the jury to give the statement what weight they think should be attached to it, the learned trial judge erred in telling them that the content of the statement did nothing to rebut, contradict or explain any of the evidence in the case. In effect, the jury was being told that the content of the statement was of no value. That was a matter solely for the assessment of the jury."

[47] In **Berthill Fox v The Queen** [2001] UKPC 40, Lord Hoffman, delivering the judgment of the court, stated that

"The classic explanation of the unsworn statement is that given by Lord Salmon in Director of Public Prosecutions v Walker [1974] 1 WLR 1090. The judge may tell the jury that they may consider that the statement is of less value than sworn evidence because the accused has chosen not to submit himself to cross-examination. But he must direct them that it is material in the case and that it is for them to decide what weight, if any, they will give to it."

Their Lordships found that the trial judge's direction in this respect was "entirely orthodox" but considered in some detail the trial judge's addendum that "[s]uch a statement cannot prove facts that have not been otherwise proven by evidence given on oath. But I should hasten to add here, however … the accused does not have to prove anything." While their Lordships found that this direction "might have left the jury rather

puzzled", they also found that the judge "emphasized, throughout the remainder of the summing up, that the burden of proof was upon the prosecution." Further, the judge put the contents of the unsworn statement to the jury.

[48] In **Philip McKenzie v R** [2011] UKPC 41, there was a conflict between eyewitness evidence and the appellant's unsworn statement from the dock. Lord Brown stated, with approval that "the appellant gave a very full account of his defence (stretching over ten pages of transcript) and then had the benefit of the judge's direction to the jury that, although "an unsworn statement is not evidence", "you give it what weight you think it deserves, what he has told you, but you have to consider what he has told you". Similarly in **McLeod v The Queen** [2017] UKPC 1, there was eyewitness evidence that the appellant had chopped the deceased with a machete. The appellant's defence was a simple denial given in an unsworn statement from the dock. He said that he had been at home and asleep at the time of the incident. He was convicted. On appeal to the Privy Council, Lord Hughes, giving the judgment for the Board, said:

> *"The judge gave the conventional direction. She made it clear that the conflict [between the eyewitness evidence and the unsworn statement] had to be resolved, and that the burden lay on the Crown, so that if what the appellant had said in court put the jury in doubt, acquittal must follow. That was correctly to state the test, and to give some value to the unsworn statement for assessment against the evidence of [the eyewitness]. She correctly directed the jury to take good character into account in the appellant's favour in resolving the conflict. But she also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been. She said this: ... So, he gave you a statement from the dock. But you remember you are going to give it what weight you see fit. It is not evidence that has been tested under cross-examination. So, you can't weigh it in the same scale as the evidence of the witnesses for the prosecution because they all gave evidence on oath."*

*Lord H*ughes described that direction by the trial judge as "accurate."

[49] In **R v Har**t (1978) 27 WIR 229, Kerr JA commented disapprovingly on what he referred to as the "**Coughlan** prescription." In **Coughlan**, Shaw LJ had stated that

> *"What is said in [an unsworn] statement is not to be altogether brushed aside; but its potential effect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences to be drawn from them in a different light. Inasmuch as it may thus influence the jury's decision they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case."*
> (*See* **R v Coughlan** (1976) 64 Cr App R 11)

According to Kerr JA, it is

> *"asking too much of a jury of laymen to appreciate the nice distinction of a statement being of some weight but yet of no evidential value. It is confusing to tell the jury in one breath that they should give the unsworn statement such weight as they think it deserves and in the next that it has 'no evidential value whatsoever' – and all this after telling them at the outset that their verdict must be according to the evidence."*

[50] The trial judge in **Hart** gave an almost identical instruction to the jury, with the addition of these words: "…the statement is not evidence, it cannot prove any fact. So anything that is introduced in his statement that is not in evidence anywhere, has no evidential value whatsoever." Kerr JA stated that "in the ordinary case a trial judge should avoid the **Coughlan**...prescription, which, as worded seems to go too far and to go beyond the context of that case"; and that, in the ordinary case, trial judges should follow the guidance provided by the Board in **DPP v Walker**."
In the present case, the learned trial judge directed the jury that "the accused decided … to give a statement from the dock and he is entitled to that right…" He went on to tell

the jury that

> *"…you will recall, members of the jury, that before I explained [the Appellant's] rights that he did not have to say anything and that if he did so, if he so wished to say something, he could do so by taking the witness stand as all Prosecution witnesses did or he could give a dock statement. The accused informed the Court that he wanted to give a dock statement. And I want you to know, members of the jury, that the giving of that dock statement is the accused's legal right. When I was advising him of his right, you will recall that I told him that that dock statement has no evidential value; that it cannot prove anything but that I will advise you to give his statement from the dock what weight you think it deserves which means that his statement from the dock is of a persuasive nature only. It can't prove anything but it can persuade you to see his case in a certain way. Now this is the accused's dock statement that the accused made known his defence."*

This direction bore all the appearance of the classic "**Coughlan** prescription." However, despite telling the jury that the dock statement had no evidential value, the learned trial judge then proceeded to point out certain aspects of the dock statement to the jury, saying that

> *"In his dock statement he said ---the law does not require a Judge to read what the accused said from the dock. It neither requires the Judge to remind the jury to take account of what he said but I will tell you little things about what he said to put this case in perspective."*

The learned trial judge then proceeded to tell the jury

> *"[s]o here is his defence. He was high because he was taking drugs and he was taking alcohol. That's why he was high. By saying this, members of the jury, the accused had raised a defence known in law as intoxication."*

And later,

> *"You may find that on the statement of the accused, there is no evidence of intention because as he said he was intoxicated because his main defence, remember this, hinges on intoxication which brings out the issue of lack of intention to kill." Additionally, the learned trial judge told the jury that in considering the question of whether or not at the time the Appellant had the intention to kill, they must consider "the totality of the evidence … including the statement of the accused from the dock…"*

[51] Like the trial judge in **Berthill Fox**, the learned trial judge in this case told the jury that the dock statement "cannot prove anything." In **Fox**, the judge was a little more expansive, stating that "such a statement cannot prove facts that have not been otherwise proven by evidence given on oath." Even so, their Lordships thought that the jury there might have been "rather puzzled." But, like in the later case of **McLeod**, that supposed puzzlement was cured by the judge emphasizing the Prosecution's burden of proof during the remainder of the summing-up. Some such emphasis did occur in this case. Adequate burden of proof directions were given earlier in the summing-up, and shortly before the substance of the learned trial judge's instruction on the dock statement, he reminded the jury that

> *"It is the law … that an accused person that is tried does not have to say anything. He does not have to prove anything and even if he raises a defence, as in this case, where the accused raised the defence that he was under the influence of alcohol and drugs, the accused does not have to prove this defence. Having raised his defence, it then becomes the burden of the Prosecution to disprove it."*

However, these instructions still fell somewhat short of the four elements in the **Walker** direction, namely that

> *i. It was exclusively for the jury to make up their minds as to whether the*

dock statement had any value;

ii. *If it had value, what weight should be attached to it?*

iii. *Whether the evidence for the Prosecution satisfied them of the accused's guilt beyond a reasonable doubt? And,*

iv. *That they should give the dock statement only such weight as they may think it deserves.*

[52] The instant case should be contrasted with **Dennison**, where "the judge's repeated qualification of the value and weight of the applicant's unsworn statement, which was his chosen vehicle for the purpose of conveying his defence to the jury, resulted in the defence not being fairly and adequately left to the jury." Here, there can be no doubt that the learned trial judge put the defence of intoxication to the jury, pointing out to them the parts of the unsworn statement that indicated that the Appellant was "high." He informed the jury that intoxication included a state produced by narcotics and drugs. Further, that if the Appellant was intoxicated and behaved in a certain way and "lost his mind and didn't know what he was doing … that is an excuse that the law gives him for doing what he did."

Diminished responsibility

[53] Section 118 of the Belize Criminal Code 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 omission in doing or being a party to the killing.*
>
> *(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.*

(3) A person who but for this section would be liable whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

[54] In **Marcus Jason Daniel v the State** [2012] UKPC 15, Lord Dyson, giving the judgment of the Board, stated that "[t]he 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." He cited Lord Parker CJ in **R v Byrne** [1960] 2 QB 396, 403 where he 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."

In that case, the appellant took the deceased for a drive. His friend was also in the car. During the drive, he started to touch the deceased. She pushed his hand away. He then choked her, and claimed that his friend choked her too. However, the appellant claimed that it was he who dragged her out of the car, slit her throat and stabbed her in the chest and abdomen. He then proceeded to slit his own fingers. The appellant gave evidence at the trial saying that "it was a demon inside my head". He also 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 [the deceased] in front of me". He claimed that he did not know that he was stabbing [the deceased] and that he was high on drink and drugs. He said that when the deceased pushed his hand away "the demon thing raise in me". The appellant was convicted of murder. On appeal, their Lordships examined Section 4A of the Trinidad and Tobago Offences Against the Person Act (as amended) Chapter 11.08, which is comparable to section 118 of the Belize Criminal Code.
Lord Dyson referred to **HM Advocate v Braithwaite** 1945 JC 55, 57-58 where Lord Justice-Clerk Cooper said:

"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."

[55] There are certain similarities in the utterances of the appellant in **Daniel** and the Appellant in this case, particularly in the claim that "the demon thing" or "the devil" was operating on their minds. However that may be, in this Appellant's case, the learned trial judge did not address the issue of diminished responsibility at all, although he did say to the jury that "the law recognizes that drugs and alcohol can lead you to behave in an abnormal manner … it says that if you are in that abnormal condition, you are entitled , like in this case, the act of killing, you are entitled for the offence to be reduced to manslaughter because you never have the specific intention to kill at the time." It does not appear as if the learned trial judge was addressing here the issue of mental abnormality within section 118. As in **Daniel**, the interests of justice require that that defence be considered now, in light of the evidence at trial and the fresh evidence. The Appellant's burden of proof was probably discharged merely by the assertion in the Report that he was under treatment both before and after the offence. Additionally, there is the Appellant's own dock statement, in which he acknowledges his guilt, but claims "psychiatric effects" and the evidence of the witnesses Japeth Young, Dale Guzman Thompson and Christopher Carrillo who remarked on his odd behavior before and at the time of the offence.

[56] In the circumstances, we acknowledge that the Appellant may possibly have been suffering from some abnormality of mind at the time of the offence, whether alcohol-induced or drug-induced or not, and the Appellant is accordingly entitled to the benefit of that doubt. Accordingly, we now substitute a judgment of guilty of manslaughter for the verdict of guilty of murder. In light of this, the only issue remaining for discussion is the sentence.

The Sentence

[57] We have had the benefit of submissions on sentencing from counsel. Counsel for the Appellant first reminds us about the court's discretion under section 108 of the Criminal Code and refers us to the principles of sentencing: retribution; deterrence; prevention and rehabilitation as laid out in **Yong Shen Zhang v The Queen,** Criminal Appeal No. 13 of 2009. Counsel submits that in this case, a life sentence for manslaughter would be wholly inappropriate. In **Yong Shen Zhang's** case, the appellant was a businessman, previously of good character, who had an altercation with his friend about money that was owed to the appellant. The appellant, feeling that he was outnumbered by the deceased, the deceased's wife and some of the deceased's employees, shot the deceased in the arm. The bullet however, also penetrated the deceased's body, resulting in his death a few days later. After the shooting, the appellant went straight to the police station and effectively turned himself in, surrendering his firearm in the process. He pleaded guilty and was remorseful. He was sentenced to fourteen years for manslaughter, the court taking into account all of the circumstances, including witnesses' pleas for leniency and the impact on the life of the deceased's family. That sentence was reduced on appeal to five years for the reason that the trial judge "erred in premising her sentencing exercise on a starting sentence of life imprisonment." Barrow JA reasoned that there is a usual range of sentence, referring to **D.P.P v Clifford Hyde**, Criminal Appeal No. 2 of 2006, which established the range for a "standard street fight" as between fifteen to twenty years. He continued:

*"As a matter of reasoning the maximum penalty must be considered as appropriate only for the worst cases. The features of this case make clear that it does not fall into the category of worst cases. A significant difference exists between this case of unintentional homicide and homicide cases "on the borderline of murder", in which this court has upheld sentences of 25 years imprisonment; see Criminal Appeal No. 10 of 1996 E**nrique Soberanis v The Queen** and other appeals at p. 4 (unreported; judgment delivered February) 1997)."*

[58] Counsel then directed us to **R v Chambers** (1983) 5 Cr. App. R (S) 190, cited in **The Queen v Germaine Sebastien**, Case No. 4 of 2006 which purports to establish guidelines for sentencing in cases of diminished responsibility. **Chambers** sets out the various courses open to a judge. Simplistically, they are:

(i) a hospital order if recommended by the psychiatric reports;

(ii) if not recommended and the accused will be a danger to the public for an unpredictable period, life imprisonment;

(iii) if accused is so grossly impaired that accused's degree of responsibility is minimal, leniency;

(iv) if hospital order is not recommended and accused's degree of responsibility is not minimal, a determinate sentence based on degree of responsibility and the period of time the accused will continue as a danger to the public.

[59] However, in **Robinson v the State** [2015] UKPC 34, a case from Trinidad and Tobago, the court stated that "[t]he correct sentence for manslaughter on the basis of diminished responsibility ought properly to be considered in Trinidad and Tobago, according to local sentencing rules and practice." It appears that the standard street fight range of fifteen to twenty years falls within the local sentencing rules in Belize. The instant case was not a street fight. It was a vicious attack on an unarmed victim, whom he had already beaten earlier on the night in question, in front of her children.

[60] The Appellant cited the following diminished responsibility cases in which the sentences range from eight to twelve years. See **Lavern Longsworth v The Queen**, Criminal Appeal No.21 of 2012; **The Queen v Veola Pook** (unreported) (eight years - Battered Woman Syndrome); t**he Queen v Felicia Chen** (unreported) (eight years- Severe Depressive Disorder with psychotic symptoms). Counsel for the Respondent submitted that the higher end of the sentencing range be utilized since the principle of sentencing that ought to be used in this case is "prevention" and the Appellant had been previously convicted and sentenced to imprisonment. We are unable to address that submission as we were not informed of the particulars of the former imprisonment. However, using the "street fight" gauge, and acknowledging that unlike the deceased in this case, persons engaged in a fight are for the most part on equal footing, we find that the facts in this case are of a more egregious nature. We take into account Dr. Latham's description of the Appellant during the interview and his diagnosis of schizophrenia, and conclude that we should start at the lower end of the street fight scale – fifteen years, and add something to reflect the influence of aggravating factors: the choice of weapon, the number of stab wounds, the presence of the children and the previous violence he inflicted on the deceased about an hour before the fatal incident.

[61] The conviction for murder is quashed and a judgment of manslaughter on the grounds of diminished responsibility is substituted. The Appellant is sentenced to a term of imprisonment of 18 years, credit to be given for time already served and time on remand, as long as no part of that time was in relation to any other offence for which the Appellant was charged.

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AWICH JA

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DUCILLE JA