APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 27
HCA/2018/333/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL CONVICTION

by

NICHOLAS RODGERS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty (Jackson QC), Harvey; John Pryde & Co, SSC
Respondent: A Prentice QC AD; the Crown Agent

10 May 2019

Introduction

[1] On 31 May 2018, at the High Court in Glasgow, the appellant was found guilty of a charge which libelled that:

> "on 6 August 2017 at ... Peebles, you did assault Alexandra ... Stuart [aged 22] ... brandish a knife at her, cut her legs with the knife and strike her on the body with the knife ... and you did murder her."

On 22 June 2018, the appellant was sentenced to life imprisonment with a punishment part of 16 years.

[2] This appeal against conviction raises two issues. The first is how a jury ought to be directed where there is evidence that the accused's actions may have been caused by either his mental condition, or his ingestion of drink and drugs, or both. The second relates to the manner in which a jury should be directed when there is a burden of proof on the defence using the standard of balance of probabilities.

The evidence

[3] The circumstances of this case are tragic, ending in the death of a 22 year old female postal worker who had done nothing to provoke the fatal assault upon her.

Appellant's psychiatric history

[4] The appellant was aged 26 at the time of the killing. He had a history of psychiatric problems. These appear to have originated in a "challenging childhood" (report of Dr Isobel Campbell, honorary consultant forensic psychiatrist, dated 27 November 2017, p 15). He was seen at the Royal Infirmary, Edinburgh as a result of an overdose of prescribed medication, which he had taken in front of his then girlfriend, in November 2013. The treating psychiatrist noted that the overdose "appeared to be linked to anger issues while intoxicated". The appellant was offered, but declined, counselling and psychiatric services. Further impulsive overdoses followed. By June 2016 he was being prescribed the antidepressant Fluoxetine. A few months later, he was described as "quite chaotic ... using drink, recreational drugs and anabolic steroids". He was "exhibiting maladaptive

personality traits rather than suffering from a true depressive illness" (*ibid* p 16). He was started on the antipsychotic Quetiapine.

[5] In May 2017, the appellant was described as behaving "less erratically" and was discharged from psychiatric follow-up. However, on 2 July, he took another overdose, which required intensive care before a reference to the Huntlyburn psychiatric unit in Melrose. His medication was replaced with the anticonvulsant (mood stabiliser) Lamotrigine. In late July, he was expressing suicidal thoughts and drinking and gambling as an escape mechanism. He was prescribed Diazepam (Valium, a benzodiazepine). On 3 August, he phoned his psychiatric nurse describing himself as "the beast" and stating that he would not be attending his appointment as he was in the pub. The "beast" was a reference to a character in an American horror film, namely "Split". The appellant had doubled his Diazepam intake. Despite advice to the contrary, he was still drinking heavily.

[6] Dr Dickson, a consultant psychiatrist at Huntlyburn, had been in charge of the appellant's care in early July 2017. The appellant's diagnosis had been complicated by his drug use and personality issues. He had clear cut symptoms of depression, which were unrelated to substance misuse. He had a bi-polar II personality disorder, manifested in episodes of hypomania, unconnected to drugs or alcohol. The ingestion of drugs and/or alcohol made his disorder worse. There was no evidence of psychosis or loss of reality. In Dr Dickson's view, there was no basis for the view that the appellant had multiple personalities (as the "beast" had) or a personality disorder.

[7] Two community psychiatric nurses, who had worked with the appellant after he had left Huntlyburn, referred to his prescribed drugs, notably the Lamotrigine for his bi-polar disorder. The appellant had been reluctant to engage with therapies. He had been warned

that he should abstain from alcohol and take his medication as prescribed. He had been told that mixing alcohol and Diazepam was dangerous. This had occurred more than once.

[8] A psychotherapist had been seeing the appellant since October 2015. The appellant had contacted her on 16 July 2017, after his discharge from Huntlyburn. She had seen him on the following day and on two further occasions in the same week. The appellant's mood had been variable. He had been upset with his mother and complaining that he had been taken off his medication. She had last seen him on 2 August, when she had concerns for his safety and had contacted the community psychiatric nurses. The appellant had declined to attend for consultation and treatment with them. Their last contact had been on 5 August, when the appellant had texted "Not drinking and feeling positive".

[9] In early August 2017, according to Dr Campbell's report of her interview with him (*infra*), the appellant had been having paranoid thoughts about what his girlfriend and her mother were saying about him and the reasoning behind his football coach's decision to drop him from the team. He had sold his car at undervalue and then gambled away the proceeds of some £2,500.

The killing

[10] On Saturday 5 August 2017, there was an annual rugby event in Peebles. This is a major social occasion. The appellant had been in his flat in Innerleithen. He had started drinking and broken into his (locked) medication box and poured all the pills onto a table. At about 1.00am he sent a friend, namely SM, a photograph of the table covered with pills. He said that he was contemplating suicide. SM invited the appellant to his flat. On his arrival, the appellant had what the trial judge describes as "a bag of alcoholic drinks". The judge says that, apart from beer and gin, the appellant drank "shots", and "Mickey Finns"

(ie presumably alcohol laced with drugs). The appellant expressed dissatisfaction with his family, whom he did not consider to be supportive of him, and the care which he had been receiving at Huntlyburn.

[11] After about an hour, the appellant left SM's flat. He went to a party at the house of EA; the *locus* of the offence in Peebles. He arrived there at about 3.00 or 4.00am with a bottle of vodka or gin. He was drinking straight from the bottle. He was taking drugs at the party, where cannabis, Ecstasy and cocaine were being consumed. The appellant was later found to have taken cocaine. He voiced his personal concerns to various people. He was described by one of the party goers as "quite drunk, upset and suicidal". The appellant told Ms A that he knew that he should not be drinking because he was on medication. He was seen drinking the dregs from bottles which had been discarded in the kitchen. At one point the appellant demonstrated an anger management technique called "pulling in the waves". His behaviour was regarded as unusual.

[12] By about 11.00am there were only a handful of people still in the house. The appellant had been asleep, but had been woken by the laughter of RAn, with whom he had conversed earlier, and the deceased, who had both been singing "Happy Birthday" to someone on Facetime. The appellant took hold of Ms An's phone before returning it to her. He started texting on his own phone. He was not speaking, but staring about. He started to pace back and forwards. He looked confused. He went into the kitchen and returned with a knife with a 7 inch blade. He walked towards the deceased and Ms An and said "You're not laughing now", whilst pointing a knife at them. He kicked a table to the other side of the room. This woke JR, who joined the group. A discussion ensued, during which Mr R tried to reason with him.

[13] The deceased was on a couch with her knees drawn up under her chin. She was crying. Mr R and Ms An were on either side of her. Finally, the deceased said, "There's no point. You'll tell on me", "I'm an evil bastard. I've done horrible things." He held the knife as if it were a dagger and continued, "I've f...d it now. I may as well kill somebody." At this point he just stabbed the deceased on the chest, killing her. He tried to withdraw the knife, but it was too deeply imbedded. Mr R and Ms An tried to push him away. He struck Ms An on the head, before walking out of the door.

[14] Sometime later, the appellant was arrested in the car park of Tesco, where he had been involved in an altercation with his girlfriend. He had arranged with her to be picked up there. He was swearing and shouting and threatening to kill the police. Once subdued, he said "I've killed her. I've stabbed her and I shouldn't have done." He repeated this and other similar expressions of regret on the way to the police station. There, he said "There's no excuse. This wasn't meant to happen."

Psychiatric opinion

[15] After the appellant had been arrested, he was seen by a number of psychiatrists. First, at about 6.00pm, on Sunday 6 August, he was seen by Dr Fiona Wood. The interview was terminated because he was angry and aggressive. A week later he was assessed by Dr Joanna Brown to determine fitness for trial.

[16] Dr Campbell had been instructed by the appellant's law agents. She produced a detailed report following upon an interview with the appellant on 30 October 2017. Dr Campbell recorded the appellant as saying that he could not remember anything after arriving at the party. He said "It just does not make sense ... There is no motive, I just do not

understand ... Why kill someone I hardly knew and got on with?" From Wednesday, 2 August 2017, he could remember only "snippets".

[17] In her report, Dr Campbell concluded that the appellant:

> "has displayed poor anger management since adolescence and arguably since childhood ...
>
> [He] has over many years displayed extreme emotional lability and a variety of dysfunctional responses to stress including binge eating, gambling large sums of money and drinking to excess ...
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> [He] has generally not been regarded as suffering from mental illness but as having had some maladaptive personality traits and difficulties with relationships and substance misuse.
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> More recently ... he was diagnosed as having Bi-polar II disorder ...".

Dr Campbell expressed the opinion that the appellant suffered from an Emotionally Unstable Personality Disorder (Borderline) in ICD-10 (the WHO International Classification of Diseases) and a Borderline Personality Disorder under DSM 5 (the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders). The former involved "a marked tendency to act impulsively without consideration of the consequences, together with affective instability". Outbursts of intense anger could lead to acts of violence or "behavioural explosions". The latter was "A pattern of instability of personal relationships, self image, and affects, and marked impulsivity, beginning by early adulthood ...". Dr Campbell considered that the appellant had been suffering from "a significant abnormality of mind at the time of the ... offence", namely [EUPD].

[18] Dr Campbell gave evidence that the use of alcohol and Diazepam was "not generally recommended". She continued (p 52):

> "At low doses, they basically produce more than an additive effect, ... there's a risk of excessive sedation, and in high doses there is a risk of paradoxical aggression, so rather than having a calming effect, the combination of large doses of alcohol with benzodiazepines in large or small doses can disinhibit aggression."

Dr Campbell answered affirmatively to the following double question (p 92) from the appellant's counsel:

> "... your opinion is that his mental health condition, ie the unstable personality disorder, was present and contributed to his behaviour on 6th August".

She confirmed that alcohol "may also have contributed to that". The following exchange then took place:

> "... so far as ... your opinion is concerned, [the appellant] was, at the time of the offence, suffering from a significant abnormality of mind which is the [EUPD]? – Yes. And I do think ... he also had ... a moderately severe depressive episode in the weeks leading up to it".

On the trial judge intervening to ask about the contribution of the drug/alcohol combination, Dr Campbell said that this combination would be "unhelpful".

[20] The advocate depute's line was to establish that Dr Campbell's opinion was based in part on the appellant's account to her (he did not testify), including his position on loss of memory, despite what he had said after his arrest. The advocate depute questioned the level of the appellant's irrationality, given that he had arranged a lift on leaving the *locus* and had tried to hide. Alcohol could affect people's "impulse control" across the population at large. Dr Campbell accepted that the large amount of alcohol, which the appellant had consumed, "in all probability ... significantly contributed" to his behaviour. She did not agree with Dr Dickson's diagnosis of a bi-polar personality disorder.

[21] Another psychiatrist, namely Dr Rachael Sibbett, provided a detailed report for the Crown dated 14 August 2017 and based on an interview with the appellant on 7 August. It was admitted under section 259 of the Criminal Procedure (Scotland) Act 1995. Dr Sibbett had been unable to attend the trial. Her report covered much of the same ground as Dr Campbell had done. Dr Sibbett concluded that the appellant had an EUPD and possibly mild to moderate depression, both being mental disorders. At the time of the offence the

appellant had been intoxicated. This "likely significantly contributed to and may have been the crucial factor in the alleged offence".

The judge's charge

[22] Having defined murder and culpable homicide for the jury, the trial judge turned to what he described as the crucial issue of diminished responsibility. He explained that it was the defence who had raised diminished responsibility on the basis that, although it was accepted that the appellant had killed the deceased, he had not been fully responsible for his actions because of his medical condition and that thus his criminality was reduced. The judge directed the jury that if it was established that the appellant's mind had been affected either temporarily or permanently so that it worked abnormally, then a person's responsibility is diminished. This could arise if the person's ability to control his behaviour was substantially impaired by reason of abnormality of mind. If the ability of an accused to determine or control his conduct was substantially impaired by reason of an abnormality of mind, then the person could be convicted of culpable homicide on the grounds of diminished responsibility. An abnormality of mind could be caused by mental illness, or a personality disorder. These conditions might lead the accused to see things differently from a normal person; possibly to suffer from delusions or possibly to lose the ability to judge rationally between right and wrong. However, any abnormality brought about by the voluntary ingestion of alcohol or drugs could not be taken into account in this regard.

[23] The trial judge continued:

> "... here of course there is evidence of mental illness and a personality disorder as well as evidence of alcohol and substance abuse, and for that matter the misuse of prescription drugs. Now, it is open to you to find that he had an abnormality of mind as a result of his depressive illness and his personality disorder. It is open to you to find that notwithstanding his use of alcohol and drugs, his underlying mental state gave rise to the abnormality of mind that was the substantial cause of his

> actions ... However, it is also open to you to find that the substantial cause of his conduct was his use of alcohol and drugs and that he should not have his culpability reduced by means of diminished responsibility from murder to culpable homicide. And posing the question in that way is beguilingly simple but as you would appreciate, there is a great wealth of evidence to which you are going to have to have regard ... in order to decide on which side of the line you consider the matter falls.
>
> ... while the Crown has to prove beyond reasonable doubt that the accused committed this crime, in the situation we find ourselves this afternoon, the burden of proving diminished responsibility is not on the Crown, it is on the accused. He has to prove that on ... the balance of probabilities. Now, proof on the balance of probabilities is a lower burden than proof beyond reasonable doubt. All that it means in practical terms is that something is more probable than not, I think [defence counsel] put it into percentage terms, something is more likely than not if it's 51% playing 49%. It could be 70 playing 30 or 90 playing 10 but a minimum, it has to be more likely than not which is 51% playing 49%, that's as colloquially as I can put the matter. So it's more likely than not, and that is the burden of proof that the defence bear in this trial.
>
> ...
>
> ... if on balance you thought it was more probable than not that he was suffering from diminished responsibility at the time the crime was committed, that would be enough and he doesn't need to prove that by corroborated evidence. So, to establish diminished responsibility the defence must prove four things, first of all that at the time of committing the crime the accused was suffering from a mental abnormality. Secondly, that that mental abnormality is scientifically or medically recognised. Thirdly, whether permanently or temporarily it must have affected his mind substantially so that it didn't work like the mind of a normal adult, or to put it in words used in a different case, there must be something far wrong with him which affected the way he acted. And fourthly that as a result of that, his ability to determine and control his behaviour was, again a critical phrase, substantially impaired."

The grounds of appeal and submissions

Appellant

[24] The first ground of appeal was that the trial judge erred in directing the jury that it was open to them to find either that the substantial cause of the appellant's actions was the appellant's abnormality of mind or that it was his use of alcohol or drugs at the time. He failed to direct the jury that there was a third option open if the jury were satisfied that both had played a part. In that event, the test was whether the abnormality of mind remained a

substantial cause. It did not need to be the only cause or even the main or predominant cause. It was sufficient that it remained a cause (*Graham* v *HM Advocate* 2018 SCCR 347, adopting the model direction in *R* v *Dietschmann* [2003] 1 AC 1209, see also Scottish Law Commission Report No. 915: Insanity and Diminished Responsibility (2014) at para 3.38 quoting the charge in *HM Advocate* v *McLeod*, (unreported) 24 October 2002, High Court at Forfar). The question for the jury was whether the appellant had satisfied them that, despite the ingestion of drink or drugs, his mental abnormality substantially impaired his mental responsibility for the fatal act. If an accused's personality disorder was an operative, that is to say substantial, cause of his or her actions, the plea of diminished responsibility remained available. Section 51B of the Criminal Procedure (Scotland) Act 1995 had made no change to the law.

[25] The second ground was that the trial judge erred when he defined the balance of probabilities in percentage terms. Balance of probabilities was a simple English phrase and as long as there was specific reference to the standard being lower than that of beyond reasonable doubt, its meaning could not be improved (*Glancy* v *HM Advocate* 2012 SCCR 52 and *Robertson* v *HM Advocate* 2012 SCCR 450). The mathematical approach was "pseudo mathematical" and thus in error (*Re A (Children) (Care Proceedings: Burden of Proof)* [2018] 4 WLR 117, approving *Milton Keynes Borough Council* v *Nulty* [2013] 1 WLR 1183 at para [37]).

Respondent

[26] The plea of diminished responsibility was now provided for in section 51B of the 1995 Act. The fact that a person was under the influence of alcohol, drugs or any other substance, did not of itself constitute abnormality of mind, or prevent abnormality of mind being established. In other words, the intoxication should be ignored. All that mattered was

whether the abnormality of mind, which was not caused by intoxication, caused impairment. The trial judge's directions properly reflected the terms of the section. Where Parliament had defined a defence in specific ordinary language, the jury direction should reflect that definition (*Mackay* v *HM Advocate* 2017 JC 311 at para 26). It would have been obvious to the jury that there were three possibilities, namely: that the sole cause was the abnormality of mind brought about by a mental disorder; the sole cause was consumption of drink and drugs; or the cause was a combination of both. The jury would have understood that they could find that the appellant had acted with diminished responsibility if they were satisfied that his mental disorder substantially impaired his ability to determine or control his conduct, even if intoxication played a part.

[27] Looked at in abstract or in theory, the abnormality of mind need not be the only cause of the impairment. In terms of section 51B, the crucial consideration was the timing of the conduct. Where, despite a mental disorder, a person could usually function normally in society, but committed a crime after ingesting alcohol or drugs, it would be difficult to resist the conclusion that it was not his underlying mental condition which caused him to lose control, but his consumption of the alcohol or drugs. Even if the jury had been directed that, despite his consumption of drink and drugs, it was open to them to find that the appellant's underlying abnormality of mind was a substantial cause of his actions, there was no realistic possibility of the jury reaching that conclusion.

[28] On the second ground, the judge's comments were entirely appropriate, correct in law and did not constitute a misdirection. Balance of probabilities meant more likely than not. It was defence counsel who had used the mathematical formula adopted by the judge. There was nothing wrong in expressing a balance of probabilities in this way. The elucidation provided was perhaps unnecessary, but it could not have caused any confusion

in the mind of the jury. *Milton Keynes Borough Council* v *Nulty* (*supra*) was a civil case in England involving three possible causes of a fire. It was concerned about how a fact-finder should go about deciding if he was satisfied on a balance of probabilities that a particular thing had happened when there were more than two possibilities and each one of them was improbable.

Decision

[29] In their report (No. 915) on *Insanity and Diminished Responsibility* (2004), the Scottish Law Commission recommended (at para 3.9) the abolition of the common law test for diminished responsibility as it had recently been explained in *Galbraith* v *HM Advocate* 2002 JC 1. The SLC's view was that, although the reformulated test in *Galbraith* had "extended considerably the types of condition which could form the basis" for the plea, it had "expressly excluded the conditions of voluntary intoxication and psychopathic personality disorder from its scope" (SLC Report paras 3.5 and 3.7). It was the exclusion of these conditions which prompted the abolition. The SLC reasoned (*ibid* at para 3.15) that otherwise the test would do "little more than re-state the *Galbraith* criteria". In considering the "alcohol exclusion" (*ibid* para 3.35 *et seq*), the SLC noted that the reason for it was the principle in *Brennan* v *HM Advocate* 1977 JC 38 (LJG Emslie, delivering the opinion of the full bench, at 46), that:

> "... a person who voluntarily and deliberately consumes known intoxicants, including drink or drugs, of whatever quantity, for their intoxicating effects, whether these effects are fully foreseen or not, cannot rely on the resulting intoxication as the foundation of a special defence of insanity at the time nor, indeed, can he plead diminished responsibility".

[30] The SLC were concerned that this might be interpreted as meaning that the plea was not open if the accused was intoxicated. The SLC had regard (at para 3.38) to the situation in which a person suffered from a mental abnormality and was drunk at the material time. They considered *R* v *Dietschmann* [2003] 1 AC 1209 in which the House of Lords approved (Lord Hutton at para 41) a direction that "Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility" arising from that abnormality". If a jury took the view that the accused's responsibility had been impaired by both mental abnormality and drink, and that he might not have killed if he had not taken drink, then:

> "the question ... is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that".

[31] The SLC concluded that:

> "Re-stating this [*Dietschmann*] rule in terms of Scots law, the issue is whether, despite the intoxication, the accused was suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct. In other words, the presence of intoxication is to be ignored provided the abnormality of mind was a substantial (but not necessarily sole) cause of the killing".

The SLC considered that this approach had been adopted by the trial judge (Lord Drummond Young) in his charge in *HM Advocate* v *McLeod*, 24 October 2002, unreported, High Court at Forfar). There it was said that if "both causes were operating" then if the mental disorder was:

> "the substantial cause ... that is a basis for diminished responsibility ... The test, in other words, is whether the abnormality of mind, other than intoxication, is a substantial cause of the attack. It needn't be the only cause. It needn't even be the main or predominant cause. It is sufficient that it is a substantial cause".

[32] This all led to the statutory formula, which the court now requires to interpret and was introduced into the Criminal Procedure (Scotland) Act 1995 (by section 168 of the Criminal Justice and Licensing (Scotland) Act 2010), as follows:

> "51B(1) A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct ... was ... substantially impaired by reason of abnormality of mind.
>
> (2) ... abnormality of mind includes mental disorder
>
> (3) The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct ... does not of itself –
>
> ...
>
> (b) prevent such abnormality from being established ...
>
> (4) It is for the person charged with murder to establish, on the balance of probabilities, that the condition set out in subsection (1) is satisfied".

[33] In *Graham* v *HM Advocate* 2018 SCCR 347 the court adopted (at para [105]), for common law purposes, the model direction in *Dietschmann*; regarding it as consistent with the principle in *Brennan* v *HM Advocate* (*supra*). Abnormality of mind had to be a substantial cause of the impairment for the plea to be open. It need not be the only cause and the impairment "must not be brought on by the voluntary ingestion of drink or drugs". If, nevertheless, the jury considered that a personality disorder was an operative (ie substantial) cause of an accused's actions, the plea remained available. It does not seem to be disputed that the principles of the common law position are still apt when considering the statutory provision. If an accused's actions at the material time have been substantially impaired by reason of abnormality of mind, then the jury may find diminished responsibility established even if intoxication also played a part.

[34] Much of the judge's directions in the area were unexceptional. However, in so far as he directed the jury (as he did) that they had an option to find, as an alternative, either that

the mental disorder or the ingestion of alcohol or drugs had led to the impairment, he was in error. It was not a question of these two possible causes necessarily being alternatives. The issue for the jury was, in terms of section 51B(1), whether the abnormality was a cause (ie an operative or substantial cause) of any impairment of the appellant's ability to determine or control his conduct at the material time. The trial judge's use of "the" rather than "a" when referring to substantial cause created the error. It was a material error, given that it related to the central issue in the case. All that the jury had to be told in relation to the possible combination of causes, and once the standard *Brennan* direction was given, was that they could return a verdict of culpable homicide, based on the appellant's diminished responsibility, if they were satisfied on the balance of probabilities that "despite the drink, his mental abnormality substantially impaired" his ability to determine or control his conduct (*R* v *Dietschmann* (*supra*), Lord Hutton at para 41).

[35] The next question is whether the error has led to a miscarriage of justice. As *Dietschmann* correctly analyses matters, the proper approach is to discount the effect of the drink and drugs both on their own or by reason of their combination with the appellant's underlying mental disorder. This flows from the application of the principle in *Brennan* v *HM Advocate* (*supra*). An accused person cannot rely on the effect of the voluntary ingestion of drink and/or drugs whether that effect operates on its own or as a result of its combination with the appellant's underlying mental disorder to impair his ability. The question in practical terms is whether, if this appellant had not ingested the alcohol/drugs which he did, would he have acted as he did and delivered the fatal blow as a consequence of his mental abnormality?

[36] There was no psychiatric evidence to that effect. The unchallenged evidence was that the appellant had taken a very large quantity of alcohol and had consumed both

prescribed (Valium) and illicit (Cocaine) drugs. The effects of such a combination are notorious. Dr Campbell deponed specifically to the Valium/alcohol mix causing "paradoxical aggression" and a disinhibition of aggression. Having regard to this evidence, it cannot reasonably be concluded that a miscarriage of justice has occurred. Even on the assumption that the appellant's ability was impaired as a consequence of a combined effect of voluntary alcohol/drug ingestion and a mental abnormality, the correct verdict was one of murder.

[37] On the second ground of appeal, there was no material misdirection on balance of probabilities. For the reasons explained *In re A (Children) (Care Proceedings: Burden of Proof)* [2018] 4 WLR 117, (King LJ at para 51 *et seq*, citing, at para 56, *Milton Keynes Borough Council* v *Nulty* [2013] 1 WLR 1183, Toulson LJ at para 34 *et seq*) it can be dangerous to attempt to reduce the exercise of determining whether something is more likely than not to have happened to one of combined arithmetical possibilities (see also the attempt in *A County Council* v *M* [2012] 2 FLR 939, Mostyn J at para 16). In this case, the jury had, or rather ought to have had, a straightforward question to answer of whether, discounting the effect of alcohol and/or drugs, the mental disorder was a substantial cause of impairment. It may have been better if the trial judge had not taken up defence counsel's inaccurate (only 50% + is actually needed) arithmetical formula. Nevertheless, using it in the circumstances prevailing in this case would not have led the jury to misunderstand the meaning of probabilities. It is not a substantially erroneous description (see eg its use in Davidson: *Evidence* at para 4.84, citing *Davies* v *Taylor* [1974] AC 207, Lord Simon at 219-220).

[38] The appeal must be refused.