SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HIGH COURT CRIMINAL
APPEAL NO. 10 OF 1995

BETWEEN:

CARDINAL WILLIAMS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Ms. Suzie d'Auvergne	Justice of Appeal (Ag.)
The Hon. Mr. Adrian Saunders	Justice of Appeal (Ag.)

Appearances:

Mr. J. Guthrie QC, Mr. K. Starmer and Ms. N. Sylvester for the Appellant
Dr. H. Browne and Ms. S. Bollers for the Respondent

2000: December 5, 6
2001: April 02

JUDGMENT

[1] BYRON CJ: I have read the judgments prepared by d'Auvergne J.A. (Ag.) and Saunders J.A. [Ag.]. They have both come to the conclusion that the conviction of murder should be quashed and that a conviction for manslaughter should be substituted. I think that the factual and legal issues have been set out in great detail. I find it unnecessary to repeat this exercise. I was impressed by both Dr.

Eastman's and Dr. Mahy's testimony and conclude that that there is a likelihood that the jury could have adopted the views expressed by either of them. In those circumstances it would be open to the jury to return a verdict of manslaughter on the ground of the appellant's diminished responsibility. Additionally, both of my colleagues have noted that the appellant has been on death row since 1995, and concluded that in accordance with the Pratt and Morgan principle, the death penalty would not be imposed, whatever the final verdict. The expense and trauma of a retrial would be wasteful and meaningless. I agree that the conviction be set aside and a verdict of manslaughter be substituted. The issue of the subjective motives and the antecendents of the appellant was addressed in the technical evidence given before us, as was the issue of the gravity of the offence. I agree that we have received sufficient information to consider the mitigating factors and make a fair adjudication on the sentence.

[2] I support the views expressed by d'Auvergne JA (Ag.) that mental condition of diminished responsibility is a mitigating factor as it tends to reduce the offenders responsibility for his behaviour in committing the offence.

Order

[3] I would therefore order that the conviction be set aside and a conviction of manslaughter be substituted with a sentence of 10 years imprisonment.

[4] d'AUVERGNE JA (Ag.): By order of Her Majesty in Council dated 12th July 2000 this appeal was remitted to the Eastern Caribbean Supreme Court of Appeal for re-hearing. The reasons for remitting the case are contained in the judgment of the Judicial Committee of the Privy Council dated 23rd November 1998 and reflected in the order dated 16th December 1998.

[5] The Judicial Committee of the Privy Council in that judgment of 23rd November 1998 rejected the original grounds of appeal against conviction of the appellant but

had by an application for leave to tender new evidence in the form of a report by Dr. N.L.G. Eastman, a distinguished English forensic psychiatrist, who went to St Vincent and interviewed the appellant in prison for over five hours on 19th February 1998, remitted the matter to the Court of Appeal to decide how to deal with Dr. Eastman's evidence. It was contemplated by the Judicial Committee of the Privy Council that the appellant would be permitted to call Dr. Eastman to give evidence either at a new trial or before the Court of Appeal; that the said Dr. Eastman would be subjected to cross-examination and that other evidence could be called in rebuttal, for "their Lordships consider that Dr. Eastman's evidence is "likely to be credible" in the sense that it satisfies that test of being apparently credible, though it need not be incontrovertible" per Denning L J in Ladd v Marshall 1954 lWLR 1489 at page 1491.

History

[6] On the 16th day of November 1994 the appellant Cardinal Williams inflicted a fatal wound to the throat of his girlfriend, Caroline Moses, with a kitchen knife outside their house. The wound inflicted was a 5 ½ inches jagged laceration to the right side of the neck, completely severing the strep muscles of her neck, carotid arteries, the windpipe the vagus nerves, the phrenic nerves, exposing the spinal cord between the C1 and C2 vertebrae. A post mortem examination revealed fifty-one other lacerations on different parts of her body. Almost immediately after, their two children ages five and two respectively, were found dead with their throats cut in separate rooms in the house.

[7] On the 23rd day of June 1995 the appellant was convicted of the murder of Caroline Moses and was sentenced to "Suffer death in the manner authorised by law". The appellant appealed from that conviction and sentence. This first appeal against conviction was dismissed by order of the Eastern Caribbean Court of Appeal dated 29th January 1996 (Byron CJ Singh J & Matthew JA ag) The appellant by special leave appealed as a poor person to the Judicial Committee of

the Privy Council. The said Committee rejected the original grounds of appeal but remitted the matter as stated earlier, to the Eastern Caribbean Court of Appeal to deal with Dr. Eastman's evidence.

[8] The Court of Appeal received notice of the report made by the Judicial Committee of the Privy Council on the 4th December 1998 and was prepared to hear the matter on the 7th December 1998 but counsel for the appellant was not ready and again on the 22nd March 1999 Learned Counsel for the appellant informed the Court that Dr. Eastman's report was ready and filed but he would be unable to testify till July 1999.

[9] At that juncture in the proceedings both the appellant and the respondent seemed to have rejected the option for a new trial and were prepared to have the testimony of Dr. Eastman tested, as was, Albert Matthew JA (ag). However the majority of the Court of Appeal treated the remitted appeal as an ordinary remitted appeal and having heard the submissions and read the report of Dr. Eastman which was treated "as evidence" dismissed the appeal for reasons contained in a judgment dated 25th March 1999 Page 4 under the rubric. The Referral.

[10] A summary of which reads as follows:

> "…. Do not agree with reason given by the Privy Council…. The appellant proffered no reason or no evidence to their Lordships why Dr. Eastman was not called at the trial. The issue of diminished responsibility was live at the trial, a psychiatrist was available in St. Vincent and the Grenadines and in fact testified on behalf of the defence at the trial. I am satisfied that despite the so called indigence of the appellant as suggested by Lord Hoffman the reality of the situation was that with some diligence on the part of Counsel for the accused, the psychiatrist or even Dr. Eastman who presumably would have been available could have given the fuller relevant evidence at that trial. The transcript from the Privy Council does not show any evidence to justify the finding by Lord Hoffman of indigence of the appellant at the time of his trial. Indeed at his trial and before us, the appellant was represented by able Counsel."

> That "Dr Eastman in his report sought to express an opinion on diminished responsibility of a killer at the time he committed the offence on an interview he had with the killer for the first time for some five hours and some four years after the crime was committed… the opinion he has expressed is more speculative than conclusive. He has based it purely on what the appellant told him *viva voce* and without any medical records. The opinion on what was told to him may be "likely to be credible" but the real question is whether what was told to him by the appellant was in fact credible. In his report he has accepted as true all the appellant told him. He then gave his opinion. The Privy Council in concluding that his evidence is "likely to be credible" by inference has also accepted that what the appellant told him was credible ……. Dr. Eastman's opinion was based on matters the credibility of which was not established and therefore was a mere academic opinion on those hypothetical facts."

At the hearing

[11] On the 5th of December 2000 a newly constituted Court of Appeal sat and heard the evidence of Dr. Eastman and Dr. Mahy. The evidence of Dr. Eastman discloses that he had an interview with the appellant at Kingstown Prison St Vincent on the 19th of February 1998 lasting five (5) hours and fifteen (15) minutes and that on that same day he also had an interview with Dr. Debnath the psychiatrist who interviewed the appellant and gave evidence at the appellant's trial; that Dr. Debnath had told him that he had only assessed the appellant in terms of his mental state at the time of the assessment itself.

[12] I pause here to note that at the trial Dr Debnath said "I was requested to look into two things, one his mental condition at that time, secondly his amnesia. The answer to the first question - his mental condition, I found him as mildly depressed. In regards to amnesia my opinion is that he was not suffering from any kind of amnesia. He was malingering."

[13] Dr. Eastman having been sworn told the Court that he accepted his first report of 4th June 1998 and his two later reports dated 29th April 1999 and 6th June 2000 respectively to be true and correct.

[14] He then reiterated and emphasised certain aspects of his reports which are hereby noted.

The appellant told him about a noise at the back of his head that was "like a stick breaking": that he had never known his father though he had a step father who had been with his mother since he was three months old; that he described his mother as a very nice woman meek and gentle who died in 1985. That after the death of his mother who had been ill treated by his step father he went to live with his maternal aunt until her death; that he had lived for a short period with that aunt during his mother's lifetime after a severe beating from his stepfather. He described that aunt "as an angel"; that he was the fourth in the family, his eldest brother was 20 years, his senior and the second brother was eight years older and who frequently beat him, that he had two of his sisters who were "retarded" and had been treated for depression at an early age.

[15] The personal history of the appellant indicated that though he attended school from the age of five years he went to school very infrequently. He was labeled "retarded" by the other school children who often taunted him. He described his falling out of a tree at the age of 11 years and "not knowing what was going on for about two hours thereafter". He told the doctor that the bang on his head "turned me foolish. I couldn't function properly. I couldn't remember how to do things which I am told to do" and that this continued until the present time and that he still suffered from headaches though he had not had any other accidents or illnesses: that he did farming as a living on lands belonging to his parents. Examples of deliberate self harm as a child were re-iterated for example his mother pulling him out of the fire, and of his sticking himself with a nail.

[16] Dr. Eastman noted that it was about one year after the death of his mother that the appellant met Caroline his girlfriend who assisted him to partially get over his symptoms of depressive illness which re appeared with Caroline's infidelity. Dr. Eastman placed specific importance on the noise at the back of the head and

voices whispering to him and of the fall he had. He fell from a tree at the age of 11 years and was never properly treated and would thereafter fall, kick his legs and frothed at the mouth, suggestive of seizures.

[17] Dr. Eastman narrated the appellant's relationship with Caroline and of what happened on the 16th November 1994. He said that the appellant told him that Caroline was honest to him at first, the relationship was alright for five years although she wanted sex more than him, left him for six months to live with another man and returned home two months prior to the offence. That two days before the incident she took the children's things from the home and carried them away intending to return for the children and that on the day of the offence while getting his daughter's lunch ready for school he heard someone call him he looked out and saw it was the children's mother who said that she had returned "for the children" and he told her that he would not allow her to take them to another man's house; whereupon she told him if she could not get them, he would not get them either. The appellant in response to Dr. Eastman's question replied "I didn't know what she meant, but upon his daughter's request for passion fruit juice and finding out that there was not any in the house he went with a knife to some fruit trees. He later found his son and daughter both dead in different bedrooms so he went outside where he had left his girlfriend and a fight ensued "I start pelting out with the knife and one of the cut catch her in the throat".

[18] Dr. Eastman reported that upon examination he found that the appellant was of low average intelligence, his movement was retarded (meaning slowed up), his speech was slow but clear and intelligible, his mood was depressed.

[19] Dr. Eastman concluded that in his medical opinion the appellant suffered from depressive illness which may have dated from his childhood but became evident in the aftermath of his mother's death and later developed a further similar depressive illness around the time when his wife lived with another man for six months. He said that "it is important to emphasize that depressive illness is a

medical diagnosis which, goes far beyond 'ordinary sadness' even where the precipitent of the symptoms is something which would make the ordinary person sad (for example loss of one's spouse). Specifically as regards the symptoms described by the appellant, these are sufficient to amount to the classification "major depressive episode".

[20] Under cross examination by Dr. Henry Browne, Dr. Eastman said that his experience with Afro American men was limited to about 30% of the patients he saw in London, England and more limited in the Caribbean. He denied that he based his conclusions on only what the appellant had told him. He agreed that appellants do tell lies and in particular that this appellant lied to him when he told him that he did not kill his children. He agreed that the appellant did not specifically say to him that he had any illness on the day of the offence but said "I am confident that on that day he may have suffered brain damage, fits before and after called Epileptic focus." He agreed that the anti depressants given to the appellant were in very low dosages and was given to the appellant after the commission of the offence.

[21] Under re-examination he adhered to his opinion that the appellant suffered from mental disorder though still able to think clearly. He said that for someone "who had no history of violence to kill in the street before a number of people connotes mental disorder, a mental abnormality of mind". He insisted that for a parent to kill both of his children (an issue which was denied and kept silent at appellant's trial) in the absence of mental illness is rare.

[22] It is crystal clear that Dr. Eastman's opinion is that the appellant suffered from an abnormality of mind which substantially impaired his mental responsibility and that there was strong evidence from his interview with the appellant that the latter had suffered a depressive illness at the time of the offence and strong prima facie clinical evidence of brain damage sufficient to cause a seizure disorder which he

thought was most likely to have been caused by a childhood head injury (described above).

[23] Dr. George Mahy called as an expert witness by the crown accepted his previous report and re-iterated that he had visited the appellant at the Kingstown prison, St Vincent on Friday the 19th March 1999.

[24] He reported that his interview was for two and a half hours in the morning and after one and a half hours for lunch-break and was again interviewed for another one and a half hours in the afternoon making a total of four hours; that the appellant was bought into a room where he was already sitting, that initially he would not make any eye contact with him and appeared to be distant and showing little emotion; that he later relaxed and gave the reason for his being tense namely, that his attorney had told him not to talk to anyone unless she was present.

[25] Dr Mahy reiterated what he had already reported that the appellant was a good listener, and who thought before he spoke, though slow in giving answers. That his verbal ability was good though his formal education was inadequate; that the appellant spoke of his various "attacks of trembling and getting stiff and sometimes not knowing what was happening around him…. of being absent minded after the attacks and sometimes like he would hear a voice in his head associated with the stiffness" and that he "was often told that he looked foolish during the attacks;" that he had always been given bush tea to drink firstly by members of his family and latter on by Caroline to clear up the attacks.

[26] Dr. Mahy said that he formed the view that the appellant is an epileptic and that he has had several attacks of grand mal Epilepsy hence the reason why he was told not to climb because he could get a seizure and fall from a height and get injured.

*[*27] Dr. Mahy further reported that the appellant told him that he could remember "everything" that happened on the day of the fight with Caroline and that his version of what he told him in the morning was identical to what he repeated during the afternoon interview; that Caroline was a big woman who had beaten him up on several occasions; that she had had various relationships with other men, that she cohabited with one of them for a period of six months and thereafter returned home; that the incident started over a return of a pot to cook for the children; that he was very angry and the whole situation had him quite upset.

[28] Under oath Dr Mahy said "I did not think he was depressed when I saw him at the prisons,… he was not suffering from psychotic illness. "I thought it was possible he had minimal brain damage,…. in my opinion he suffered from grand mal Epilepsy … that on the 16th November 1994 Cardinal Williams functioned at a level that can be said to be rational behaviour."

[29] Dr Mahy concluded his examination in chief by saying that it was his opinion that the appellant was embarrassed by the fact that Caroline's flirtations behaviour was known to everyone and in desperation took a deliberate decision to do what he did.

[30] He commented on the low dosages of the drugs given to the appellant in prison and commented on Dr. Eastman's report concerning Dr. Debrath. He said that latter was asked to find out "whether the appellant was unfit to plead by reason of amnesia which the appellant said he had; that Dr. Debnath examined the appellant on the 10th June 1995 and gave two possibilities for the appellant's inability to recall the events, namely (1) malingering (2) denial as a form of defence mechanism. He emphasised that the appellant was able to recall "everything" and even stated "the reports of the events are conflicting because some of the witnesses are Caroline's friends who don't like me but I remember everything that happened."

[31] Under Cross Examination Dr. Mahy agreed that someone suffering from depression is able to take deliberate decisions but said that while he accepted the appellant's account of his head injury he was not prepared to say that depressive illness impaired his mental capability. He insisted that the appellant did not suffer from substantial impairment of mind but suffered from mild depressive illness which was minimal and therefore "he had a high degree of ability to reason;" that he accepted that the appellant suffered from seizures not organic brain damage.

Arguments

[32] Learned Queen's Counsel Guthrie argued that the appellant's killing of the two children should now be accepted as evidence during the proceedings. He quoted Section 45 of the Eastern Caribbean Supreme court (Saint Vincent and the Grenadines) At chapter 18 which allows the admission of new evidence in the Court of Appeal and provides that unless satisfied that the evidence if received would not afford any ground for allowing the appeal, the court shall exercise the power to receive it if:

(a) it appears to it that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and

(b) it is satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure so to adduce it.

He further quoted the cases of Stafford & Luvagolio vs D.P.P. [1974] A.C 878. In particular Page 891 Letters F, J & H. In that case the case of Regina v Cooper (Sean) 1969 1QB 267;271 an appeal in which no fresh evidence was heard Widgery L J said

> "However,… we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us

> wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

[33] He also quoted the case of Queen v Arnold 31 BMLR Page 24 at pages 32, 33 & 35 which further quotes the case of R v Byrne (1960) 3ALLER at 4, (1960) 2QB 396 at 403, where Lord Parker CJ giving the judgment of the Court of Appeal said:

> "Abnormality of mind", which has to be contrasted with the time honoured expression in the M'Naughten Rules "defect of reason", means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. 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 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…Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is, no doubt, of importance, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it."

[34] Learned Queen's Counsel pointed out that indeed the medical opinions are founded on facts but if out of them, the medical opinions are credible then it is a question to be left for the jury.

[35] Learned Director of Public Prosecutions in his reply contended that Dr. Eastman's report was replete with hearsay evidence and therefore has no factual basis upon which a medical opinion should be founded; that the said facts were not given as evidence before the court and consequently lacks integrity.

[36] Learned Director of Public Prosecutions argued that statements made by the appellant to Dr. Eastman lacks credibility since there was very compelling

evidence from the appellant himself which destroyed any defence that he was suffering from such abnormality of mind which would substantially impair his mental capability, for indeed, the appellant gave a statement to the police four hours after he killed Caroline; that the contents showed that facts were given with a sane mind with no delusions; that it portrayed a person with a deliberate cold and calculated purpose and one who recognised the full and dire consequences upon the fulfillment of that purpose; that the statement showed a revenge killing of Caroline by the appellant, that he demonstrated the mind of a man full of street sense in the way he gave evidence at trial leaving out salient aspects and now at this court sitting using those left out aspects as a shield.

[37] Learned D.P.P. then quoted the case of Walton v Queen 1978 1 ALLR Page 542 and Queen v Jones 33 BMLR 88 where fresh evidence was received by the Court of Appeal but the convictions were upheld.

[38] The Learned Director of Public Prosecutions urged the Court to reject the opinion evidence as given by Dr. Eastman since his opinion cannot co-exist with facts he received from coming from the appellant. He pointed out that while the two doctors agreed with the fact that the appellant suffered with depressive illness Dr. Eastman insists that it was in the degree of moderate to severe whereas Dr. Mahy would not flinch from his opinion that it was mild and that it did not substantially impair his mental capability.

[39] Learned Director of Public Prosecutions urged the Court to note carefully the actions of the appellant on that morning. He said that because of Caroline's refusal to return the cooking pot he was so angry that he rushed her in a neighbour's yard and then slit her throat. He then lighted the curtain and the bed spread in order to destroy the evidence. He concluded that those who commit acts must be made to pay for their consequences.

[40] Learned Queen's Counsel for the appellant replied that the Learned Director of Public Prosecutions address was contrary to what was ordered by the Judicial Committee of the Privy Council which was, would the evidence of doctor Eastman be acceptable to a jury?

Conclusion

[41] Having read and listened to the evidence of both Dr. Eastman and Dr. Mahy in their reports and as given in the witness box, as I see it, the question to be decided is whether there is in Dr. Eastman's evidence "material upon which a jury could have found that the appellant was suffering from diminished responsibility."

[42] Though both doctors agree that the appellant at the relevant time was suffering from a depressive illness, Dr. Mahy is adamant that the depressive illness suffered by the appellant was of a mild degree and did not impair his metal capacity, that he had a high degree of ability to reason and that the appellant maintained that he remembered "everything that happen." "Dr. Eastman on the other hand insists that the depressive illness suffered by the appellant was an "abnormality of mind" which substantially impaired "mental responsibility."

[43] I am cognisant of the decision in Seers 1984 Cr Appeal R 261 and in Lloyd 1965 Cr Appeal R. 61 where the test of substantial impairment was explained as:

> "Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between"

[44] It is my considered judgment that there is a basis for supposing that a jury may be likely to find that there was substantial impairment. Having said so I also bear in mind that this appellant was convicted of and sentenced to death on the 23rd day of June 1995; and that it is now over five years since conviction and sentence (Pratt v Attorney General of Jamaica [1994] 2 A.C).

[45] Accordingly I would substitute a verdict of manslaughter and impose a term of imprisonment.

Sentence

[46] It has been the practice of this Court to impose a sentence of fifteen (15) years in cases of persons found guilty of manslaughter by virtue of the defence of provocation. See St. Lucia cases Criminal Appeal No. 1 of 1995 Denis Alphonse vs The Queen and Criminal Appeal No. 19 of 1994 James Jn. Baptiste vs The Queen. However, in this case, both doctors agreed that at the time of the killing the Appellant suffered from depressive illness and Dr. Eastman's evidence was that the Appellant's mental condition was such that diminished responsibility was available as a defence.

[47] Therefore in considering the appropriate sentence for this serious crime, the Appellant's depressive illness is a circumstance which would invite leniency, yet I have to consider that he may constitute a threat to the safety of members of the public. He had no previous convictions but the crime of manslaughter is a serious first offence. I have considered the case of Ramnath Harrilal vs State Privy Council No. 17 of 1998 and the sentence of five (5) years later imposed by the Court of Appeal of Trinidad and Tobago and the sentence of ten (10) years imposed in R vs Chambers 1983 Criminal Law Review Page 688.

[48] In the circumstances I would impose a sentence of ten (10) years imprisonment.

[49] SAUNDERS, JA (Ag): On the 23rd June, 1995 the appellant was convicted of the murder of Caroline Moses, his common law spouse. The mandatory sentence of death was imposed upon him. His appeal to this Court was dismissed. There then

followed a course of events that ultimately resulted in his appeal being remitted to this Court by Order of Her Majesty in Council dated 12th July, 2000. I shall briefly describe those events in due course but it may be better first to give a short account of the evidence surrounding the killing of the deceased.

The facts surrounding the killing

[50] Shortly after the deceased was killed the appellant gave to the police a statement under caution. In a judgment of the Privy Council delivered on the 23rd November, 1998 portions of that statement were paraphrased in these terms:

> "In his statement, the appellant said that in recent times Caroline had on several occasions gone off with other men. His cuckoldry was well known in the area and his friends made jokes about it. On one occasion she lived with another man for six months and then returned. He took her back. A few days earlier she had stayed out all night with another man and the next day the police had relayed to him her request to remove her possessions from the house. When he returned he found that almost everything in the house had been taken. He did not see her again until that morning, when she passed the house carrying water……"

[51] The witnesses who testified at the trial gave a fairly consistent account of what happened next on that fateful morning. There was an altercation between the appellant and Caroline. He confronted her about her removal of foodstuff and other items from the house. They began to curse. The appellant ran inside and returned with a knife. He chased after the deceased, caught up with her in the road and, in the presence of onlookers, slashed her throat. In the process he inflicted on her no fewer than fifty other wounds, many of them superficial lacerations. The appellant then declared that he was going to kill his two children and drink gramaxone, a powerful herbicide that, when consumed by humans,

invariably proves fatal. An onlooker urged the appellant not to kill the children. He responded by inviting the onlooker to get a gun to shoot him i.e. the appellant. The appellant then went into his house and closed the door. While he was still in the closed house smoke was seen coming from the building. The police arrived on the scene and approached the home. The appellant jumped out of a window, ran into a banana field and turned himself in at the Police Station where he made the statement to which I have earlier referred. The children were found in the house with their throats cut.

[52] In his statement to the police the appellant admitted taking the lives of his two children. The reason he then gave was that he would be hanged and he wanted to spare them the agony of growing up without mother or father. Shortly before his trial he was seen by Dr. Debnath, a Vincentian psychiatrist. Dr. Debnath formed the opinion that the appellant was mildly depressed and that he was faking amnesia.

[53] Counsel for the appellant now concedes that the killing of the children could only have been the work of the appellant. At his trial however, the appellant steadfastly denied killing them and accordingly a decision was taken to try to conceal from the jury the appellant's responsibility for the deaths of the children. While giving his evidence on oath before the jury the appellant maintained that it was Caroline who had killed the children and that consequently he, in an enraged state, had rushed outside and killed her. The appellant maintained this unlikely version of events in an interview with a Dr. Eastman some two and a half years after his conviction.

The background to the remittal

[54] After the appellant's initial appeal to this court was dismissed he was granted special leave to appeal to the Judicial Committee of the Privy Council. At that appeal an application was made by his counsel to tender fresh evidence in the form of a report from Dr. Eastman, a prominent English psychiatrist. In February 1998 Doctor Eastman had interviewed the appellant at H.M. Prisons in St. Vincent for over five hours. Based upon this interview, the doctor had prepared a detailed report of his findings as to the appellant's mental condition at the time of the killing.

[55] At the hearing before the Privy Council, their Lordships took the view that Dr. Eastman's report, "…..if accepted, would be material upon which a jury could have found that the appellant was suffering from diminished responsibility." Their Lordships considered that the doctor's evidence passed the threshold test for admissibility under the relevant statutory provisions of Saint Vincent and the Grenadines. It was further held that there was a reasonable explanation as to why this evidence was not adduced by the appellant at his trial. In the circumstances, their Lordships took the decision, in their own words, to:

> "…….. remit the appeal to the Court of Appeal to decide how best to deal with Dr. Eastman's evidence. The Court may consider it expedient to order a new trial, so that the evidence can be given subject to cross-examination and any rebutting evidence before a jury. Or it may decide in the first instance to hear such cross-examination and rebutting evidence itself. Their Lordships consider that the procedure to be followed must be a matter for the Court of Appeal to decide."

[56] The case did come back before this Court, but by a majority decision this Court declined to hear any further oral evidence. Instead, Dr. Eastman's written report was treated as evidence and rejected in its entirety principally on the basis that the findings therein were premised upon facts that had not been established. The majority took the view that, in the circumstances attending the killing, there was very compelling evidence to destroy the defence of diminished responsibility. The appeal was again dismissed and the conviction of the appellant and the sentence of death imposed upon him were reaffirmed.

[57] From that decision the appellant again sought and obtained special leave to appeal to the Judicial Committee of the Privy Council. By this time, Dr. Eastman had issued two supplementary reports. More importantly, a report had also been prepared on behalf of the Crown by Dr. Mahy, a renowned Caribbean psychiatrist. Dr. Mahy too had visited and interviewed the appellant in prison.

[58] Their Lordships therefore had before them both sets of medical reports. Their initial assessment of them was that: "….It is plain that there is much agreement between the two doctors but there are areas where they do not express the same view." Their Lordships therefore felt that the areas of obvious and potential difference between the two doctors

> "could be explored and clarified by oral evidence-in-chief and by cross-examination. That was the intention of the original order…….In their Lordships' view they still need to be so explored….."

Accordingly, it was ordered that the matter should go back before a differently constituted Court of Appeal so that oral evidence could be taken and the matter re-considered in the light of the new evidence.

[59] The oral evidence was heard by us in early December, 2000. Drs. Eastman and Mahy were examined on oath, cross-examined and their respective reports put into evidence. Counsel then addressed the court on how this fresh evidence should be assessed and what consequential orders should be made.

Evidence tendered by Drs. Eastman and Mahy

[60] I do not find it necessary to detail the qualifications and expertise of the two doctors. Suffice it to say that they are both highly respected and eminently well qualified professionals. Each of them is a Fellow of the Royal College of Psychiatrists with extensive experience in the field. Dr. Eastman has the very significant additional qualification of being a trained lawyer. Dr. Mahy practises in the Caribbean and would be more familiar with Caribbean realities.

[61] As their Lordships had earlier intimated, the written reports, adopted by the doctors and tendered as part of their evidence, suggested a measure of agreement between the psychiatrists on certain issues. When the *viva voce* evidence was given before us however, it was quite apparent that with respect to the essential questions concerning this appeal there were substantial differences between the medical experts.

[62] Dr. Eastman's oral evidence closely followed his extremely thorough main report. At page 25 of that report, the doctor had summarised that:

> "……..in my opinion, there is strong evidence of the appellant suffering a depressive illness at the time of the offence and strong prima facie clinical evidence of brain damage sufficient to cause a seizure disorder which seems most likely to have been caused by a childhood head injury. The latter raises the clinical possibility of abnormal cognitive and emotional mental functioning in the appellant generally. Both factors, depressive illness and possible brain damage, are relevant to, and support, the defence of diminished responsibility……"

[63] These findings were based upon the doctor's professional evaluation after interviewing the appellant. Dr. Eastman went out of his way to point out to the court that the symptons described by the appellant were consistent with his diagnosis. Moreover, says the doctor, the appellant's academic level is such that it is highly unlikely that he could have appreciated and therefore fabricated the various individual threads that gave his story a ring of consistency.

[64] The appellant gave Dr. Eastman

> "….a family history of psychiatric illness in that two of his eldest sister's children, called Shoma and Monty, he described as "retarded". Also he said that both of them, at the ages of 17 and 15 years respectively had been treated by a doctor for depression. Further, he described a maternal uncle being in a mental home. He said "he would run away and we would take him back" (this appeared to be a relative called Curtis Williams). He was apparently ill all of his adult life and was described by local people as "the crazy man"…….He died in a psychiatric hospital about 16 years ago."

No attempt was made to identify witnesses who could corroborate or contradict much of the information provided by the appellant in the interview. Some of those capable of doing so had died.

[65] The appellant also told the doctor that as a child he suffered tremendous physical abuse from his stepfather and his brother. It would appear that his mother was the only person who sought to protect him from this abuse and the appellant formed a strong bond with her. Dr. Eastman says at page 16 of his report:

> "…….there is clear evidence of very substantial emotional disturbance in childhood, with deliberate self harm (which is in itself extremely unusual in children and always suggestive of emotional disturbance). In my opinion, this is highly likely to have arisen from the severe abuse of the appellant which he described at the hands of his stepfather and his brother (I think also one of his sisters). In this context his mother was seen by the appellant as his source of emotional support, with his aunt being a secondary source particularly after his mother died. In my opinion, his developmental history made the appellant highly vulnerable to episodes of depressive illness in adulthood…."

[66] The appellant told the doctor that, at about the age of 11 years, he fell out of a tree, struck his head and did not know what was going on for about two hours thereafter. He woke up and found himself in the Kingstown General Hospital where he said he stayed for about eight days. He said he sustained cuts and a fracture of the left arm. I must pause here to note that this account was consistent with evidence given on oath by the appellant before the jury. The appellant had testified at the trial that, "When I was much younger I fell off a tree in the river and I got lash in my head so I couldn't hear well." He also showed the jury, on that occasion, and Dr. Eastman subsequently, where on his left hand there was still a visual reminder of that fall.

[67] The evidence seems clear that the appellant is an epileptic. He described to Dr. Eastman symptons of epilepsy that he said first arose after his fall from the tree. This caused the doctor to theorise that:

> "All of the symptons …….. are strongly suggestive, prima facie, of seizure disorder originating in brain disorder, possibly arising from his claimed head injury at the age of 11 years; they need further formal neurological investigation including brain imaging with MRI or CT scanning, neuropsychometry and electro-encaphalogram…"

[68] Dr. Eastman further opined that the appellant has

> "a history of episodes of moderately severe depressive illness which may well date even from his childhood but which certainly became evident, as a first episode, in the aftermath of his mother's death. The symptoms he describes at that time…….are entirely consistent with, and support, such a conclusion (in particular, loss of weight, thoughts of deliberate self harm, anhedonia, inability to carry out daily activities, inability to look after himself, feeling worthless and valueless, not working, also memory difficulties). Although it is possible that there were also other episodes in between, in my opinion, the appellant then developed a further similar depressive illness around the time when his wife lived with another man for six months, and thereafter. The symptoms he describes……. are, again, all strongly suggestive of this conclusion."

[69] Dr. Eastman mentioned two matters that, in his view, strengthened and validated his conclusion that the appellant was mentally ill at the time he killed Caroline Moses. The first is that, "…..deliberately killing both (or all) one's own children in the absence of mental illness is rare" unless there is a history of child abuse. There was no evidence of any such abuse here. Secondly, the doctor pointed to the enormous number of wounds inflicted upon the deceased by a man with no history whatsoever of violence.

[70] Doctor Eastman noted that depression is an illness that can range from being mild, when it presents itself as ordinary sadness, to severe, when it can manifest itself in

the form of a psychotic illness. The appellant's condition at the relevant time, the doctor stated, was somewhere in the middle. In his view it was severe enough to substantially impair his ability to judge things and to carry out actions.

[71] Under cross-examination Dr. Eastman acknowledged that the appellant did not specifically describe his concentration on the day of the killing so as to permit the doctor to form a view as to whether it was or was not impaired at the material time. Nor did the appellant indicate to the doctor anything that might reasonably lead to the view that he had suffered a *grand mal* seizure on the day of his committing the offence. Without carrying out the requisite tests the doctor could not say conclusively that the appellant was indeed suffering from brain damage but that was nonetheless his confident *prima facie* view. In response to the suggestion that the killing of Caroline was a clear act of revenge on the part of the appellant, Dr. Eastman stated that it was quite possible that a depressed or brain damaged person could harbour feelings of revenge.

[72] Dr. Mahy's written report was not as extensive as Dr. Eastman's. That report confirmed the appellant's troubled childhood and agreed with the opinion that the appellant is epileptic and has suffered and probably still has episodes of *grand mal* seizures. This report also concluded that the appellant suffered a depressive illness at the time of the offence. Broadly speaking, that was the scope of the common ground between the two psychiatrists.

[73] Dr. Mahy found the appellant to be a person whose intelligence was within normal limits. While it was his opinion that, at the time of the killing the appellant was suffering from mild depression, this doctor ruled out the likelihood of a major depressive disorder. He did so because he found no evidence to suggest that the appellant was not functioning well in the weeks and days leading up to the commission of the offence. Indeed, precious little of any such evidence surfaced during the trial. Dr. Mahy also noted that the appellant was able clearly to recall all the events of the day of the killing as exemplified by his detailed statement under caution to the police. That, the doctor stated, would be unusual if he had been experiencing a major depressive disorder. Dr. Mahy's own view is that on the day of the killing, the appellant was acutely embarrassed and desperate. He had reached the stage where he was no longer prepared to tolerate his wife's infidelity and he took a deliberate decision to do what he did.

[74] In cross-examination, Dr. Mahy conceded that it was quite possible for a depressed person to take a deliberate decision. When asked about the view that in the absence of a mental disorder it is rare for a parent to kill all or both of his children, the doctor had a ready response. He stated that there was developing in the Caribbean a pattern of killing where a parent in similar circumstances would kill the children in order to ensure that the latter did not suffer while growing up without their parents. This appears to be a recent cultural pattern, he said. Dr. Mahy expressed his respect for Dr. Eastman's approach and findings but he remained firmly of the view that he could not share them. He candidly granted however that "it may be that Dr. Eastman is right and it may be that I am right."

Submissions of Counsel

[75] Mr. Guthrie Q.C. submitted that, in keeping with the circumstances attending the remittal of this matter and the views already expressed by their Lordships, there were two questions before this court. Firstly, whether Dr. Eastman's evidence is still such that, if accepted, it is material upon which a jury could have found that the appellant was suffering from diminished responsibility? Or, secondly, has his evidence been controverted, so as to be rejected?

[76] To put the matter in this manner obscures the fundamental decision that this court must make. For a start, their Lordships have virtually already answered in the affirmative the first of those two questions and it is not for this court to contradict that finding. As to Mr. Guthrie's second question, I discern in it shades of one of the arguments that was put and rejected in Stafford and Luvaglio v. DPP [1974] A.C. 878. That case, along with R. v. Byrne, 88 Cr.App.R. 33; and R. v. Callaghan and others, 88 Cr.App.R. 40, makes it clear that ultimately the question the court has to ask itself is whether in its judgment, in all the circumstances of the case, including the verdict of the original jury upon the evidence they heard and the fresh evidence, the conviction was safe.

[77] It is true that in the cases above mentioned the courts were concerned with the construction of section 2(1) of the Criminal Appeal Act 1968 (U.K.). For these purposes the relevant provision is similar to its St. Vincent and the Grenadines

counterpart. Section 40(1) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, Chapter 18 states, inter alia:

> "The Court of Appeal on any such appeal against conviction shall, subject as hereinafter provided, allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial….."

Regarding the scope of that provision, I can do no better than to quote Viscount Dilhorne in the House of Lords in *Stafford*, itself a case concerning the receiving of fresh evidence. At page 906 Letter A - C, Viscount Dilhorne stated that:

> "At the end of the day it is for this House to say whether in the light of the further evidence the verdict was unsafe or unsatisfactory…….
>
> While, as I have said, the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question…."

[78] Dr. Browne submitted that the substratum of fact underlying Dr. Eastman's evidence partakes of inadmissible hearsay, unproven assertions from the appellant himself, and the court should therefore decline to accept that evidence. The case of R. v. Arnold 31 BMLR 24 was cited in support of this proposition. This argument was tentatively responded to by their Lordships when, in remitting this matter to us a second time, they observed

> "that some of at least of Dr. Eastman's evidence consisted of his professional appraisal of the [appellant's] state of mind, independent of the truth of any fact of which the [appellant] told him.."

As was noted in Harrilal v. The State (unreported) Privy Council Appeal No. 17 of 1998, inevitably a psychiatrist has to rely upon what he is told. That

circumstance does not mean that courts ought automatically to reject the opinions of psychiatrists. In this respect Dr. Mahy is in no better a position than Dr. Eastman. He too relied, even if only partially, upon what the appellant told him in order to form his own assessment.

[79] In his reports and his oral evidence Dr. Eastman went to some length to point out that he approached the appellant's symptoms with caution and scepticism. It was only after a process of cross-checking that he felt confident about his diagnostic conclusions. It seems to me that quite apart from the pains taken by Dr. Eastman to ensure that the appellant was not feigning symptoms, there is some hard evidence underlying Dr. Eastman's opinions. The killing of the children by a father who clearly loved them dearly, the ferocity of the attack on the deceased by a man who had hitherto not been known for being violent, the threat to drink grammaxone, the invitation to the onlooker to shoot him, the clumsy attempt to set fire to the house, all of these are proven facts some of which were relied upon by Dr. Eastman.

[80] Dr. Browne also invited the court to examine the whole conduct of the appellant from the time of his arrest to the present time and the manner in which his Defence has been mounted throughout this entire case. A wide range of matters was pointed to. First of all there is the full confession from the appellant giving extraordinary details of the killings. Then Dr. Debnath later assessed that he was faking amnesia about the incident. There followed his stubborn denial, at the trial and since then, of responsibility for the deaths of the children juxtaposed with the

assertion that it was Caroline who had done so. One cannot overlook the fact that this was a very convenient way of putting matters for an accused who at the trial was running a defence of Provocation. Then there is the fact that the issue of diminished responsibility was not raised until the case reached the Privy Council for the first time. Now, when that defence appears to be the straightest arrow in the defendant's quiver, his counsel acknowledges that it was the appellant who killed the children, a circumstance that on one view appears to bolster that defence.

[81] To put it mildly, none of this does any credit whatsoever to the appellant. The observations of McCowan LJ in R v Richardson (1 February and 9 May 1991, unreported) as quoted by Hobhouse LJ in R v Arnold are apposite:

> "We have found this a very troublesome matter ……..On the one hand, this is a case of a man who has advanced an admittedly lying defence and it having failed now wants to try another one. The court is extremely reluctant to lend any assistance to that sort of purpose. Indeed, it could only be in an exceptional case that it would do so. On the other hand, we have to consider whether there is a risk that by reason of his own stupid lies a miscarriage of justice may have occurred….."

In short, we are here principally concerned with whether the appellant's conviction is safe and satisfactory. These matters to which Dr. Browne referred us, while they adversely reflect on the credit of the appellant, are marginal to a determination of the fundamental issue to be decided here.

Is the conviction safe and satisfactory?

[82] For the Crown, Dr. Browne urged the Court to prefer the testimony of Dr. Mahy and to dismiss the appeal. He argued that clinical depression capable of supporting a defence of diminished responsibility does not come and go from day to day but is pervasive. R v Julian Cox 26 January 2000 (unreported) was cited. Dr. Browne further submitted that all the evidence in this case appears to indicate that the appellant functioned reasonably well in the days leading up to the offence and his recall of events, as seen from the detail in his statement under caution, was good. There is therefore little likelihood that his depressive illness could have been so severe as to substantially impair his mental responsibility, counsel submitted.

[83] Even if I accept that submission, it must be borne in mind that Dr. Eastman also rested his conclusions as to the appellant's mental responsibility for the killing on the basis of possible brain damage sustained when the appellant fell from a tree at about the age of 11 years. Only scientific testing can determine with certainty whether this brain damage exists, how serious it is and the extent to which it affects the appellant. Dr. Eastman posited that this damage

> "….raises the clinical possibility of abnormal cognitive and emotional functioning in the appellant generally. Both factors, depressive illness and possible brain damage, are relevant to, and support, the defence of diminished responsibility….".

[84] I subscribe entirely to the honest view expressed by Dr. Mahy when he offered that his opinions in this matter may be right (in which case the conviction for

murder should logically stand), or Dr. Eastman's may be right (in which case a sufficient argument has probably been made out that the appellant was suffering from diminished responsibility). I do not consider it necessary to determine which of the two psychiatrists more impressed me. The mere thought that Dr. Eastman's opinions could be right cannot but weigh very heavily in any assessment on the safety of the appellant's conviction.

[85] If it could have been said that the medical evidence adduced here pointed convincingly in one direction, then the task of this court would have been relatively easy. However, where, as here, the evidence is somewhat equivocal, then I would ordinarily consider it inappropriate for this court to confirm or substitute the conviction and sentence. As was stated in R v Byrne (1960) 3 A.E.R. 1 by Lord Parker CJ at page 3 of the judgment:

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

[86] Similar sentiments have been expressed in R v Arnold 31 BMLR 24 at page 32*:*

> "It is for a jury to decide contested issues of diminished responsibility when they arise, not this court. Diminished responsibility is exceptional, in that it is an issue upon which the burden of proof lies upon the defendant. It is for the jury, on a balance of probabilities, to return such a verdict."

[87] I believe that in this case it would have been ideal for a jury to listen to the medical evidence and assess that evidence in the light of all the other evidence in the case. In other circumstances I would not have hesitated to order a re-trial of this

matter. A number of factors give me pause however. The appellant has been sitting on death row since June, 1995. In view of the length of time that has elapsed, and given the ruling of the Judicial Committee in Pratt v. Attorney General for Jamaica (1994) 2 A.C. 1, it does appear that, even if the appellant were re-tried and convicted yet again of murder, it is unlikely that the sentence of death could lawfully be carried out in relation to him. Why then should I put him and the State through the rigours of a re-trial? What practical purpose would be served where a re-trial could only result in either of two consequences, namely another conviction, in which event the judge would then impose a sentence that could not be lawfully carried out or a finding of diminished responsibility? In these circumstances, I agree that the conviction should be quashed and substituted with a conviction for manslaughter. For the reasons advanced I also agree that the appellant should suffer the term of imprisonment proposed.

Sir Dennis Byron
Chief Justice

Suzie d'Auvergne
Justice of Appeal (Ag)

Adrian D. Saunders
Court of Appeal Judge (Ag.)