Neutral Citation Number: [2013] EWCA Crim 475

Case No: 201107029B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LUTON CROWN COURT
His Honour Judge Foster
T20107441

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 24th April 2013

Before :

LORD HUGHES OF OMBERSLEY
LADY JUSTICE GLOSTER
and
MR JUSTICE HICKINBOTTOM

- -

Between :

Lee Robert Foye	**Appellant**
- and -	
The Queen	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Jeremy Benson QC and Philip Rule (instructed by **O'Neill, Wright & Nash, Solicitors**) for the **Appellant**
Neil Moore (instructed by the **Crown Prosecution Service**) for the **Respondent**

Judgment
As Approved by the Court

Lord Hughes:

1. This defendant was a prisoner serving a sentence of life imprisonment for murder when he killed another prisoner in circumstances of some brutality. The only live issue at his trial was diminished responsibility. If made out, that partial defence would reduce the offence from murder to manslaughter. The jury rejected diminished responsibility and convicted of murder. His grounds of appeal challenge the manner in which the issue was left to the jury.

2. The defendant was 25 when he killed the other prisoner. The following facts are common ground. He had been a disturbed and aggressive child. There were episodes of violence to others, of cruelty to animals and of fire setting. He was treated as characterised by Attention Deficit Hyperactive Disorder and given the drug Ritalin for about two years until he was twelve. He was in care for a year and then educated at a residential special school for children with emotional and behavioural difficulties until expelled for repeated violence culminating in an assault with a pool cue. He was frequently convicted as a teenager of offences of dishonesty and violence. He had a history of alcohol and drug abuse, both of which had led to brief admissions to hospital following excessive consumption. He is a large man of approximately 18 stone (115 Kg) and a keen user of training weights.

3. At the age of 20 he was in a sexual relationship of about two years' duration with a young woman, but also with a second woman, Lauren. In August 2005 he went to live with the first. About a week later, on 28 August 2005 he had a row with her, and, leaving their home, went from her immediately to Lauren. Within days, after he and Lauren had had sexual intercourse, he murdered her following, according to him, an argument which ensued when she asked his intentions for the future. He inflicted some 46 stab wounds upon her and stamped repeatedly on her head. According to his own subsequent account he had been intoxicated with alcohol and cocaine when he committed this offence and was regularly injecting steroids. He was on bail at the time. He denied responsibility for the killing to everyone who asked, until pleading guilty abruptly and unexpectedly at court.

4. While on remand awaiting trial for this first murder the defendant assaulted another prisoner. After conviction, and when detained at HMP Woodhill, he made himself a sharpened knife which was hidden in his cell. Following transfer to HMP Dovegate, a therapeutic prison, he attacked another prisoner only about three months after arrival, breaking his eye socket, cheekbone and jaw. What lay behind that attack, if anything, never emerged; it was not the subject of any prosecution.

5. The defendant was assessed after the first murder as having a severe personality disorder of the kind variously known as 'dissocial', 'antisocial' or 'psychopathic'. That is characterised by (inter alia) callous unconcern for others, high levels of aggression, a low tolerance of frustration, difficulty in taking responsibility for his actions and a readiness to blame others. At times he nevertheless presented himself as co-operative and keen to engage with therapeutic work. That resulted in the move to Dovegate. He was transferred away from that prison after the attack on the other prisoner, having been heard to say that he would 'fight all the way' if removed. Subsequently, after a period of good behaviour in another prison, HMP Swaledale, his transfer to HMP Grendon Underwood was made at the end of January 2010. Grendon Underwood is, as is well known, a specialist prison entirely dedicated to

psychotherapy; those who are sent there are those of whom there is reason to hope they will commit to it and profit from it. Many of its prisoners have committed extremely serious offences. It was there that the present offence was committed only about six months later.

6. On Sunday 1 August 2010 the defendant went looking in the morning for a fellow prisoner, Coello, who lived on the same wing as he did. Coello was not there, having gone to the chapel. The defendant went away, bided his time, and came back in mid afternoon. He had equipped himself with toilet paper to cover the spyhole in the cell door. He locked the door from the inside to keep others out. He attacked Coello, who was a much smaller man of about 11 stone and 5'4" tall. It seems that he put him in a headlock and then having got him to the ground stamped repeatedly on his head until he was thought to be dead, and indeed for some time thereafter. Others heard the noise and came to the cell, but the defendant covered the spyhole with the toilet paper. After the attack the defendant returned to his own cell, changed his bloodstained clothes (which another prisoner put in a bin), lay down and smoked a cigarette and, when challenged, denied any part in the killing. He appeared calm and relaxed. Coello was mortally injured, although not in fact quite dead, and could not be saved. When the staff removed the defendant from the wing, he joked with others that he was being re-classified as a category D (low security risk) prisoner and released on licence.

7. Subsequently the defendant admitted that it was he who had killed Coello. He did not himself give evidence, and indeed absented himself from his trial except on the first day. The issue properly advanced on his behalf was one of diminished responsibility. Although his lawyers could not formally admit that he intended to kill or do serious bodily harm to Coello, the account which the defendant had subsequently given to the psychiatrists left no room for doubt about it. He told them consistently, after the event, that he had determined at least the previous day to kill Coello, along with (so he said) two other (unidentified) prisoners. He told them that he had looked for Coello to kill him in the morning and, not finding him, had returned in the afternoon. Indeed, he asserted that he had taken a spoon with him, intending to eat Coello's brains, but had been unable to split open his skull despite the repeated stamping. He said that he had previously thought about cutting off Coello's face with a razor, as seen in a violent film.

8. The jury was inevitably told that the defendant was a prisoner and that he was serving a term for an offence of violence, but it was not told of the previous murder. It was told of something of his history in the various prisons, because he relied on his engagement with therapists and on some of his history of violence. It was thus told of the incident at Dovegate in which he had broken the facial bones of another prisoner (paragraph 4 supra).

9. The defendant put before the jury evidence from other prisoners and prison therapeutic staff that he had spoken before the killing of experiencing increasing violent thoughts. He had spoken of such to other prisoners both privately and in some of the regular group sessions organised by the establishment. One such disclosure, relating to anger at people who had misbehaved towards his mother, was recorded about four weeks before the killing of Coello, but there were also others. He told psychiatrists subsequently that these thoughts had been increasingly dominant, that he had not slept properly the previous night (after, it would appear, deciding to kill

Coello and, on his own account, others) and that on the day of the killing his mind was racing. After he had killed Coello, he said, he felt relieved and calm, and had slept well.

10. It was the fact that Coello had been in prison for rape of a child, a member of his own family. In prison he was engaging with therapy and with the chaplaincy, and his wife was loyal to him. His engagement with therapy led him to speak openly of what he had done, both in group sessions and otherwise. Some of the other prisoners, including at times the defendant, reacted adversely to his speaking graphically of his offence. The defendant was reported by a number of people, both prisoners and staff, as having said at one point about two days prior to the killing, that Coello should not be on the wing he was on, and indeed should be 'put down'. Coello was by no means the only sex offender on the defendant's wing; there were some nine others. The defendant was not the only person who had voiced hostility towards, or annoyance with, Coello.

11. After the killing and transfer to another prison, and before his trial, the defendant (i) smashed up his cell at the end of October 2010 (ii) severed one of his ears from his head on 18 April 2011, declining to have it surgically replaced, (iii) announced on 1 June 2011 that he was 'having thoughts' of severing the other and (iv) did sever the other ear on 14 July.

12. Three consultant psychiatrists gave evidence at the defendant's trial. Drs Thirumalai and Joseph had reported respectively in December 2010 and March 2011. They agreed the diagnosis of severe dissocial, or psychopathic, personality disorder. They saw no evidence of any other mental illness. Dr Joseph had addressed future management of the defendant. He concluded that he could not tolerate a therapeutic regime, and specifically that he was unsuitable for detention at Rampton Hospital within the prison estate because of risk of violence. The third psychiatrist, Dr Shapero had been consultant in charge of the unit at HMP Woodhill where the defendant was imprisoned after the killing. He agreed with the diagnosis of severe personality disorder. He also recorded, however, that the defendant had asserted at the time of severing his ears that he had been hearing voices and that he had harmed himself to stop them. That led Dr Shapero to suggest that there might be a psychotic element of mental illness to the defendant's condition, although it was not clear whether the voices were hallucinatory or connected to the personality disorder, or both, nor could the doctor identify any reason why a psychotic condition should have developed. He had prescribed anti-psychotic drugs and had suggested possible transfer to Rampton. He described the defendant in his evidence as a man desperate for help. Neither of the other psychiatrists had seen any evidence of voices or of psychotic symptoms. In his evidence at trial, Dr Joseph raised the possibility of manipulative behaviour, conditions in therapeutic prisons or Rampton being generally thought to be more congenial than in other high security prisons.

13. The law of diminished responsibility applicable to this trial was as it stood before the recent amendments to section 2 of the Homicide Act 1957, made by the Coroners and Justice Act 2009; those came into effect only after this killing. There is, however, no difference of substance between the two formulations of the partial defence, so far as this case is concerned. There are and were two elements to diminished responsibility: (1) an abnormality of mind and (2) consequential substantial impairment of mental responsibility for the acts constituting the offence. There was consensus that the

defendant satisfied the first element, for the personality disorder came within the expression 'abnormality of mind' on any view. The issue for the jury was the second element, namely whether that or any other condition "substantially impaired" his mental responsibility for killing Coello. The prosecution contended that it did not. It pointed to the evidence that he was in calm control of himself, planned what he did, and, whatever else he had said about violent thoughts, had told no one that weekend that he was on the verge of killing Coello and/or others. The Crown also suggested that he had targeted Coello because he was a sex offender, and that that demonstrated control. Contrariwise, it was contended for the defendant that he was unable to resist the homicidal thoughts which built up. He denied that he had selected Coello because he was a sex offender. Whether he targeted Coello for this reason or not was of course only one aspect of the level of control which the defendant could or did maintain, and the level of his control was in turn only one aspect of the general jury question whether his condition substantially impaired his mental responsibility for the killing. There was ample evidence that he did target Coello (for whatever reason or none) rather than killed entirely at random, because he had gone looking for him in the morning and, not finding him, had waited until he was available in the afternoon; he had spent the morning meanwhile quietly playing on his playstation and chatting to friends.

Grounds of appeal

14. For the defendant, Mr Benson QC advances several distinct grounds of appeal.

i) The defendant should not have borne the burden of proving, even on the balance of probabilities, that he was in a state of diminished responsibility when he killed Coello.

ii) Even if this is not so, the judge was wrong not to direct the jury that it had to be sure of facts asserted by two witnesses before it could take any account of those facts upon the issue of diminished responsibility.

iii) The judge wrongly limited the cross examination of a Crown witness, MD.

iv) There were factual errors in the summing up which render the conviction for murder unsafe.

v) The judge summed up the evidence of a psychiatric witness inaccurately and unfairly.

vi) The minimum term of 35 years was manifestly excessive.

The reverse burden of proof

15. Mr Benson mounts a frontal attack on the statutory rule that the burden of establishing diminished responsibility lies on the defendant, on the balance of probabilities. He contends that the express statutory provision to that effect in section 2(2) of the Homicide Act 1957 is incompatible with the presumption of innocence contained in Article 6(2) of the European Convention on Human Rights ("ECHR") and that it should be read down as imposing only an evidential burden; once the issue is raised

by some evidence it should be for the Crown to disprove it, and to the ordinary criminal standard.

16. Diminished responsibility was introduced into English law for the first time by the Homicide Act 1957. It was a concept borrowed from Scottish common law, which had known it since the early twentieth century at least. In Scottish law it had been evolved by the common law as a means of avoiding, in an appropriate case, the mandatory death penalty for murder (see the report of the Scottish Law Commission SLC 195 (2004) at [3.1]). It was adopted in England in 1957, here by statute, for this same reason and at a time when there was mounting pressure to abolish the death penalty altogether, but a lack of Parliamentary readiness to go so far. Both in Scottish common law and by English statute the onus of establishing the partial defence has always been laid on the defendant who raises it. Section 2(2) of the Homicide Act 1957 says so expressly:

> "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."

The Act goes on immediately in section 2(3) to provide that if diminished responsibility is shown, the defendant is to be convicted not of murder but of manslaughter. In accordance with principle, section 2(2) has always been read as imposing on the defendant a burden of proof only on the balance of probabilities, and not requiring the enhanced standard demanded of the Crown when it bears a burden of proof in a criminal case, viz of making the jury sure, ie beyond reasonable doubt.

17. Article 6(2) of the European Convention on Human Rights expresses, as is very well known, the presumption of innocence which has been a fundamental part of English law since at least Woolmington v DPP [1935] AC 462. It provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

18. Immediately after the Human Rights Act 1998 incorporated into English law the principal provisions of the Convention, including Article 6, this court took the opportunity to give principled consideration to the impact of Article 6(2) upon statutory provisions under which a defendant may bear an onus of proof. In R v Lambert, Ali and Jordan [2002] QB 1112 the court heard three such cases. One (Lambert) concerned section 28(3)(b)(i) of the Misuse of Drugs Act 1971 and the onus laid upon a defendant in possession of drugs to prove that he neither knew nor had reason to suspect that the substance was a controlled drug. The other two cases (Ali and Jordan) were separate instances of diminished responsibility and thus of section 2(2) of the Homicide Act. This court addressed directly the argument that section 2(2) contravened Article 6(2) and held that it was "self evident" that it did not. It also upheld the reverse onus provision in the Misuse of Drugs Act in Lambert's case. This court certified that a point of law of general public importance was involved in all three appeals, thus opening the way to a further appeal to the House of Lords. The House of Lords heard applications from all three defendants for leave. It granted leave in Lambert and subsequently held that the Misuse of Drugs Act provision ought to be read down to mean an evidential onus only, (although Lambert's conviction was in the end upheld because his guilt was clearly established

in any event: [2001] UKHL 37; [2002] 2 AC 545). The House of Lords refused leave to appeal to both Ali and Jordan, the diminished responsibility cases.

19. As a matter of authority, nothing has occurred since in this jurisdiction to cast the slightest doubt on Ali and Jordan. On the contrary, the correctness of that decision is implicit (in these circumstances) in the refusal of leave by the House of Lords, and in the complete absence from the speeches in Lambert of any hint that the diminished responsibility provision might need future consideration, even though the House was overruling this court in one of the three cases. Moreover, the correctness of Ali and Jordan was assumed in the subsequent cases heard together by a five judge court presided over by the Lord Chief Justice in Attorney-General's Reference No 1 of 2004 [2004] EWCA Crim 1025; [2004] 1 WLR 2111 where some provisions for reverse onus were held incompatible with Article 6(2), whilst others were not. This court held that the reverse onus in section 4 of the Homicide Act 1957 relating to killing in pursuance of a suicide pact was analogous to that in section 2(2) and was likewise fully justified: see [130]-[131]. The reverse onus in section 2(2) has thus been applied in diminished responsibility cases by Crown Courts in England and Wales consistently ever since 1957, and both before and after the Human Rights Act 1998.

20. We agree with Mr Benson that there has been, since Ali and Jordan, a number of cases in which statutory provisions for reverse onus have been considered, and that some of them have been held incompatible with Article 6(2) ECHR. We do not agree that there is anything in any of these cases to justify the contention which he advances that the law has so moved on since 2000 that Ali and Jordan is no longer sound. On the contrary, as we shall show, everything which has happened since, in England and Wales, in Scotland, in Europe and in other relevant places, confirms the correctness of that decision and the justification for section 2(2).

21. We should deal with Mr Benson's ambitious contention that this court is free to depart from the decision in Ali and Jordan.

    i) He submits that Ali and Jordan cannot stand with Lambert and the subsequent decisions of the House of Lords. This is wrong. Lambert contains nothing inconsistent with Ali and Jordan but rather, to the contrary, must have proceeded on the basis that an appeal against the decision was unarguable. The other subsequent cases, as we shall show, address the correct Article 6 test and none casts the beginnings of doubt on the rule as to diminished responsibility.

    ii) He submits that in Ali and Jordan this court proceeded on the basis that the Human Rights Act 1998 was already in force, whereas this was later shown not to be so. That is right so far as it goes, but it is little to the point. It was precisely *because* this court applied the Human Rights Act that it made a decision that the law of diminished responsibility does not contravene Article 6.

    iii) He submits that this court in Ali and Jordan wrongly took into account a deference to Parliament. That is just another way of saying that Ali and Jordan is wrong which is what this court is not in a position to do. We shall moreover show that this court did not fall into the error of making an assumption that

Parliament must have been correct. It did no more than recognise that the fact that a democratically elected Parliament had passed the legislation in question and that a degree of appropriate deference constitutes one relevant factor.

iv) He submits that the decision in Ali and Jordan was *per incuriam.* Whether the decision was right or wrong there is no possible basis for this submission. An assertion that other arguments might have been addressed to the court does not begin to provide such a basis. The absence of detailed examination of the facts of the two cases of Ali and Jordan cannot do so either, because the court was addressing the principle of the reverse onus rather than its application to particular facts.

22. We do not, however, confine ourselves to holding, as we might, that we are bound by Ali and Jordan and need say no more. In deference to the detailed argument mounted before us, we address the principle involved.

23. The very clear justification for section 2(2) Homicide Act lies in the following factors.

i) Diminished responsibility is an exceptional defence available in an appropriate case with a view to avoiding the mandatory sentence which would otherwise apply, so that a discretionary sentence can be imposed, tailored to the circumstances of the individual case.

ii) Diminished responsibility depends on the highly personal condition of the defendant himself, indeed on the internal functioning of his mental processes.

iii) A wholly impractical position would arise if the Crown had to bear the onus of disproving diminished responsibility whenever it was raised on the evidence; that would lead not to a fair, but to a potentially unfair trial.

24. The generally acknowledged statement of principle on the application of Article 6(2) ECHR to cases of presumptions or reverse onus provisions is the European Court of Human Rights case of Salabiaku v France (1988) 13 EHRR 379. There, the Strasbourg court rejected the argument that all that Article 6(2) requires, in such a case, is that the verdict be according to local law. That would enable national legislatures to deprive the presumption of innocence of its substance. The court said this:

> "Presumptions of fact or law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect….
>
> Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

In other words, a reverse onus must be justified. Applying that test, the court upheld a provision of French law which deemed guilty of a customs infringement offence a

person who was in possession of contraband, at least in the absence of *force majeure* or of it being impossible for the defendant to know the contents of the container. In effect, this provision laid upon the defendant the onus of proving such an exception.

25. This Salabiaku test was the one by which this court directed itself in Lambert, Ali and Jordan – see [14]. It was likewise the test applied by the House of Lords in R v Johnstone [2003] UKHL 28; [2003] 1 WLR 1736, where the provision under consideration was section 92(5) of the Trade Marks Act 1994, and the reverse onus which it creates was upheld as justified: see Lord Nicholls at [48]–[53]. So also was this test applied in Sheldrake v DPP [2004] UKHL 43; [2005] 1 AC 264, per Lord Bingham at [11]-[12], where a large number of illustrations of its application, both in domestic and European law, are reviewed. At [21] Lord Bingham helpfully identified the principled approach to a reverse onus provision, and some of the common factors which will be relevant to whether it is justified. He was not, of course attempting an exhaustive list. He said:

> "the overriding concern is that a trial should be fair and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary…. The substance and effect of any presumption adverse to a defendant must be examined and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention of the ability of the court to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption …. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

26. We agree with Mr Benson that the Salabiaku test necessarily involves the proposition that the mere fact that a reverse onus is created by national legislation cannot by itself mean that it is proportionate and justified. That would, as the Strasbourg court observed, enable national legislatures to deprive the presumption of innocence of its effect. But if a reverse onus provision has been created, plainly deliberately, by Parliament that, in a democratic society, is not a factor without significance. Lord Bingham put the position thus in Sheldrake at [31]:

> "The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may nonetheless be questioned whether (as the Court of Appeal ruled…) 'the assumption should be that Parliament would not have made an exception without good reason.' Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by section 3."

We do not, however, agree that in Ali and Jordan this court fell into the error there identified. On the contrary, at [14], this court set out the passage in Salabiaku in which the observation is made that a national legislature cannot strip the presumption of innocence of substance, and plainly directed itself in accordance with it. All that this court said, at [16], was that it remains important to have in mind that legislation is passed by a democratically elected Parliament, and that therefore courts are, under the ECHR, entitled to, and should, pay a degree of deference to Parliament's view as to what is in the public interest, which has then to be balanced against the interest of the individual.

27. The Salabiaku test has been applied consistently in the several cases on similar points in this court. We likewise address ourselves to it.

28. In principle, two successive questions arise. The first is whether section 2(2) of the Homicide Act impinges at all upon the presumption of innocence in Article 6(2) ECHR. If it does, the second is whether it is a proportionate and thus justified modification of it, in accordance with Salabiaku. In practice, the two questions are frequently addressed together and there is undoubtedly overlap between them, because the extent to which the onus relates to a component of the offence, or to an exception to or recognised excuse for it, can be addressed at both stages of the argument.

29. Some reverse onus provisions very clearly require a defendant to prove that he has not committed the component elements of the offence. An example is section 51(7) of the Criminal Justice and Public Order Act 1994, considered by this court in one of the cases in Attorney-General's Reference No 1 of 2004 (supra) at [134] and [146]. The offence created is, by section 51(1), one of intimidating a witness with the intent thereby to obstruct or pervert the course of justice. Section 51(7) then provides that that intent is to be presumed unless the contrary be proved. The reverse onus thus goes expressly to a stated element of the offence, the intent. There was therefore in that case an impact on the presumption of innocence, although, as the court held, a justifiable one in the circumstances. Other reverse onus provisions are clearly designed to provide exceptional defences or excuses even where the elements of the offence are made out. An example is section 5(2) of the Road Traffic Act 1988, considered by the House of Lords in Sheldrake v DPP (supra) at [35] and [40]-[41]. The offence created by section 5(1) is that of being in charge of a motor vehicle with excess blood alcohol. Section 5(2) then provides for a defence if the defendant proves that there was no likelihood of his driving while there remained in his system alcohol over the limit. The offence under section 5(1) does not require as an element that the defendant was likely to drive; rather, section 5(2) provides for an exceptional defence. There was arguably no impact on the presumption of innocence at all. The court, however, was content not to resolve that issue, since it was of the plain view that the provision was justified even if there were such impact.

30. We accept the proposition that this distinction is sometimes difficult to discern and may depend on the grammatical form which the framers of the penal provision have elected to use. Lord Steyn drew attention to this in Lambert in the House of Lords at [35], citing the Canadian decision of R v Whyte (1988) 51 DLR (4^{th}) 481. We also agree that, even where it can be discerned, it does not universally provide an answer to the question whether the reverse onus provision is justified and that further enquiry into justification is needed. That is well illustrated by the two examples given in

paragraph [29] above, in neither of which was the form of the provision treated as determinative. However, as those and other cases show, the answer to the question whether the reverse onus provision applies directly to an element of the offence, or to an exception or excuse, will be a relevant factor in determining whether it is justified. Lord Woolf CJ said so in Lambert, Ali and Jordan at [16]:

> "If the defendant is being required to prove an essential element of the offence this will be more difficult to justify. If, however, what the defendant is required to do is establish a special defence or exception this will be less objectionable."

We respectfully agree, and also with the similar analysis of Sir Brian Kerr LCJ in the Northern Ireland case of R v McQuade [2005] NICA 2; [2005] NI 331 at [24]-[25]:

> "We do not, in the event, believe it necessary to embark on this interesting debate in the present case for reasons which will appear presently. Whatever may be the true position, it is, in our view, clear that it is less difficult to justify a burden on the defendant, where he has raised an entitlement to a statutory defence, to prove entitlement to that defence than it is to support a requirement that a defendant discharge an onus of proof in relation to an element of the offence."

The context of that statement was identical because the reverse onus provision there under consideration was the one arising upon diminished responsibility, on which the law is, in essence, the same in Northern Ireland as in England and Wales.

31. However difficult the distinction between onus as to an element of the offence and onus as to an exceptional excuse may sometimes be, there can be no doubt which is involved in the case of diminished responsibility. Even if insanity can be viewed by some as going to *mens rea* (see the Canadian case of Chaulk discussed at [38] below), the same can scarcely be said of diminished responsibility. The Scottish origins of the concept made this clear. The earliest statements of diminished responsibility were to be found in judgments of Lord Deas in HM Advocate v Dingwall (1867) 4 SLR 249 and HM Advocate v Maclean (1876) 3 Couper 334; in each he referred to it as "an extenuating circumstance". By the time the law in Scotland was firmly established, Lord Normand described diminished responsibility in Kirkwood v HM Advocate (1939) JC 36 as "an extenuating circumstance and it has effect as modifying the character of the crime, or as justifying a modification of sentence, or both." We agree with the conclusion of the Northern Ireland Court of Appeal in McQuade at [22] that the English section 2(2) and its Northern Ireland equivalent, like the Scottish common law and, now, Scottish statute, do not require the defendant to disprove an element of the offence but to establish an exception or excuse. The elements of murder are an unlawful killing and intention to kill or to do grievous bodily harm. The special provisions of section 2 for the case of diminished responsibility have nothing at all to do with the requirement that the Crown must prove each of these elements to the criminal standard. They provide, rather, an exception for a particular class of defendant against whom those elements have all been proved. Both the form of the provision and its historical derivation, in England as well as in Scotland, demonstrate that it is designed to provide for an escape from the mandatory sentence which would otherwise attend a conviction for murder, formerly death and now life imprisonment.

Although that is achieved by substituting a conviction for manslaughter, to which offence the mandatory sentence does not apply, it could as well be accomplished by providing that where the section applies the mandatory sentence should cease to be required. For this reason we do not agree with Mr Benson's submission that section 2(2) can properly be impugned as carrying an unacceptable risk that a defendant might be convicted when the jury is less than sure of his guilt. The question of diminished responsibility does not arise at all until the Crown has made the jury sure that the defendant killed unlawfully and had the requisite intent. In the present case, there could not be the faintest doubt that each of the elements of murder had been established; a clearer case it is difficult to imagine.

32. Accordingly, the better view is that section 2(2) does not impact upon the presumption of innocence at all. But, like this court in Ali and Jordan and the Northern Ireland Court of Appeal in McQuade, we proceed, in case we are wrong about that, upon the alternative assumption that it may.

33. Section 2(2) recognises the truth that in the absence of proof to the contrary a man can be assumed by the law to be of ordinary mental condition: see the observations to this effect in McQuade at [28]. The law does not in any way inhibit a defendant from demonstrating that in his case this ordinary assumption cannot be made, but it is entirely reasonable that a matter so personal to the defendant should be for him to prove, albeit only on the balance of probabilities. For the same reason, the position is identical if the defendant asserts not diminished responsibility but the greater mental disability of insanity in law: that is likewise for him to prove on the balance of probabilities.

34. Mr Benson accepted that this is the law in relation to insanity and that the reverse onus is there justified on the Salabiaku test. He sought to distinguish diminished responsibility and adopted the language of Lord Hope in the Scottish case of Ross v HM Advocate 1991 JC 210, who referred to the relevant presumption as being one of sanity rather than of responsibility. However, the context of Lord Hope's observation is vitally important. Ross was a case where the defendant asserted automatism, that is to say totally involuntary behaviour induced by an external factor for which he bore no responsibility: the jury had found that his drink had been laced, without his knowledge, with a mixture of temazepam and LSD. What was decided in Ross was that such automatism, if raised, went to the issue of mens rea, which it is always for the Crown to prove. At page 221 Lord Hope expressly distinguished automatism on the one hand from both insanity and diminished responsibility on the other, and he said in terms that the reverse onus applied to the latter two defences. As will be seen, it has always been the law of Scotland that it is for the defendant to establish diminished responsibility, and this has recently been reaffirmed. The decision in Ross was entirely in accord with the English law of automatism as explained in R v Quick [1973] QB 910, as to which see the recent analysis in this court in R v Caley and others [2013] EWCA Crim 223 at [19]. What Lord Hope was very clearly saying in Ross was that the reverse onus which applies in an insanity or diminished responsibility case cannot be extended to every instance in which a defendant denies mens rea; it was for that reason that he drew the distinction which he did between a presumption of sanity and one of (criminal) responsibility. Diminished responsibility is closely analogous to insanity, not to automatism, which may well involve no abnormality of the mind at all. Thus Lord Hope's *dictum* in Ross cannot be pressed

into the service to which Mr Benson seeks to put it without wholly departing from the rest of his judgment in that case. The assumption which the law recognises, both in the case of insanity in its restricted English meaning and in that of diminished responsibility, is an assumption of normal mental functioning – unless of course the contrary is demonstrated.

35. In the case of both insanity and diminished responsibility, the issue depends on the inner workings of the defendant's mind at the time of the offence. It would be a practical impossibility in many cases for the Crown to disprove (beyond reasonable doubt) an assertion that he was insane or suffering from diminished responsibility. Of course, if there were a bare assertion, or one supported only by poor evidence, it would be open to the Crown to invite the jury to reject it, but if the onus lies on the Crown to disprove the condition beyond reasonable doubt, this would not be enough. It would have to adduce evidence of the absence of abnormality in the defendant's mental state. But the defendant is under no obligation to submit to a medical examination and may well refuse. If he does formally submit, he may simply fail to co-operate. He may refuse, lawfully, to make available past medical or other records which are necessary to a report on his condition. This is a simple but fundamental reason why the reverse onus is essential to the working of the law of diminished responsibility. This was the main reason given by Lord Woolf CJ for the decision in Ali and Jordan, where, at [18] he said:

> "There could be situations where there is an uncooperative defendant. Then it would be very difficult for the prosecution to satisfy the jury of the negative. A defendant is not required to submit to an examination by a doctor and it would not be desirable to change the law to require him to submit to an examination."

This was also the reason which persuaded the Scottish Law Commission to alter its previous provisional position in the light of extensive public consultation and to recommend the reverse onus provision which is now to be found in Scottish statute (see below). Likewise it was the principal consideration which underlay the decision of the Northern Ireland Court of Appeal in R v McQuade [2005] NICA 2 that the reverse onus in diminished responsibility is fully justified. Sir Brian Kerr LCJ referred at [28] to the fact that the defendant's mental condition is unquestionably personal to him, and that it lies within his power to provide to medical experts the information necessary to establish the existence of diminished responsibility. At [31], in holding that the reverse onus was proportionate and justified, he added:

> "We have reached this conclusion principally because of what we perceive to be the practical difficulties in the way of requiring the prosecution to prove that a defendant who raises the issue of mental abnormality does not suffer from that condition."

36. Mr Benson sought to neutralise this factor by his contention that if the reverse onus were to be read down there would still remain an evidential burden on the defendant to raise the issue. That is of course true, because if there is no evidence in the trial which gives rise to any question of impaired mental functioning, the judge would not, no doubt, be required to leave the issue to the jury. But an evidential burden, so called, requires no more than that the question be raised by some piece of evidence. It is very easy to raise an issue of mental abnormality. Such a concept is not limited to

identifiable mental illness, but may extend to any malfunctioning of the mind or personality; depression and post-traumatic stress syndrome are, for example, included among the conditions which may form the basis for a finding of diminished responsibility. The defendant himself might well give evidence, and speak for the first time of peculiar sensations in his mind, or of impulses which he felt unable to resist, or of asserted events in his childhood, any of which might lend colour to the suggestion that he suffered from some abnormality of mind. Nor would it be in the least an unusual case for it to be possible to elicit from Crown witnesses evidence that the defendant had appeared to them to be behaving oddly; in that event there might be no evidence from the defendant at all. In both cases, it would be much too late in the course of the trial to investigate the complex psychiatric questions of the defendant's history and mental functioning. Nor, with great respect to Mr Benson's alternative submission, would the position be much improved by imposing a requirement that there must be *some* medical evidence before the issue of diminished responsibility be raised. Even supposing that the undoubted powers of the court to read down section 2(2) of the Homicide Act if necessary to ensure compliance with Article 6 extend to re-writing it to insert such a requirement, that would leave impossible practical difficulties unsolved. What kind of medical specialism would qualify? Would the opinion of a doctor who had not examined the defendant suffice? Even if it would not, there would remain no obligation on the defendant to submit to examination by an independent psychiatrist, nor to provide past medical records, and the jury would be left in an impossible position.

37. It is of some significance that the special partial defence of diminished responsibility, in those common law jurisdictions where it exists, is generally characterised by the reverse onus for which section 2(2) of the Homicide Act provides. We have referred already to the law in Northern Ireland, as expounded in R v McQuade. The position in Scotland is instructive, given that it is the source of the concept of diminished responsibility, and that it has applied recent intensive consideration to the question. From the outset the reverse onus was applied by the courts, as a matter of common law, on the grounds that the partial defence was best regarded as an extenuating circumstance. In October 2001 the Scottish Law Commission was asked by Ministers to review the law of both insanity and diminished responsibility following a prior review of the law of mental health in Scotland (the Millan report). In its initial consultation paper the Commission favoured the removal of the reverse onus. However, after public consultation and further thought the Commission reversed its provisional view and firmly recommended that the reverse onus was necessary to the operation of the law of diminished responsibility, given its extenuating nature and the practical consequences of its being removed: Scot LC 195 at [5.17] to [5.28]. Its recommendation was accepted by the Scottish Parliament and the previously common law reverse onus is now enshrined in section 51B(4) of the Criminal Procedure (Scotland) Act 1995, inserted by amendment through section 168 of the Criminal Justice and Licensing (Scotland) Act 2010. Subsequently, in Lilburn v HM Advocate [2011] HCJAC 41; 2012 JC 150, the Appeal Court has held that the reverse onus thus provided for creates a legal and not an evidential burden. The court held at [9] that there was a clear rational basis for treating the position as analogous to that of insanity, and as distinguishable from provocation or self defence. It adverted to the report of the Law Commission and to the practical consequences of a different conclusion. It applied the Salabiaku test and concluded that a legal onus was proportionate.

38. The Scottish Law Commission observed, at [5.16, n22] that this was the position in many other legal systems. It referred to reverse onus rules in England, Scotland, Northern Ireland, Canada, New Zealand, South Africa, all the Australian States and the majority of the States of the USA. In Canada the Supreme Court considered the validity of the legislation relating to the analogous case of insanity in R v Chaulk [1990] 3 SCR 1303. The question was whether a reverse onus in the case of insanity infringed the presumption of innocence which is contained in section 11(d) of the Canadian Charter of Rights and Freedoms and also in section 16(4) of the Criminal Code. That statement of the presumption of innocence does not materially differ from that contained in Article 6(2) ECHR. The court held by a majority of 6:3 that the reverse onus provision did impinge on the presumption of innocence, but that it served a legitimate objective which justified overriding a constitutionally protected right and moreover satisfied the additional test of proportionality; thus it was not invalid under the Charter. Delivering the opinion of the majority of five, Lamer CJ said this:

> "While the effect of s. 16(4) on the presumption of innocence is clearly detrimental, given the importance of the objective that the Crown not be encumbered with an unworkable burden and given that I have concluded above that s. 16(4) limits s. 11(*d*) as little as is reasonably possible, it is my view that there is proportionality between the effects of the measure and the objective."

39. Further, in Robinson (1993) No. 20858/92, the European Commission of Human Rights held manifestly unfounded a complaint that section 2(2) of the Homicide Act infringed Article 6(2) and the presumption of innocence. It had previously reached the same conclusion in relation to the English law of insanity in H v UK (1990) No 15023/89. It gave a considered judgment, holding that section 2(2) did not impinge on the presumption of innocence but rather gave effect to the assumption of sanity, and that the provision was justified under the Salabiaku test.

40. Lastly, it is to be observed that the English law of diminished responsibility was, like the Scottish law, recently subjected to independent review by the (English) Law Commission, in the context of an overall examination of the law of homicide. At the first stage of its examination (Law Com No 290, August 2004) the Commission specifically considered the reverse onus. It concluded at [5.92] that the position should not be changed. It did so because the defendant's mental state is peculiarly within his own knowledge and because it could be investigated only with his cooperation: see [5.90]. It contrasted provocation which depends on external facts. At the second stage of its examination (Law Com No 304, November 2006) the Commission made some limited recommendations to change the definition of diminished responsibility, but it adhered to its view as to the reverse onus. Indeed, at [5.105] it rejected a further alternative proposal for a separate offence of killing under diminished responsibility on the ground that it would impose on the Crown an unworkable obligation to *prove* diminished responsibility. The reasoning is the same as applies to the possibility of disproving it.

> "As D is not obliged to submit to an examination by the prosecution's medical experts, a contested trial would become impossible to prosecute."

As is well known, the Commission's recommendations for a subdivision of homicide into two degrees of murder plus manslaughter did not in the end command Parliamentary approval. Its recommendations as to the substance of diminished responsibility did, save for the disappearance of the concept of developmental immaturity. But the whole topic of diminished responsibility was thus considered in depth. The reverse onus was endorsed both by the Commission and, in due course, by Parliament via the retention of section 2(2).

41. At the hearing of this appeal, Mr Benson submitted that the partial defence of loss of control (formerly provocation) ought to be regarded as analogous to diminished responsibility so that in principle a reverse onus ought not to be applied to the second and not to the first. After the hearing, the decision of this court in R v Asmelash [2013] EWCA Crim 157 was handed down in relation to the new law as to loss of control (sections 54-55 of the Coroners and Justice Act 2009). By a supplemental submission in writing, Mr Benson invited us to derive from it support for the submission which he had previously made. He draws attention to paragraph [24] of Asmelash in which this court said that the approach to self-induced intoxication ought to be the same for both partial defences. In particular, he relies upon the following words of Lord Judge CJ:

> "Moreover, faced with the compelling reasoning of this court in *Dowds* in the context of diminished responsibility, it is inconceivable that different criteria should govern the approach to the issue of voluntary drunkenness, depending on whether the partial defence under consideration is diminished responsibility or loss of control. Indeed, given that in a fair proportion of cases both defences are canvassed before the jury, the potential for uncertainty and confusion which would follow the necessarily very different directions on the issue of intoxication depending on which partial defence was under consideration, does not bear contemplation."

42. The issue in Asmelash concerned self-induced intoxication. Section 54(1) provides for the partial defence of loss of control if there was a qualifying trigger (which are defined) and if:

> "(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D"

Asmelash had been drunk when he stabbed his victim. The issue in the case was whether his self-induced intoxication was one of his circumstances for the purpose of section 54(1)(c). This court held that it was not. It held that the law's general approach to denying voluntary intoxication as a ground of defence to criminal offences (except on the issue of the formation of a specific intent) underlay the new statute and any change in it would have been spelled out in unequivocal language. The reaction of the hypothetical other person with a normal degree of tolerance and self restraint had to be judged as if he were sober. In reaching that conclusion this court adopted reasoning similar to that of a different constitution of the court in the diminished responsibility case of Dowds [2012] EWCA Crim 281; [2012] 1 Cr App R 34. There, it had been held that the general approach to self-induced intoxication underlay the new law of diminished responsibility so that such voluntary intoxication

was not a recognised medical condition which could be relied upon to found that partial defence.

43. It is perfectly true that this reasoning about the underlying general approach to self-induced intoxication applied equally to Dowds and to Asmelash, thus to diminished responsibility as to loss of control. It does not for a moment follow that everything else which applies to one partial defence must also apply to the other. In particular, it is plain beyond a peradventure that the reverse onus is applied by Parliamentary statute to diminished responsibility and not to loss of control. That is deliberate and entirely comprehensible. Diminished responsibility depends on the internal mental condition of the defendant. Loss of control depends on an objective judgment of his actions as a reaction to external circumstances. It is equally plain, and beyond argument, that this court in Asmelash was not beginning to enquire into the reverse onus contained in section 2(2) of the Homicide Act. Nor does the fact that the two partial defences may not infrequently be canvassed in the same case mean that the incidence of the onus of proof has to be the same if there are good reasons why it should not be. It may well be true that, if all other considerations were equal, it would be preferable for a jury to have only one incidence of the burden of proof to consider. But all other considerations are not equal. There are good, indeed compelling, reasons for the incidence of proof to differ for diminished responsibility, just as it does for insanity. What the court in Asmelash found did not bear contemplation was the need to give different directions on the *same* issue, namely voluntary self-intoxication. It said nothing about different directions on different issues, and such are sometimes inevitable. With the help of well constructed written routes to verdicts, it is common experience that juries can readily cope with such different directions as to onus in the relatively few cases where they are necessary. There is nothing in Asmelash which assists this appellant.

44. It follows that the reverse onus now under consideration is consistent with the law generally maintained in jurisdictions which know the concept of diminished responsibility as a specific and partial defence to murder. It has been upheld for sound reason in accordance with the ECHR Salabiaku test in the courts of England, Scotland, Northern Ireland and Strasbourg, and it has been retained by Parliament after a comprehensive review. The alternative contended for is neither workable nor required by principle given the purpose of the partial defence as a moderation of a mandatory sentence. Provocation and self defence, which Mr Benson suggested were analogous, are not. For all these reasons, even if we are not, as we hold, bound by Ali and Jordan we reject the argument that the reverse onus is an unwarranted infringement of Article 6(2) of the ECHR.

The onus as to particular parts of Crown evidence

45. Two of the fellow prisoners who were called by the Crown gave evidence to the effect that the deceased had felt under pressure from the defendant, and/or that the defendant had forced him to go to the gymnasium and had bullied him. Most of this evidence consisted of hearsay reports of what the deceased was said to have said to the witnesses. The evidence was disputed on behalf of the defendant, who had some support for the assertion that there were contra-indications; the deceased had said nothing similar to his confidant the chaplain and the gym records showed that the deceased and the defendant were scarcely ever there at the same time. The possible significance of this evidence was said to be to support the Crown contention that the

defendant had a reason – even if a bad one - to kill the deceased, namely his objection to the deceased's sexual crimes. That, the Crown argued, suggested an absence of diminished responsibility.

46. Mr Benson invited the judge to direct the jury that they should not act on the evidence of these two witnesses unless sure that they were accurate. The judge declined to do so. In our view he was clearly right. There are two fallacies in the argument advanced. First, a jury considering diminished responsibility does not have to apply different burdens of proof to separate pieces of evidence, any more than it has to do so when considering any other issue. What it has to do is to look at all the evidence and to ask itself whether, taken together, it thinks it more likely than not that the mental responsibility of the defendant for the killing was substantially impaired. Second, the fact that a witness is called by the Crown, or (called by whomever) is relied upon by the Crown, has no bearing on the question of the onus of proof. Evidence is evidence, whoever adduces it.

47. When considering the case on the papers, the single judge was concerned that the jury might have been confused because this evidence might have been thought relevant both (a) to the elements of murder and (b) to diminished responsibility if the elements of murder were made out. On careful inspection of the full circumstances of this trial, that simply did not arise. There was never more than one issue in this case, and that was diminished responsibility. There was no room at all for doubt about the elements of murder. But even if there had been, the argument would still have had no foundation. We similarly reject Mr Benson's contention that the direction he sought should have been given because, in other circumstances, this evidence *could* have been relevant to the elements of murder if they had (hypothetically) been in issue. It is an error of principle to apply the onus of proof to individual snippets of evidence. The onus of proof is applied to the whole of the evidence. If murderous intent is in question, the jury must ask itself whether it is sure (that is beyond reasonable doubt) that the defendant intended to kill or to do really serious harm, and it must resolve that on the whole of the evidence. If the answer is yes, and diminished responsibility is asserted, then it must ask if responsibility was, more likely than not, substantially impaired, and again it does this on the evidence as a whole. It is perfectly possible to be less than sure, or less than satisfied on the balance of probabilities, about any individual fragment of evidence taken alone, but to be in the relevant state of mind on the evidence as a whole.

MD

48. One of the prisoners called to give evidence was MD. She was a pre-operative transsexual. One part of her evidence was in dispute. She said that Coello had confided in her on the Friday and Saturday before he was killed on the Sunday that he was fearful of someone on the wing who was having fantasies about killing people which he, Coello, believed were aimed at him. According to MD, in the second of these conversations Coello had put a name to the person he was afraid of, viz "Lee". This part of the conversation between MD and Coello was challenged on behalf of the defendant.

49. MD had spoken on the telephone to a friend the day after the killing and although she had reported Coello feeling bullied or threatened, she had reported no name. This was proved, and it was suggested on behalf of the defendant that the attribution of a name

to what Coello had said was a late invention designed to curry favour with the authorities because she wished to leave the wing for another one, or perhaps wished to leave Grendon Underwood altogether. She agreed that she was herself complaining of being bullied by other prisoners (but not by the defendant) because she was a sex offender. When cross examined properly along these lines, she agreed that she had not revealed the name used by Coello until after she had left the prison. But she said that by the time of the conversation just before the killing her transfer had already been agreed. That prompted further inspection of the prison records which revealed twenty-odd pages of notes of conversations between prison staff and the witness. They supported her evidence that she was making complaints on her own behalf before the murder but they contained no sign of any plan to transfer her, nor of written application to be moved dated earlier than 3rd or 6th August. She was recalled and the absence of such record was put to her. Her evidence was a good deal less than clear, but in substance she stuck to her contentions (a) that she did have a genuine complaint and had not fabricated it and (b) that a move to a different prison had already been agreed orally but she did not want this; rather she wanted to move to a different wing within Grendon.

50. Following that further cross examination and re-examination, Mr Benson applied to put the whole of the bundle of prison records before the jury. The judge refused, taking the view that the issue went to credit only and that the answers of the witness were final. Mr Benson now contends that the judge was wrong.

51. We do not agree. Mr Benson is of course right that the prison records were business records and thus admissible under section 117 of the Criminal Justice Act 2003 if, but only if, they went to an issue in the case other than one of credit. But they did not. The question whether MD had or had not been given some kind of hope of transfer was quintessentially one of her credit. It was, moreover, of the most marginal significance for the issue in the case, namely substantial impairment of mental responsibility. The same applied to the point that she had been prepared, whilst still at Grendon Underwood, to name two people who were threatening her, although this was formally admitted and thus available to the defendant. It did not matter much at all whether Coello had voiced concerns about the defendant. It might have done if the identity of the killer were in issue, but it was not. It might have mattered if Coello were saying that the defendant had uttered threats to him privately, of which there was no other evidence, but this is not what MD was reporting Coello to have told him. There was no doubt, from a large volume of indisputable evidence, that various prisoners had voiced anger at Coello's graphic description of his offence, nor was there any doubt that amongst the things said had been this defendant's remark that Coello (or perhaps people like him) should be moved to another wing or put down. The defendant's case was that this was a throwaway remark made amongst other things said which were hostile to Coello, and not a mark of a plan to kill Coello because he was a sex offender. Moreover, Mr Benson was able to read out the relevant passages in the prison notes in the course of cross examining MD. Formal admissions were also made to the effect that no name had been given for anyone threatening Coello, and that the earliest written record of any complaint by her came after the killing. The jury cannot have failed to grasp the point. The notes were no help on whether there had been a previous oral request. On any view, MD had deliberately omitted to refer to the name 'Lee' until after she had left Grendon

Underwood. To the extent that the point was capable of benefiting the defendant, it was made.

Details in the summing up

52. Mr Benson advanced a series of proposed grounds based upon suggested factual errors in the summing up. The single judge refused leave on all of them, individually and collectively. We agree that it is unarguable that they render the conviction unsafe. We summarise briefly.

i) Enough has been said above about the points made on the evidence of MD. Although there were two 'Lee's and the one in Coello's subgroup was not the defendant, there was never any suggestion by anyone that it was not this defendant who made the remark about Coello needing to be on a different wing or put down.

ii) We cannot see that the accidental inclusion in the read evidence of McCann to the effect that he had seen the deceased and the defendant speaking to one another apparently without hostility can have had any impact on the jury's decision. Even if the Crown had suggested generally that the defendant was cultivating Coello with a view to murder, it is a very long step from this fragmentary evidence to that possibility.

iii) The judge's summing up of the evidence of Warwick quite sufficiently identified points made during it on behalf of the defendant.

iv) The admittedly possible if rather complicated reasoning now advanced on behalf of the defendant on the basis of a tiny piece of Mr Mandikate's evidence, to the effect that the defendant had said that his homicidal thoughts related to persons unknown as well as to those who had behaved badly to his mother, did not require separate identification to the jury.

v) Dr Joseph was perfectly entitled to refer to the record of Mr Mandikate that the defendant had spoken of admiring his violent father, and the rival contentions about the possible significance of this were neutrally summed up.

vi) There was a slip in relation to the percentage of prisoners overall with personality disorders. It would no doubt have been corrected by defence counsel if it had been likely to be unfair to the defendant, but it was not.

vii) The judge did indeed refer to the opinion of Dr Joseph as coming robustly to the view that the defendant did have control of himself at the material time, and it is true that this was based on hypotheses which the jury had to resolve, but they were hypotheses which commended themselves to the doctor. The passage in the summing up is immediately balanced by the different view of the other two psychiatrists on the subject of control.

viii) In our view the judge would have been better to avoid reference to Dr Shapero having had a closer clinical association with the defendant than the other doctors, but we are quite unable to see that it can have led the jury to an unfair conclusion.

ix) We do not agree that the treatment of the possible psychotic symptoms which appeared extremely late and without any apparent trigger, was unfair. The comment might have been rather stronger, since Dr Shapero was not able to suggest any medical process by which they might have arisen.

Sentence

53. Under paragraph 4(2)(d) of Schedule 21 to the Criminal Justice Act 2003, the starting point for a defendant previously convicted of murder, as this defendant had been, is a whole life order. Mr Benson submitted that this did not apply to this defendant because of his personality disorder, which was a driver to callous homicidal violence, because of his comparative youth at 25 and because of the evidence that he had been to some extent confronting his homicidal thoughts in therapy. These, however, were mitigating factors to set against the normal starting point, rather than reasons for that starting point not to be relevant at all. That is how the judge, correctly, treated them. Because of them he reduced the sentence from a whole life minimum term to a minimum term of 35 years. We can see nothing wrong in principle in the judge's approach to settling the minimum term. The personality disorder did indeed provide a reason to depart from the statutory starting point, as did the defendant's age. So, to an extent, did the signs of progress in therapy, although the judge was clearly entitled, having heard the whole of the psychiatric evidence, to accept the opinion of Dr Joseph that the defendant was manipulative. Given the extreme callousness of both murders, the clear premeditation of the present murder over about a day or two, the vulnerability of the victim and the fact that the defendant was already serving a life sentence with a minimum term of nearly 17 years, we do not agree that it is arguable that the term imposed by the judge is manifestly excessive.

Conclusion

54. It follows that for the reasons set out the appeal against conviction must be dismissed. We refuse leave to appeal against sentence.