Heffernan v The Queen [2005] NTCCA 14

PARTIES:	HEFFERNAN, ANDREW CRAIG
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 24 of 2004
DELIVERED:	13 October 2005
HEARING DATES:	25 AUGUST 2005
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ

CATCHWORDS:

CRIMINAL LAW
Appeal against conviction – miscarriage of justice – failure of trial Judge to order an investigation into accused's fitness to stand trial – Crown duty – trial Judge failing to direct the jury as to defences of insanity and diminished responsibility – statutory scheme for mental impairment and questions of fitness to stand trial – presumption of competence – appeal dismissed.

Criminal Code 1983 (NT); *Criminal Code Amendment (Mental Impairment and Unfitness To Be Tried) Act* 2002 (NT).

Rodway v The Queen (1990) 169 CLR 515 at 521; *Pemble v The Queen* (1971) 124 CLR 107 at 117-118, 132-133; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162, followed.

Kesavarajah v The Queen (1994) 181 CLR 230 at 244, 245; *Eastman v The Queen* (2000) 203 CLR 1 (p 50); *R v Taylor* (1992) 77 CCC (3d) 551 (53), considered.
R v Presser [1958] VR 45 at 48 (p 51), referred to.
R v Berry (1978) 66 Cr App R 156 (158), applied.
Fittock v The Queen (2001) 11 NTLR 52 at [33] (p 66), applied.

REPRESENTATION:

Counsel:

Appellant:	Mr D Grace QC
Respondent:	Mr W J Karczewski QC & Dr N Rogers

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Heffernan v The Queen [2005] NTCCA 14
No. CA 24 of 2004

BETWEEN:

ANDREW CRAIG HEFFERNAN
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 13 October 2005)

The Court:

Introduction

[1] On 12 August 2004 after a trial before a jury in which the appellant was unrepresented, the appellant was convicted of murder. He appeals against that conviction on the basis that there has been a miscarriage of justice by reason of his mental state at the time of the trial and the failure of the trial Judge to order an investigation into his fitness to stand trial. In addition, the appellant argued that the trial was unfair by reason of a failure by the Crown to comply with its duty and that the trial Judge erred in failing to direct the jury as to defences of insanity and diminished responsibility.

[2] It is common ground that for many years the appellant has suffered from a condition of paranoid schizophrenia. In order to understand the position of the trial Judge at trial and to put the grounds of appeal in their proper context, it is necessary to canvass the history of the appellant's mental state and the proceedings in the Supreme Court in considerable detail.

Mental State before Trial

[3] The appellant was born in December 1975. Information as to his background is gleaned from a number of medical reports prepared in connection with offences committed by the appellant.

[4] The earliest report is that of a psychiatrist, Dr Alroe, dated 27 February 1999. The appellant was then 23 years of age. He was charged in Queensland with an offence of grievous bodily harm that occurred on 19 August 1998. In the days prior to the offence the appellant had been behaving oddly. He was seen talking to himself, wandering aimlessly, sharpening knives and fashioning daggers. He had been cutting at his foot and his abdomen to remove foreign objects. In that process the appellant had created a fissure in his abdomen and was continually digging at it. When seen at Outpatients in the Emerald Hospital, the appellant had abused the doctor for not taking X-rays of his foot to detect foreign objects.

[5] Dr Alroe diagnosed the appellant as suffering from a severe disorder of paranoid schizophrenia. On that basis he expressed the view that the appellant was insane within the provisions of the Queensland Criminal

Code. Notwithstanding that condition, however, in the view of Dr Alroe the appellant was "fit to plead" as he fully understood the court process, knew what a Judge and jury were and knew the nature of the defences and the likely actions of the prosecutor.

[6] Dr Tabart is a psychiatrist with the Northern Territory Department of Health & Community Services. In a report dated 22 November 2002 Dr Tabart reported that the appellant had a history of two previous paranoid psychotic episodes in Queensland and that he had subsequently escaped from Queensland to New South Wales where he committed a number of minor offences. A report from a New South Wales health team dated 27 November 2001 does not disclose any abnormal behaviour. Dr Tabart reported that the appellant absconded from New South Wales in mid-July 2001.

[7] The murder of which the appellant was convicted was committed on 2 August 2001. The deceased's body was found in bushland near a pull-off on the Stuart Highway approximately 60 kilometres south of Alice Springs. The deceased's throat had been cut. The Crown produced a very strong circumstantial case connecting the appellant to the murder.

[8] When interviewed by the police on 15 August 2001, approximately two weeks after the killing, the appellant admitted leaving Alice Springs in the company of the deceased, but said they met a friend of the deceased on the way out of Alice Springs who was in another vehicle. According to the appellant, the deceased got out of the vehicle being driven by the appellant

and into the other vehicle. The deceased told the appellant to meet them at the Erldunda turn off. The appellant drove off first and waited for a considerable time at the turn off, but the other vehicle did not show up. He eventually drove to the next town and slept in the car on the side of the road. The appellant told police that the next morning he thought about going back to Ayer's Rock, but as he really wanted to see his girlfriend he decided to drive to where he could catch a bus and leave the car at that locality. As he was driving towards Marla he hit an eagle which damaged the windscreen. Because the vehicle was unsafe to continue driving he caught a bus at Marla. He left the car keys and the deceased's property in the car. After arriving in Adelaide the appellant caught a bus to Melbourne.

[9] Following his arrest the appellant was held at the Alice Springs Correctional Centre from 18 August 2001 until 13 December 2001. Dr Wake is a physician who practices exclusively within the Northern Territory prison system and is the visiting medical practitioner to all prisons and detention centres. He had supervision of the appellant upon the appellant's admission into the Correctional Centre. Dr Wake reported that during the appellant's initial weeks in prison he was guarded with information and specifically refused permission for Dr Wake to seek background medical and psychiatric information. The appellant advised Dr Wake that he was given advice by his lawyer not to speak to medical and forensic carers in the prison. In Dr Wake's view, at that time the appellant was "not overtly psychotic".

[10] In October 2001 the appellant presented with what were described by Dr Wake as "essentially panic attacks". The appellant was able to discuss his symptoms in detail. At that time the appellant did not exhibit symptoms or signs which alerted Dr Wake to mental illness. Dr Wake was aware that the appellant had a history of paranoid schizophrenia.

[11] The preliminary examination commenced on 3 December 2001. The appellant had appeared before a magistrate on four previous occasions. On each of those occasions and throughout the committal the appellant was represented by counsel.

[12] The preliminary examination occurred over nine days from 3 December 2001 to 11 March 2002. In a report dated 3 December 2002 Dr Wake recorded that after an attendance at court in December 2001, on his return to the Correctional Centre the appellant was "quite floridly delusional and distressed". Dr Wake described the content of the delusions in the following terms:

> "The content of the delusional systems involved his parents and other authority systems including the Australian Army which agents had perpetrated compromising actions upon his body since a very young age. He had 'lost all his human rights', been forced to eat human flesh and been infected with a hook worm that could never be cured. He was markedly paranoid and indicated that if he told his medical attendants all that had happened then we too would be subject to the negative actions that he had to endure and might even be killed by secret agents."

[13] Dr Wake expressed a view that the appellant had been masking his delusions:

> "This onset of paranoid delusional systems was so sudden and intense and completely developed that I believe that Mr Heffernan was masking his true beliefs and thoughts during his period of relative wellness from August to December 2001. Mr Heffernan has been observed subsequent to December 2001 to be very good at masking his delusions and even on occasion has discussed with myself 'how much' he should tell various medical or mental health visitors. The likely reason for the masking over these four months lies with his belief that prison authorities are involved in an ongoing attempt to harm and compromise him, plus the advice from his lawyer compounding this idea (if indeed such advice was given to Mr Heffernan by his lawyer). There is plenty to suggest that Mr Heffernan was psychotic between August and December 2001. To be specific his paranoid fears on prison entry, the violent events in the dormitory, his panic attacks of October 2001, the previous history since obtained and the failure of his symptoms to remit on relatively large doses of medication subsequent to December 2001."

[14] We will return to the question of the appellant's ability to mask his symptoms. This ability was emphasised by counsel for the appellant as a significant factor in determining whether the material before the Judge required that he conduct an investigation into the appellant's fitness to stand trial.

[15] On 9 December 2001 Dr Tabart saw the appellant. He concluded that the appellant was acutely psychotic and unable to give informed consent for treatment. In Dr Tabart's view the appellant was not fit to stand trial at that time.

[16] The appellant was transferred to the Joan Ridley Unit at the Royal Darwin Hospital where he was an inpatient from 13 to 20 December 2001. At that time the appellant continued to withhold his consent for contact to be made with other mental health agencies. He explained that his consent to such a

request would lead to his death and to the death of those treating him. The appellant said that two weeks earlier he had ceased his medication because one evening he had been over-sedated and during his over-sedation several transmitters/monitors were surgically implanted by members of the Army that had infiltrated the prison. He indicated scars on his left shoulder as proof that the surgery had taken place.

[17] The appellant reported to Dr Tabart that he had been relatively settled until the time of his committal. He then began to feel anxious and complained of panic attacks. He periodically refused food or insisted that he would only eat food that had been sealed by prison officers so that it could not have been tampered with. He expressed a belief that agents of the military who were conspiring to harm him and keep him under surveillance were poisoning his food.

[18] During the interview with Dr Tabart, the appellant described the beginning of his troubles and subsequent events in the following terms:

> "Mr Heffernan described the onset of his troubles from the age of 4 when he witnessed a conversation between agents of the Civil Rights (or army) police and his father who had been arrested by them for bestiality. He was told by the agents that he was to be used as a government experiment and that evening multiple devices were implanted in his body and his features were surgically transformed so that he was no longer recognisable to his family. He has these devices connected to the Internet so that all his experiences and conversations are forwarded directly to the Internet. Indeed, he says he discovered the Internet and by his invention made many businesses very successful, for example, if he says in a conversation, 'buy this pizza from this pizza shop or that used car dealer everyone goes to these shops', then members of the public will then flock to that business. He believes that the agents of the Army who

> conducted the initial experiments have been torturing and harassing him for the past 21 years without let up."

[19] Dr Tabart reported that on examination the appellant was hyper-vigilant and very suspicious. In Dr Tabart's words the appellant "readily and intensely described his delusional system and revealed interpenetration of persecutory and grandiose delusional themes". The appellant also reported that his lawyer was, at times, disguised as an Army agent being the same agent who had attempted to castrate the appellant when he was aged fifteen years. In Dr Tabart's view the appellant's judgment was grossly impaired and the appellant had no insight that he had an illness or an illness that required treatment. Dr Tabart reported that in December 2001 the appellant was unable to give informed consent to treatment and was unfit to stand trial.

[20] In his report of 3 December 2002 Dr Wake noted that little was done in December 2001 while the appellant was in the Joan Ridley Unit and that following the appellant's return to the Alice Springs Correctional Centre the appellant began to talk about his delusional ideas. Subsequently the appellant resorted to either talking about the delusions or not talking about them as he saw fit at the time. In Dr Wake's view, as at December 2002 the appellant was severely disabled by his paranoid disease despite current levels of therapy. The appellant had refused to speak since July 2002 which Dr Wake believed was a mechanism of controlling any attempt at in depth discussion of the mental illness.

[21] Dr Wake noted that notwithstanding the refusal to speak, the appellant appeared outwardly cheerful and cooperative with medical and prison workers. The appellant had invented a form of written language by which he communicated.

[22] According to Dr Wake, the appellant had no insight into the fact that he was mentally unwell. His delusional systems were very intense and influenced his understanding and appreciation of what was happening about him to a great degree. In Dr Wake's view the appellant was not fit to stand trial. The appellant possessed a most bizarre view of the court officials and their motivations towards him. He believed that his medical attendants were in the pay of the secret service and intended to compromise him. Dr Wake reported that the appellant claimed to be innocent and not to have been at the crime scene.

[23] In the context of the delusions described by Drs Tabart and Wake, in a letter dated 3 May 2002, Dr Tabart stated on 23 April 2002 that he discussed the appellant's delusional beliefs about his solicitor with the appellant. The appellant acknowledged to Dr Tabart that on two occasions he had believed that his persecutors had seen him while masquerading as his legal counsel. On one occasion the appellant perceived the persecutor to be the same person who had attempted to castrate him when he was aged 15.

[24] In the letter Dr Tabart expressed the view that the belief constituted symptoms of Capgras Syndrome which he said is one of the

misidentification delusional syndromes common in some forms of paranoid schizophrenia. In this syndrome there is a denial of the identity of familiar persons coupled with a belief that they have been replaced by doubles.

[25] Dr Westmore, a forensic psychiatrist from New South Wales, examined the appellant on 27 January 2003. A forensic psychiatrist from South Australia, Dr Raeside, examined the appellant the following day. The examinations were complicated by the appellant refusing to speak and communicating by either shaking his head or writing on a note pad. Both doctors concluded that the appellant was unfit to stand trial.

[26] Dr Westmore discussed with the appellant the interview conducted by the police. The appellant confirmed he had told the police that the deceased got into a car belonging to another person and that that was the last that he saw of the deceased. Dr Westmore reported:

> "I asked him directly was that still the position and he nodded in the affirmative."

[27] As to the appellant's understanding of proceedings, Dr Westmore reported as follows:

> "FITNESS ISSUES
>
> I asked him had he been to court before and he nodded yes, indicating he had been to court five times. When asked who was in charge of the court he wrote, 'Supreme Court magistrate.' I asked him was that person also called a judge and he nodded yes. I asked him what the judge's job was and he wrote, 'View and hear all evidence and make a fair decision about the final verdict.' Of his solicitor he wrote 'Speaks on my behalf.' I asked him was his

> solicitor for him or against him and he wrote, 'Neutral.' Of the role of the prosecutor in court he wrote, 'Presents evidence held by the Crown.' I inquired was the prosecutor for him or against him and he wrote, 'Neutral.' Of the jury he wrote, 'The jury has the difficult task of viewing and hearing all the evidence and making a decision whether the accused is guilty or innocent, the jury must make a fair and non-biased decision.' He indicated there were twelve people on the jury. When asked where those people came from he wrote, 'One from overseas, eleven from the country where the trial is held.' I asked him why was one of the jury members from overseas and he wrote, 'It's federal law.' When asked about the oath he wrote, 'Pledge a religious belief.' I asked him was it important to tell the truth in court and he nodded in the affirmative. I asked him why and he wrote, 'It is an offence to lie and people's lives have been affected by what is said in the court room.' Of the role of witnesses he wrote, 'Answer questions asked of them by the prosecutor or the defence lawyer or barrister.' He was unfamiliar with his right of challenge."

[28] Ultimately Dr Westmore concluded that although the appellant appeared to have a reasonably good understanding of the issues relevant to fitness to stand trial, a combination of his elective mutism, the style of his communication and the absence of insight into his mental illness made him unfit to stand trial. In the view of Dr Westmore, because of these combined difficulties the appellant would be unable to provide his legal representatives with appropriate and ongoing instructions.

[29] As to the appellant's lack of insight into his illness, Dr Westmore reported that the appellant was less than forthcoming when asked about his psychotic symptoms. Dr Westmore expressed the view that it was possible that the appellant was attempting to minimize or conceal those symptoms from a psychiatric examiner. Dr Westmore added:

> "His fitness to be tried is further complicated by the fact that he probably has little, if any, insight or understanding about the nature and extent of his mental illness and he may therefore be unable to raise that issue either as a potential defence or a matter to be considered by way of mitigation by the court."

[30] Dr Raeside had previously seen the appellant in May 2002. At that time the appellant understood he had been charged with murder and disputed the charge with Dr Raeside. According to Dr Raeside, the appellant demonstrated a clear understanding of the differences between a plea of guilty and not guilty and was able to discuss the role of the court and its various officers. He understood the concept of cross-examining witnesses, but indicated that two key witnesses were missing. The appellant described the role of defence counsel as giving a "fair representation to the accused, state the facts and discuss the arguments for and against".

[31] During the examination of January 2003, Dr Raeside asked the appellant about the court processes. Dr Raeside reported as follows:

> "Upon questioning Mr Heffernan about the court process, he responded 'The jurors will be appointed to the difficult task of hearing all the evidence. The judge will make the final decision about the verdict … by listening and witnessing all the evidence'. I asked what evidence he thought the prosecution might use against him. He again put down his pen, sat back, and simply shrugged his shoulders. He then wrote, 'I went and listened at the committal hearing is all I know'. He agreed that he would not say anything in his defence and simply sit back and let the judge decide. I asked what he would like his defence counsel to do for him. He responded 'speak on my behalf with my directions written'. However, he would not indicate what his directions were, despite his lawyer being present. Even after being reassured about the nature of the interview, including the nature of privileged communication, he simply responded 'John knows what to do. It is my first trial. Directions will only be given when required'.

> In relation to the various pleas and potential outcome, Mr Heffernan repeatedly replied that he did not know what the outcome would be if found guilty. Finally, he acknowledged that he would be 'back to prison. Life'. If found not guilty he would 'go home … Victoria will be my new home'.
>
> It was apparent that Mr Heffernan was keen to proceed to trial. He stated he wanted to 'get it over and done with'. He believed that he would handle the stress and pressure of a trial well, adding that 'waiting is worse'. He tried to either minimise or deny any mental illness or other issue which would prevent him standing trial."

[32] Dr Raeside expressed the opinion that the appellant was suffering from Chronic Paranoid Schizophrenia and that there was evidence of an acute psychotic relapse at the time of his interview in May 2002. He reported that the appellant continued to insist that he did not suffer from any psychiatric symptoms and was keen to go to trial. He considered that the appellant was unfit to stand trial because there was ongoing evidence of psychosis to such an extent as to impair the appellant's judgment and reasoning. In Dr Raeside's view, the appellant demonstrated disordered thinking and appeared to have ongoing underlying delusional ideas. The appellant was unable or unwilling, seemingly based on delusional reasons, to adequately instruct counsel and would have had considerable difficulty participating in his defence and rationally responding to evidence raised in a trial. Although the appellant appeared to have an adequate understanding of the role of various court officers and procedures, Dr Raeside said:

> "The concern however, would be the degree to which his mental state might influence his ability to follow the proceedings of the court and any trial. Additionally, the nature of his instructions to his defence

> counsel might be heavily influenced by his range of delusional ideas, including towards his own lawyer."

[33] In March 2002 the appellant was committed to the Supreme Court to stand trial. From April 2002 until February 2003 the appellant appeared on a number of occasions in the Supreme Court. He was legally represented on each occasion.

[34] In February 2003, following agreement between the prosecution and the appellant through legal counsel that the appellant was unfit to stand trial, pursuant to s 43T of the Criminal Code ("the Code") a Judge dispensed with an investigation into the fitness of the appellant to stand trial and recorded a finding that he was unfit to stand trial. As required by s 43R of the Code, the Judge heard evidence from Dr Tabart in order to determine whether there was a reasonable prospect that the appellant might, within 12 months, regain the necessary capacity to stand trial. On 7 February 2003 the Judge found that there was a reasonable prospect that the appellant might become fit for trial within 12 months and, pursuant to s 43R(4), the Judge adjourned the matter of the fitness to be tried to 21 July 2003.

[35] The appellant was remanded in custody. On 26 March 2003 he was transferred to the Joan Ridley Unit where he remained until being returned to custody at the Corrections Centre on 12 May 2003. When the appellant was transferred from Berrimah Prison to the Joan Ridley Unit in March he was selectively mute and answered questions by writing down his answers. Spontaneous speech emerged shortly after his admission to the Unit.

Dr Robertson examined the appellant on 3 April 2003. Although the appellant initially presented in a rather guarded and suspicious manner, he became more relaxed as the interview progressed and spoke fluently about his psychiatric history. The appellant was obviously affected by delusions as he spoke about many assets and companies that he had previously owned such as Aerogard and Milo. He told Dr Robertson he had lived many lives in the past and expressed the belief that he had been micro chipped for unknown reasons at the age of four. The appellant said that he had developed expertise in spells and did not want medication as he thought it was poison that interfered with his spell making ability. Dr Robertson reported that there was no evidence of any perceptual abnormality and the appellant's cognition was in tact.

[36] Following his discharge in May 2003 back to the prison, the appellant remained compliant with his medication and posed no management problems. He was reviewed by a doctor on 3 June 2003 when he presented in a much more communicative and likable manner, although he remained guarded when discussing his illness and the reason for his incarceration.

[37] Dr Robertson reviewed the appellant on 20 August 2003 and found the appellant pleasant and polite and eager to discuss his upcoming case. The appellant was fully aware of the date of the trial and the charge against him.

[38] In a report dated 8 September 2003 Dr Robertson confirmed the diagnosis of Paranoid Schizophrenia which he said was a "somewhat treatment resistant"

condition although the appellant had responded to treatment with improved socialisation. Dr Robertson expressed the view that complex delusional systems often take a long time to respond to medication and he did not expect the appellant's delusional system to change markedly in the near future. In Dr Robertson's view the appellant continued to lack insight into his illness in the sense that he did not believe that he had an illness or needed medication.

[39] As to the appellant's fitness to stand trial, Dr Robertson reported that the appellant was clearly able to understand the nature of the charge against him and was able to plead and exercise the right of challenge. In Dr Robertson's view the appellant was easily able to understand the nature of the trial and follow the course of the proceedings. The appellant was capable of understanding the substantial effect of evidence in support of the case for the prosecution and "well able" to instruct counsel. The appellant possessed a good grasp of his rights and told Dr Robertson that he was innocent until proven guilty. Dr Robertson concluded that the appellant was fit to stand trial in accordance with the criteria set out in s 43J of the Code.

[40] The trial was listed to commence in October 2003. On 10 October 2003 Dr Westmore further examined the appellant in the presence of the appellant's solicitor. After Dr Westmore introduced himself and advised the appellant that he was seeing the appellant on behalf of the prosecution rather than for treatment purposes and the content of the meeting would not be confidential, the appellant advised Dr Westmore that he was thinking of

"getting some money out of the bank and employing new legal representatives". The appellant asked Dr Westmore if he had to see him. When advised that he did not have to speak to Dr Westmore if he did not wish to do so, the appellant told his solicitor that he did not wish to proceed with the interview.

[41] The appellant and his solicitor spoke for a few minutes in the absence of Dr Westmore, following which the solicitor advised Dr Westmore that despite the solicitor's advice the appellant declined to be interviewed by Dr Westmore. After Dr Westmore and the solicitor placed telephone calls, they re-entered the prison with a view to attempting to conduct an interview. The appellant spoke with his solicitor for approximately five to ten minutes during which Dr Westmore observed the appellant shaking his head. The appellant left the visiting area following which the solicitor advised Dr Westmore that the appellant had stopped speaking to him and would only nod or shake his head. The solicitor confirmed that the appellant had again indicated that he did not wish to proceed with the psychiatric assessment.

[42] Based on information contained in previous reports of other practitioners, Dr Westmore expressed the view that in the period after March 2003 the appellant had showed "some clinical improvement". However in the absence of a further examination of the appellant, Dr Westmore made the observation that previously he concluded that the appellant was unfit to be tried and he had no other information which would enable him to alter that opinion.

[43] On 13 October 2003, three days after the unsuccessful attempt by Dr Westmore to conduct an examination, the appellant terminated his instructions to his solicitor. He remained unrepresented for appearances in the Supreme Court on 14 and 22 October 2003, 15 December 2003 and 12 January 2004. The appellant was legally represented on 6 February 2004 but instructions were withdrawn on 10 February 2004.

[44] By 18 February 2004 the appellant was again legally represented. On that date, at the instigation of the Crown, the Judge who had previously found the appellant unfit to be tried commenced an investigation before a jury as to the appellant's fitness to be tried. In the absence of the jury the Director of Public Prosecutions told the Judge that the doctors who would be called would all say the appellant was fit to stand trial, but the Crown felt obliged to bring the matter to the Court for determination by the jury "because of some uncertainty that lingers". Counsel for the appellant advised the Judge that the appellant had instructed her that he was fit to stand trial.

[45] In evidence Dr Wake confirmed that previously he was of the opinion that the appellant was not fit to plead and to exercise his right of challenge. Addressing the criteria contained in s 43J of the Code, Dr Wake said he believed the appellant was now fit to stand trial although he still retained the delusional ideation which was extremely complex and well developed. Notwithstanding his chronic psychotic condition, including his lack of insight into the condition, in Dr Wake's view the appellant was able to deal with and understand the relevant issues identified in s 43J.

[46] Dr Tabart had not seen the appellant for approximately 12 months. He believed the diagnosis of Chronic Paranoid Schizophrenia remained in place, but other than information suggesting the appellant remained delusional and unwell Dr Tabart acknowledged that he could not really comment on the appellant's current mental state. Dr Tabart conceded there could have been substantial improvement in the management and control of the symptoms during the previous ten or eleven months. In those circumstances Dr Tabart agreed during cross-examination that his opinion as to the appellant's fitness to be tried related to March 2003 when he last saw the appellant and that he could not say as at February 2004 whether the appellant was fit or otherwise.

[47] Dr Robertson addressed each of the criteria found in s 43J of the Code. In the course of expressing the view that the appellant was "absolutely fit to stand trial", Dr Robertson gave evidence that although the delusions were still present in the mind of the appellant, they were much less prominent and troubled the appellant much less than previously. Dr Robertson expressed the opinion that the appellant was much less paranoid in February 2004 than twelve months previously.

[48] In Dr Robertson's opinion, the appellant possessed an above average intelligence and would understand everything that was occurring in the court.

[49] Dr Westmore gave evidence that because of the appellant's presentation at the unsuccessful attempt to examine him in October 2003, particularly towards the end of the meeting, he again formed the view at that time that on the balance of probability the appellant would be unfit to stand trial. The two issues that troubled him were the ongoing presence of the mental illness and the appellant's difficulties in verbally communicating with his legal representatives.

[50] The cross-examination of the medical practitioners on behalf of the appellant did not challenge the view that the appellant was fit to stand trial. The jury was told that the burden rested on the Crown to prove that it was more probable than not that the appellant was unfit to stand trial. Counsel for the accused submitted that the jury should find the appellant fit to stand trial.

[51] On 19 February 2004, a jury found that the Crown had not established that the appellant was unfit to stand trial. The Judge fixed 19 July 2004 as the commencement of the trial of the substantive issues before a jury sitting in Alice Springs.

Pre-trial Hearings

[52] On 13 July 2004 the appellant terminated his instructions to his solicitors. The trial Judge was not the Judge who had presided in February 2004. At a directions hearing on 13 July 2004 before the trial Judge, the appellant advised the Judge that he had a "lack of confidence" in the Legal Aid

Commission lawyers that had been appointed to him in the past and he intended to represent himself at the trial commencing six days later. In response to questions by the Judge, the appellant said he thought he was capable of defending himself and wanted the trial to go ahead. He said he would not be taking any further legal advice that week. The Judge advised the appellant that he would be better off with proper legal advice and that he should seriously reconsider his position.

[53] On 16 July 2004 the appellant appeared before the trial Judge. Leave was sought by the Northern Territory Legal Aid Commission to withdraw from the matter and Mr Heffernan confirmed that the withdrawal was due to his instructions. In response to a question from the trial Judge as to whether he had seriously thought about the problems that were necessarily attendant upon him conducting his own case, which included an observation by the Judge that representing himself put the appellant at a disadvantage, the appellant indicated he appreciated that he would be at a disadvantage and added that he "felt a real lack of confidence with the Legal Aid lawyers that were appointed to me so I feel I'm better off to represent myself."

[54] There is no complaint about the explanation given by the trial Judge to the appellant on 16 July and subsequently during the trial about the appellant's rights. Indeed, the extensive and proper assistance provided by the trial Judge included the provision at the outset of the trial of a very detailed and helpful written memorandum describing the procedures and outlining the rights of the appellant. In addition, early in the trial the appellant was given

an aide-memoire covering the legal elements of the offence charged, alternative offences and potential defences.

[55] On 19 and 20 July 2004 extensive discussions occurred about various issues including procedures and a suppression order. A perusal of the transcript demonstrates that the appellant possessed a good understanding of the issues discussed. He indicated he wanted 15 jurors empanelled thereby providing three reserves. He asked pertinent questions of the trial Judge. The appellant told the trial Judge he needed overnight to decide whether he wished to object to any of the witnesses giving evidence by video link and advised the Judge that he objected to evidence connected with his arrest. On 20 July 2004 the appellant gave short but logical submissions concerning a suppression order and indicated that he consented to the giving of evidence by video link. The appellant again discussed his objection to evidence the Crown was seeking to lead concerning statements made by the appellant on his arrest.

The Trial

[56] On 21 July 2004 the jury was empanelled. Throughout the trial the appellant demonstrated a good grasp of procedures and his rights. He was not reluctant to ask questions of the trial Judge and, in numerous interchanges, the appellant gave answers responsive to questions and generally addressed issues in an appropriate and relevant manner. The appellant both consented and objected to evidence at appropriate times.

[57] The trial before the jury proceeded on 21-23 and 26-30 July 2004. The appellant did not cross-examine any of the witnesses called before the jury.

[58] On 30 July 2004 two police officers from New South Wales who had arrested the accused on 15 August 2001 were called to give evidence on a voir dire examination in the absence of the jury. A Northern Territory officer who conducted the record of interview with the appellant after his return to the Territory also gave evidence. The appellant cross-examined each of the three officers. His cross-examination was direct and to the point. In an appropriate manner, the appellant referred to himself as either the accused or Mr Heffernan. Having listened to an exchange between the trial Judge and the prosecutor, the appellant briefly and appropriately put his position in respect of the objection. On resumption of the trial on 3 August 2004 the trial Judge ruled in favour of the appellant and excluded the proposed evidence in the exercise of his discretion.

[59] The trial proceeded before the jury from 3 to 6 August 2004. The appellant did not cross-examine any of the Crown witnesses. The Crown closed its case on 6 August 2004. A discussion followed in the absence of the jury during which the Judge explained to the appellant his right to give evidence and call other witnesses. Asked if he was quite clear in his own mind about all those options the appellant responded:

> "Yes, Your Honour. I don't wish to take the stand and I don't wish to call any witnesses or call any exhibits."

[60] When the jury returned, in response to a question from the Judge as to what course he wished to pursue in relation to the defence case, the appellant said:

> "I do not desire to give evidence or call any evidence myself."

[61] The jury were sent away until 10 August 2004. In the interim discussions occurred about a number of issues. The appellant's responses demonstrated that he had a good understanding of the issues and his rights. By way of example, the prosecutor raised with the Judge a question of flight as evidence of consciousness of guilt and of lies in the record of interview. In an appropriate manner, the appellant questioned the use of a lie.

[62] After the discussion about lies, the Judge indicated he was about to adjourn. The appellant interrupted and asked whether he would be obliged to read out his closing address before the Judge and the prosecutor in order for it to be checked or whether he could just read it to the jury. The Judge responded that the appellant was not required to expose what he was going to say, but added that if the appellant was to say something which was tantamount to giving fresh evidence, the Judge might have to stop him because that would be inappropriate. The appellant replied that it might be to his benefit to read it so that the Judge could tell him if there was a problem and the appellant could have the weekend to repair it if it was wrong. The appellant then read to the Judge his proposed address to the jury.

[63] The draft read by the appellant was identical to the statement in closing made by the appellant to the jury. As counsel for the appellant has placed some emphasis on the content of this closing submission, it is appropriate to set out that submission in full:

> "Ladies and gentlemen, having heard all the evidence presented before the court it is now clear that the case embarked upon by the prosecution is entirely a circumstantial case.
>
> In the evidence heard from Heather Rhodes and Greg Rhodes we were told that the deceased has been identified as Stuart Rhodes, but due to insect infestation, dried blood, decay, swelling, exposure and discolouration I understand it to be quite difficult to identify the body in the disfigured state we have witnessed the deceased to be in from exhibit photographs.
>
> Ladies and gentlemen of the jury, I put it to you that the deceased shown in the exhibit photographs has been incorrectly identified and is in fact not Stuart Rhodes. In the evidence heard in this trial we have heard from Doctor Pocock who performed the autopsy. Doctor Pocock completed a thorough examination of the deceased including internal organs.
>
> One of Doctor Pocock's findings is of particular interest. In particular, the state of the deceased's lungs. Doctor Pocock has given evidence clearly stating the deceased's lungs show no sign of staining caused by cigarette smoking and concluded that the deceased must have been a non-smoker.
>
> Also we notice from the exhibit photographs of the deceased, the photographs show no sign of cigarette staining on the hands and teeth of the deceased; however, the numerous witnesses have reported Stuart Rhodes as being a heavy smoker. In fact, witnesses say Stuart Rhodes had three to four cigarettes that he would be smoking all at the same time.
>
> The evidence presented by the Crown may be considered compelling circumstantial evidence; however, we have not heard any condemning evidence of any crimes being committed by the accused,

> therefore imposing a reasonable doubt. Thank you. That's all from the defence."

[64] After the appellant had read the draft to the Judge, his Honour offered suggestions as to improvements. In particular he suggested that perhaps the appellant could place a little more emphasis on the assertion that the case was circumstantial and that, quite apart from the question of identity of the deceased, the appellant was saying that the Crown had not proved beyond reasonable doubt that if it was Stuart Rhodes who was killed, the appellant did it. The appellant responded by observing that these were two different arguments. That comment and the further discussion demonstrated that the appellant appreciated the distinction. The appellant did not adopt any of the suggestions made by the Judge.

[65] The suggestion by the appellant that the Crown had not proved that the body was that of Stuart Rhodes was an issue about which the appellant had not given any hint in the course of discussions during the trial. As we have said, in the record of interview the appellant maintained that the deceased was alive when the appellant last saw him. Although not before the jury, on more than one occasion during medical examinations the appellant had confirmed his innocence and that what he had said to the police was the correct version.

[66] As to the possibility of reliance upon a defence based upon mental illness, throughout the proceedings before the trial Judge the appellant consistently

advised the Judge that he did not wish to raise any defence based upon mental illness.

[67] The issue of the defences of diminished responsibility or insanity was raised on a number of occasions. On 20 July 2004 the prosecutor raised the question as to whether the aide memoire should cover the defence of mental impairment. The prosecutor advised the Judge that the Crown would not be raising the question of diminished responsibility because the Crown had material in its possession indicating the accused was not mentally impaired at the relevant time. The prosecutor added that although the Crown was not raising that issue, the accused should be aware of the availability of that defence.

[68] It appears that the issue of diminished responsibility was not discussed directly with the appellant until 23 July 2004 when the Judge raised the issue. His Honour made the observation that on the basis of what he had read, the appellant's approach in the trial would be to say that whoever cut the deceased's throat it was not the appellant and he was not present. His Honour then observed that it was a difficult defence situation because if the jury concluded from the circumstantial evidence that the appellant cut the deceased's throat, "then another issue might well arise on what I've read as to the question of diminished responsibility". His Honour added, in a reference to the record of interview, that material would be before the jury that the appellant not only had a condition of schizophrenia, but prior to the killing he had not been taking his medicine. Observing that he had not

studied it in detail, his Honour referred to the previous trial concerning fitness to stand trial and raised with the prosecutor whether the prosecutor had a view as to whether the prosecution had a responsibility to place that sort of information before the jury.

[69] The trial Judge then referred the appellant to the discussion in the aide-memoire concerning diminished responsibility and the reduction of murder to manslaughter. After the Judge noted that such a defence would be inconsistent with a claim that the appellant was not at the scene, and the Judge having told the appellant he could not advise the appellant as to what approach the appellant should take, the appellant responded:

> "Your Honour, diminished responsibility is not an avenue I wish to explore so I don't think I will need any medical evidence."

[70] The Judge responded that he did not want the appellant to nail his colours irretrievably to the mast at that stage. He asked the prosecutor to consider the question of the responsibility of the Crown to call evidence which might be relevant. The prosecutor indicated that the issue would be examined again and made the comment that if the prosecution sought to adduce such medical evidence, it could be against the specific wishes of the appellant. The Judge made the final comment that in the end it was a matter for the appellant.

[71] On 26 July 2004 the issue of the amendments to the Code with respect to diminished responsibility and insanity were discussed between the Judge

and the prosecutor. Noting that the discussion was probably "terribly confusing" from the appellant's point of view, and observing that the old insanity provisions probably applied, the Judge said it was his understanding that the appellant did not wish to avail himself of either provision. The appellant responded that his Honour was correct in that he did not wish to avail himself of those provisions.

[72] The issue arose again on 28 July 2004. In particular, an exchange occurred in which the appellant confirmed that he understood the consequences of a finding of not guilty on the ground of insanity.

[73] On 30 July 2004 the Crown prosecutor again raised the issue and indicated that the Crown found itself in "somewhat of a dilemma". The prosecutor referred to the appellant having disavowed any intention to rely on either diminished responsibility or insanity and the difficulty inherent in the jury learning from the record of interview that the appellant suffered from schizophrenia. Discussion followed about the medical material and the relevance of that material to the question of intent. It was the Crown's position that the material available did not establish that the appellant was insane or of diminished responsibility.

[74] After a reasonably lengthy discussion, the prosecutor put to the Judge that if neither side called medical evidence directed to the issue of mental illness, and if neither side attached significance to the reference in the interview to schizophrenia, then the Judge should not attach any significance to those

matters. At that point the appellant interrupted by saying "I'd agree with that, your Honour." After further discussion in which the Judge made the comment that he could direct the jury that as neither side had raised the issue the jury should not speculate about it, the appellant nodded his head and said, "Yes, I agree with that …".

[75] On 5 August 2004 the prosecutor returned to the subject of the appellant's mental state. She submitted that the reference in the record of interview alone was insufficient to raise the questions of insanity or of diminished responsibility. She added that they were not raised in the medical reports in the possession of the Crown nor in a discussion between the prosecutor and a doctor who had provided one of the reports. The prosecutor indicated she wished to ensure that the appellant had the material which was in the possession of the Crown. After a number of medical reports were provided to the appellant, the Judge advised the appellant that he could take time to look at the material and if there was anything in the material he wished to use, he was at liberty to use it. The prosecutor volunteered that if the accused wished to call any of the doctors on a voir dire, or if that was the wish of the Judge, then the prosecutor would call such witness or witnesses. The prosecutor added that if the appellant wished her to call the evidence in the trial as to the appellant's mental state at the time of the offence, the prosector would do so.

[76] The prosecutor also offered to make the doctors available if the appellant wished to speak with them. She undertook that such discussions would be

confidential in the sense that the prosecutor would not seek to use anything said to the doctors about the circumstances of the crime. The prosecutor then observed that at the end of the day it was the appellant's choice. The Judge advised the appellant that he should consider these matters and if the appellant wished to take up any of the offers made by the prosecutor it was only a matter of him saying so.

[77] During the discussions the prosecutor advised the Judge that the Crown did not consider it necessary to call medical evidence on the issue of intent. In an obvious reference to the questions of insanity and diminished responsibility, the prosecutor said that in addition to considering the reports, she had spoken to Dr Westmore on a couple of occasions and nothing from those conversations had caused her to alter her view about whether those defences were raised on the evidence available to the prosecution. The prosecutor finished by adding that if there were any reports not in the possession of the appellant, she would facilitate those being provided to him.

[78] The next mention of the issue of calling the doctors occurred at the instigation of the prosecutor on 6 August 2004. She asked whether the accused wished to take up the Crown's offer to call the doctors on a voir dire or in evidence. Asked by the Judge if he wished that to be done, the appellant responded that he did not wish to call any doctors for a voir dire. When questioned as to whether he was asking the prosecutor to make any of the doctors available, the appellant responded "no".

[79] The final mention of the accused's mental state occurred during a discussion on 9 August 2004 concerning proposed directions by the Judge to the jury. The Judge had provided a draft summing up in respect of which he invited comment by the prosecutor and the appellant. In connection with the proposed directions concerning manslaughter, which included issues of intent, the appellant questioned how a jury not trained in medical science and who had not heard medical evidence of any mental condition could make a decision about his mental condition at the time. The Judge explained that this part of the direction related only to the question of intention in connection with the crime of murder and the appellant responded that there had been no evidence with regard to his state of mind.

[80] As to the appellant's state of mind at the time the deceased was killed, the only material which specifically addressed that question is found in reports by Doctors Robertson and Westmore. These reports were available to the Judge, but were not in evidence before the jury. In a report dated 8 September 2003, Dr Robertson said:

> "I am convinced that Mr Heffernan was psychotic at the time of the alleged offence, this can easily be gauged by the fact that Mr Heffernan had said on at least two occasions that the victim was murdered because of bad spells."

[81] Earlier in the same report Dr Robertson reported that the appellant was "clear in his denial of guilt" and that the appellant maintained his innocence whenever asked. Dr Robertson noted that the appellant admitted to having met the victim in the bar on the previous day. As to the question of bad

spells, Dr Robertson reported that in his first interview with the appellant he was told that the appellant believed "the victim had had bad spells", but the appellant did not elaborate further as to what this meant.

[82] In his report of 12 October 2003, Dr Westmore noted Dr Robertson's view that the appellant was psychiatrically unwell at the time of the killing. Dr Westmore commented:

> "I have been unable to obtain information or a history to support that proposition and there is little in Dr Robertson's report itself which strongly supports his proposition that Mr Heffernan was mentally ill at the time of the offending behaviour."

[83] In addition, Dr Westmore reviewed the video taped record of interview conducted between police and the appellant approximately two weeks after the killing. In a report dated 13 January 2003, Dr Westmore expressed the following views:

> "Mr Heffernan's mental state during the record of interview reveals a man who was generally pleasant and co-operative with his interaction with the police. He maintained good eye contact and he spoke spontaneously and expansively. His affect was intense and very focused. His mood state appeared to be restricted. No clear delusional thoughts were identified by me as being present or active during the record of interview and he did not report or appear to respond to perceptual disturbances such as auditory hallucinations. He appeared to be alert and responsive and generally intact from a cognitive perspective.
>
> …
>
> In the record of interview completed on 15 August 2001, apart from some concerns he expressed about people having access to his 'inventions' there is no other clear evidence that he was suffering from psychotic symptoms at that time. This does not necessarily mean that he was not psychotic but the record of interview does not

> show demonstrable evidence of him being psychotic at that time. The history would suggest that over the subsequent weeks and months his condition deteriorated to the point where Dr Tabart felt that he was acutely psychotic and unfit to be tried.
>
> …
>
> I am unable to comment at this time on psychiatric issues as they might relate to the alleged offending behaviour. Mr Heffernan did not express obvious delusional thoughts regarding the deceased in the record of interview, he is denying any responsibility for the death of the deceased and at this time there is no clear evidence that he would have a mental illness defence to the charge of murder.
>
> That situation of course might change should his account of what occurred change and more evidence is obtained about his mental state at the time of the homicide."

[84] In evidence given in February 2004 during the investigation into fitness to stand trial, Dr Westmore said that in considering the record of interview he could find no evidence of psychosis.

[85] Finally as to evidence bearing upon the appellant's mental state at the time the deceased was killed, in evidence given before the jury none of the witnesses who saw the appellant in the days leading to the death or subsequently spoke of any behaviour from which an inference could be drawn that the appellant was behaving in a manner suggestive of a psychotic condition or episode.

[86] In his directions to the jury, the Judge spoke of the appellant's condition of paranoid schizophrenia in the following terms:

> "Now there is one final preliminary point before I come to the elements of the charges that I do need to make. It appears from Mr Heffernan's video record of interview that at the relevant time he

> suffered from a condition of paranoid schizophrenia for which a range of medication had been prescribed.
>
> You will also recall that Mr Heffernan told the police that as at the time of his interview, which you will remember took place on 15 August 2001, he had not been medicated for about 3 weeks. I must point out to you that neither the Crown nor the accused have sought to attach any significance to that fact, nor to raise it as an issue for your consideration.
>
> There is no evidence before you as to how, if at all, Mr Heffernan's medical condition may have affected him and you should therefore not speculate on that topic. You must decide the issues in this case only on the evidence before you and not on the basis of any such speculation."

[87] During the retirement of the jury, following a question by the jury concerning the diagnosis of the accused's health problem and a suggestion that there had been conjecture by the jury, the Judge repeated the direction that there was no evidence directly bearing upon the appellant's mental state and the jury should not enter into any conjecture about it.

[88] As we have said, throughout the trial the appellant was logical, appropriately responsive to questions and engaged relevantly in numerous discussions. In his sentencing remarks, the Judge said the appellant presented as an "intelligent person who was quick to grasp points" when they were explained to him. His Honour observed that since the arrest of the appellant and his return to a proper medical regime, his conduct had been "excellent". As to the trial his Honour said:

> "You handled yourself with dignity and composure throughout a long and stressful trial, your demeanour was beyond reproach, you co-

operated in the efficient conduct of the trial and generally behaved in a responsible manner. You have accepted the jury verdict."

Summary

[89] In summary the following key factors emerge from the background circumstances:

- The appellant has a long history of mental illness. At relevant times he was suffering from Chronic Paranoid Schizophrenia which included complex delusional systems. The illness was resistant to treatment.

- In December 2001 the appellant's delusional beliefs included a belief that his lawyer was, at times, disguised as an Army agent being the same agent who had attempted to castrate the appellant when he was aged 15 years. The appellant told Dr Tabart in April 2002 that there was an additional occasion on which he had believed that his persecutors had seen him while masquerading as his legal counsel. In the view of Dr Tabart, this delusional belief was a symptom of Capgras Syndrome which is one of the misidentification delusional systems common in some forms of Paranoid Schizophrenia.

- The appellant has demonstrated both a desire not to discuss his symptoms and an ability to mask those symptoms.

- On occasions the appellant has chosen to be selectively mute. The last recorded such occasion was October 2003 when Dr Westmore

attempted to examine the appellant and the appellant eventually refused to speak to his solicitor.

- In February 2003, notwithstanding that the appellant possessed a good understanding of various matters associated with a criminal trial, he was unfit to stand trial by reason of his ongoing psychosis which impaired the appellant's judgment, reasoning, ability to follow the proceedings and capacity to participate in his defence and rationally respond to evidence raised in a trial.

- The appellant does not possess, and has never possessed, any insight into his illness or the need for medication. At all relevant times the appellant did not believe that he had an illness or needed medication.

- In late August 2003 the appellant's treating psychiatrist formed the opinion that the appellant was fit to stand trial.

- In February 2004, for the purposes of the investigation before a jury as to fitness to stand trial, the appellant instructed his counsel that he was fit to stand trial and counsel conducted the investigation in accordance with those instructions.

- In February 2004 a jury found that the prosecution had not established on the balance of probability that the appellant was unfit to stand trial. Both the treating psychiatrist and the medical practitioner who had the supervision of the appellant within the

Corrections system gave evidence that although the appellant had been unfit to stand trial 12 months previously, and notwithstanding the ongoing presence of delusions and lack of insight into his condition, as at February 2004 the appellant was fit to stand trial.

- In the opinion of the treating psychiatrist the appellant possesses an above average intelligence and would understand everything that was occurring in the court.

- On more than one occasion the appellant terminated his instructions to his solicitors. The last such occasion was 13 July 2004.

- At the first appearance before the trial Judge on 13 July 2004, the appellant maintained that he did not wish to be legally represented.

- Throughout the trial the appellant consistently demonstrated a good understanding of legal and factual issues and conversed with the Judge politely and in a manner both responsive and relevant to the issues under discussion. The appellant did not display any reluctance to ask questions.

- At no time during the trial did the appellant outwardly display any symptom of his mental illness or mental illness generally.

- The appellant did not cross-examine any witnesses who gave evidence before the jury. The appellant appropriately cross-examined witnesses on a voir dire examination relevant to his

objection to the reception of evidence of a statement made by him upon his arrest.

- In a record of interview conducted shortly after his arrest the appellant maintained that he did not kill the deceased. In subsequent medical examinations, the appellant confirmed that version.

- In his final address to the jury, the appellant submitted that the prosecution had not proved that the body discovered by the roadside was that of the deceased, Stuart Rhodes. This issue had not been raised previously. In addition, the appellant submitted to the jury that the jury had not heard "any condemning evidence of any crimes being committed by the accused, therefore imposing a reasonable doubt."

- The Judge directed the jury that it seemed to him that the essence of the appellant's contention was that there was no direct evidence to connect him with the death and that the circumstantial evidence was insufficient to exclude any reasonable hypothesis other than guilt.

- Throughout the trial the appellant maintained that he did not want to rely upon any defence of diminished responsibility or insanity and did not want any medical practitioner called to give evidence on the voir dire or in the presence of the jury in connection with his mental condition.

- The appellant told police and medical practitioners that he was not involved in the death of the deceased. The appellant said that the deceased was getting into the car of a friend when the appellant last saw him.

- The Crown advised the Judge that the material in its possession did not support the defences of insanity or diminished responsibility.

- The appellant said in an interview conducted by police two weeks after the killing that he suffered from schizophrenia and had not taken his medication for three weeks. Nothing was said about the effects of the mental illness, the effects of not taking the medication or the appellant's mental state at about the time of the killing.

- The only material which specifically addressed the appellant's state of mind at the time the deceased was killed is found in the reports of Doctors Robertson and Westmore. Dr Robertson reported that he was convinced that the appellant was psychotic at the time of the offence, but Dr Robertson did not address the criteria applicable to insanity and diminished responsibility. Dr Westmore said he was unable to obtain information or history supporting Dr Robertson's proposition. Having examined the video of the record of interview conducted two weeks after the deceased was killed, Dr Robertson found no demonstrable evidence that the appellant was psychotic at the time of the interview.

- None of the witnesses who saw the appellant before and after the deceased was killed gave evidence of any behaviour suggestive of mental illness or a psychotic episode.

- Before the trial Judge in the pre-trial hearings and during the trial, no mention was made of the appellant's fitness to stand trial.

Issues for consideration

[90] It is against the background to which we have referred that senior counsel for the appellant argued there was a miscarriage of justice by reason of the failures of the trial Judge to conduct an investigation into the appellant's fitness to stand trial and to leave defences of insanity and diminished responsibility to the jury. During the hearing of the appeal the appellant was given leave to add a further ground that a substantial miscarriage of justice occurred by reason of the failure of the prosecution to adduce evidence of the mental state of the appellant at the time of the commission of the offence and subsequently.

Statutory Schemes

[91] At the time of the killing of the deceased in August 2001, the Criminal Code contained provisions relating to insanity and diminished responsibility in the following terms:

> "35. INSANITY
>
> (1) A person is excused from criminal responsibility for an act, omission or event if, at the time of doing the act, making the

omission or causing the event he was in such a state of abnormality of mind as to deprive him of capacity to understand what he was doing or of capacity to control his actions or of capacity to know that he ought not do the act, make the omission or cause the event.

(2) A person whose mind, at the time of his doing, making or causing an act, omission or event, was affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act, omission or event to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.

36. INTOXICATION

Section 35 applies also to a person who was in a state of abnormality of mind caused by involuntary intoxication.

37. DIMINISHED RESPONSIBILITY

When a person who has unlawfully killed another under circumstances that, but for this section, would have constituted murder, was at the time of doing the act or making the omission that caused death, in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not do the act, make the omission or cause that event, he is excused from criminal responsibility for murder and is guilty of manslaughter only."

[92] For the purposes of ss 35 and 37, "abnormality of mind" was defined in s 1 as follows:

" 'abnormality of mind' means abnormality of mind arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease, illness or injury;".

[93] As at August 2001, s 6 of the Code provided that every accused person was presumed to be of normal mind and to have been of normal mind at any relevant time until the contrary was proved.

[94] The statutory scheme for dealing with persons suffering from mental impairment was substantially altered by the Criminal Code Amendment (Mental Impairment and Unfitness To Be Tried) Act 2002 ("the amending Act") which came into operation on 15 June 2002. The new scheme provided for a new defence of mental impairment and contained numerous provisions governing determination of questions of fitness to stand trial, mental impairment and the consequences of either of those findings ("the mental impairment provisions"). Section 3 of the amending Act repealed ss 6, 35 and 36 of the Code thereby removing the presumption of normal mind and abolishing the defence of insanity. The defence of diminished responsibility reducing murder to manslaughter found in s 37 of the Code remained unaltered.

[95] Notwithstanding the abolition of the defence of insanity, s 6(4) of the amending Act retained the defence of insanity for offences committed before 15 June 2002:

> "(4) Despite sections 3 and 5 of this Act, the defence of insanity under the repealed provisions continues to apply to any offence alleged to have been committed before 15 June 2002."

[96] The deceased was killed on about 2 August 2001. In those circumstances, the appellant's alleged responsibility for the killing fell to be determined by

the law as it then stood. Section 6(4) of the amending Act did no more than emphasise this in relation to the defence of insanity.

[97] "Mental impairment" is defined by s 43A of the Mental Impairment Provisions to include, inter alia, "mental illness" which, in turn, is defined by s 43A to mean "an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary …". The presumption of normality of mind previously created by s 6 of the Code was replaced by a presumption of competence found in s 43D of the mental impairment provisions. The presumption is coupled with the imposition of a burden on the party raising a defence of a mental impairment to rebut the presumption of competence. Section 43D is in the following terms:

> "43D. Presumption of competence and burden of proof
>
> (1) A person is presumed not to have been suffering a mental impairment unless the contrary is proved.
>
> (2) The party raising the defence of mental impairment bears the onus of rebutting the presumption specified in subsection (1)."

Presumption of Normality/Competence

[98] The appellant submitted that as the defence of insanity was retained, but s 6 of the Code containing the presumption of normality of mind was repealed, there was a lacuna in the Act. In respect of accused persons to whom the defence of insanity applies, because the crime was committed before 15 June 2002 no presumption of normal mind or competence applies. Counsel submitted it was for the Crown to prove that the accused was of normal

mind. This submission was also relevant to the validity of the appellant's further complaint that the defences of insanity and diminished responsibility should have been left to the jury.

[99] As we have said, at the time of trial, the presumption formerly contained in s 6 of the Code was replaced by the presumption contained in s 43D(1). The definitions of "mental illness" and "mental impairment" in s 43A are wide enough to include a "state of abnormality of the mind" referred to in s 35(1) and s 37. "Abnormality of the mind" is defined by s 1 of the Code to mean "abnormality of the mind arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease, illness or injury".

[100] In these circumstances it is difficult to see how it could be said that s 43D(1) was not intended to apply to the appellant's circumstances. Clearly, the legislature did not intend to create a lacuna in the legislation. Section 43D(1) merely restated in a new way what s 6 had provided. Plainly s 43D(1) did not operate within the presumption against retrospective operation, but operated to affect the way in which rights fell to be determined at trial. As Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ said in *Rodway v The Queen* (1990) 169 CLR 515 at 521:

> "A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial."

[101] Clearly, s 43D(1) is a provision affecting procedure. It does not operate to affect existing rights or obligations, but operates to affect the way in which rights fall to be determined at trial: *c.f. Rodway* at 522-523. That being so, it fell to the accused to prove either insanity or diminished responsibility on the balance of probabilities because of a combination of s 43D(1) and s 440(1) of the Code.

Fitness to Stand Trial – Statutory Provisions

[102] It was common ground that the provisions creating the regime by which the fitness of a person to stand trial is now determined applied to the appellant at the time of his trial. The relevant provisions, which confer an express power on a trial Judge to order an investigation into the fitness of an accused to stand trial, are as follows:

> "***Division 3 - Unfitness to stand trial***
>
> **43J. When is a person unfit to stand trial?**
>
> (1) A person charged with an offence is unfit to stand trial if the person is -
>
> (a) unable to understand the nature of the charge against him or her;
>
> (b) unable to plead to the charge and to exercise the right of challenge;
>
> (c) unable to understand the nature of the trial (that is that a trial is an inquiry as to whether the person committed the offence);
>
> (d) unable to follow the course of the proceedings;
>
> (e) unable to understand the substantial effect of any

evidence that may be given in support of the prosecution; or

(f) Unable to give instructions to his or her legal counsel.

(2) A person is not unfit to stand trial only because he or she suffers from memory loss.

43K. Presumption of fitness to stand trial and burden of proof

(1) a person is presumed to be fit to stand trial.

(2) The presumption of fitness to stand trial is rebutted only if it is established by an investigation under this Division that the person is unfit to stand trial.

(3) If the question of a person's fitness to stand trial is raised by the prosecution or the defence, the party raising the question bears the onus of rebutting the presumption of fitness.

(4) If the question of a person's fitness to stand trial is raised by the court, the prosecution has carriage of the matter and no party bears the onus of rebutting the presumption of fitness.

43L. Standard of proof

The question of whether a person is fit to stand trial is a question of fact to be determined by a jury on the balance of probabilities.

43M. Committal proceedings

(1) If the question of an accused person's fitness to stand trial arises at a committal proceeding -

(a) the accused person is not to be discharged only because the question has been raised during the committal proceedings;

(b) the committal proceeding is to be completed in accordance with the *Justices Act* (whether or not sections 106 and 110 of that Act are complied with); and

(c) if the accused person is committed for trial – the question is to be reserved for consideration by the court

during the trial of the accused person.

(2) In the event of an inconsistency between Part V of the *Justices Act* and this section, this section prevails to the extent of the inconsistency.

43N. Institution of investigation of fitness of accused person

(1) The question of whether an accused person is fit to stand trial may be raised in the court by the prosecution or the defence, or by the court, at any time after the presentation of the indictment.

(2) The court must order an investigation into the fitness of the accused person to stand trial if -

(a) the question of fitness was reserved during the committal proceedings; or

(b) the Judge is satisfied that there are reasonable grounds on which to question the accused person's fitness to stand trial.

(3) If the court makes an order for an investigation into the fitness of the accused person after the trial has commenced, the court may adjourn or discontinue the trial and conduct an investigation.

(4) The question of the fitness of an accused person to stand trial may be raised more than once in the same proceeding."

[103] In the context of the power to order an investigation into fitness to stand trial, s 43P directs the Judge to give certain explanations to the jury and to hear evidence and submissions relating to the question of fitness. In addition, subs (3) empowers the Judge to take an active role in the investigation by calling evidence and requiring an accused to undergo an examination:

"(3) If the Judge considers that it is in the interests of justice to do so, the court may -

(a) call evidence on its own initiative;

(b) require the accused person to undergo an examination by a psychiatrist or other appropriate expert; and

(c) require the results of an examination referred to in paragraph (b) to be produced before the court."

[104] By way of exception to the implication in s 43L that the question of fitness to stand trial is to be determined by a jury, s 43T enables a court to dispense with an investigation and record a finding that an accused is unfit to stand trial if the parties to the prosecution agree that the accused is unfit.

[105] Pursuant to s 43Q, if a jury finds an accused fit to stand trial, the trial of the offence charged is to proceed in the normal way. If an accused is found unfit to stand trial, various provisions deal with subsequent procedures which are not relevant for present purposes. They include the power to hold a special hearing to determine whether the accused is guilty or not guilty by reason of mental impairment.

[106] The mental impairment provisions also deal with the role of counsel by providing counsel with an independent discretion to act in the accused person's best interests if an accused is unable to instruct counsel on questions relevant to an investigation or a special hearing. There is no suggestion that at the times the appellant was represented he was unable to instruct his counsel on questions relevant to the investigation.

Fitness to Stand Trial– Duty of Trial Judge - Principles

[107] The duty of the trial Judge in connection with the issue of fitness to be tried must be determined upon a proper construction of the statutory scheme which empowered his Honour to raise the issue at any time after presentation of the indictment and to order an investigation if he was satisfied that there were "reasonable grounds on which to question the [appellant's] fitness to stand trial." The statutory context also includes his Honour's power to call evidence, require the appellant to undergo a psychiatric examination and require the results of the examination to be put in evidence if his Honour considered that it was in the interests of justice to do so.

[108] The statutory power is to be considered in the context of the fundamental responsibility of the trial Judge to ensure that the appellant received a fair trial. This responsibility was particularly onerous because the appellant was not legally represented. In addition, although the precise extent of the material known to the Judge is not clear, his Honour knew that the appellant suffered from chronic Paranoid Schizophrenia and had previously been found unfit to stand trial. This combination required that the Judge exercise great care in ensuring that the trial was not unfair.

[109] Counsel for the appellant relied heavily upon the decisions of the High Court in *Kesavarajah v The Queen* (1994) 181 CLR 230 and *Eastman v The Queen* (2000) 203 CLR 1.

[110] In *Kesavarajah* the court was concerned with mental impairment type provisions in the Crimes Act 1914 (Cth) and the Crimes Act 1958 (Vic). The court held that the question of fitness to be tried was to be determined in accordance with the Victorian Act which provided that if a person presented for an indictable offence was found to be insane by a jury, the court could direct that such finding be recorded and thereupon order that the person be kept in strict custody until the Governor's pleasure be known.

[111] In a joint judgment, Mason CJ and Toohey and Gaudron JJ examined the common law principles applicable to the question of insanity. After observing that the words in s 393 of the Victorian Act were based on the language of s 2 of the Criminal Lunatics Act 1800 (UK), their Honours said (244):

> "In England, the courts have always applied Alderson B's interpretation in *R v Pritchard* of s 2 of the *Criminal Lunatics Act*, namely, that 'the question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge'. In the context of s 393, the word signifies inability, by reason of some physical or mental condition, to follow proceedings of the trial and to make a defence in those proceedings. Thus, it has been said that the test needs to be applied 'in a reasonable and commonsense fashion'. The test looks to the capacity of the accused to understand the proceedings and, in some cases, complete understanding may require intelligence of quite a high order. But it does not mean that the accused is required to have sufficient capacity to make an able defence." (foot notes omitted)".

[112] Reference was made by their Honours to the well known judgment of Smith J in *R v Presser* [1958] VR 45 at 48 in which Smith J set out the minimum standards required of an accused before the accused could be tried without

unfairness or injustice. Those standards are substantially repeated in s 43J of the mental impairment provisions with the exception that the requirement numbered (6) by Smith J concerning an accused possessing the ability "to make a defence or answer the charge" is not repeated in s 43J.

[113] The joint judgment then identified the duty of the trial Judge to empanel a jury for determination of the issue of insanity as arising "if appears to be uncertain" for any reason whether [the accused] is capable of understanding the proceedings at the trial". Their Honours added (245):

> "[I]t cannot be doubted that, in the context of s 393, '[o]nce a real question as to incapacity is raised, the judge must follow the procedure laid down in the section'. Sometimes the test has been stated in terms of whether there is a reason to doubt the accused's fitness to stand trial. However, the judge should leave the issue to be tried by the jury unless no reasonable jury, properly instructed, could find that the accused was not fit to be tried.
>
> …
>
> It follows that the initial question for our determination is whether the trial judge should have empanelled a jury and left the issue to the jury instead of ruling that no reasonable jury, properly instructed, could find that the accused was unfit to be tried." (foot notes omitted).

[114] After examining the material that had been before the trial Judge, all members of the court in *Kesavarajah* concluded that the trial Judge was in error because on the material put before the trial Judge a jury might reasonably have concluded that the appellant was not fit to be tried.

[115] In *Eastman*, the applicant had been convicted of murder and his appeal to the Federal Court had been dismissed. The applicant sought special leave to appeal against the dismissal on the ground that, notwithstanding that the issue as to fitness to plead had not been raised at trial or on appeal, the Federal Court had erred in not inquiring into his fitness to plead. Although special leave was granted, the appeal was dismissed.

[116] Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ, held that the High Court could not receive additional evidence concerning the applicant's mental state which had not been placed before the trial Judge or the Federal Court on appeal. In the course of his judgment, Gleeson CJ observed that the existence of a mental disorder does not, of itself, prevent an accused person from being brought to trial. His Honour cited a similar observation by Geoffrey Lane LJ in *R v Berry* (1978) 66 Cr App R 156 (158):

> "It may very well be that the jury may come to the conclusion that a defendant is highly abnormal, but a high degree of abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel and so on."

[117] Gleeson CJ then referred to the following propositions approved by the Ontario Court of Appeal in *R v Taylor* (1992) 77 CCC (3d) 551 which his Honour said were "sound" propositions and were consistent with the statutory test under consideration (14 [26]):

> "[26] The Ontario Court of Appeal, in *R v Taylor*, recorded the following propositions, agreed by counsel, as representing the state of authority in that province:

> ‘(a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.
>
> (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.
>
> (c) The fact that an accused person’s mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial
>
> (d) The fact that a person’s mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial.’ ”

[118] Gaudron J noted that in general terms a person is fit to plead if the person has “sufficient understanding to comprehend the nature of the trial, so as to make a proper defence to the charge” (20 [57]). Her Honour also observed that the accused “need not have the mental capacity to make an able defence”, but added that there were certain matters which the accused must apprehend. Her Honour then referred to the judgment of Smith J in *Presser*.

[119] As to the significance of the issue of fitness to plead, Gaudron J said (21 [62] – [64]):

> “[62] The significance of the question of a person’s fitness to plead is often expressed in terms indicating that, unless a person is fit to plead, there can be no trial. Certainly, that is the position where the issue of fitness to plead is raised before or during a trial. If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead, or, if that issue is not determined in the manner which the law requires, ‘no proper trial has taken place [and the] trial is a nullity’. To put the matter another way, there is a fundamental failure in the trial process.

> [63] The question whether there was a fundamental failure in the trial process is different from the question whether there was a miscarriage of justice in the sense that the accused lost a chance of acquittal that was fairly open. If a proceeding is fundamentally flawed because the accused was not fit to plead or if, to use the words in *Begum*, 'the trial [is] a nullity', the only course open to an appellate court is to set aside the verdict. And that is so regardless of the strength of the case against the accused or of the likely outcome of a further trial according to law. That is the basis upon which this Court proceeded in *Kesavarajah v The Queen* where the question of fitness to plead should have been but was not submitted to the jury for determination.
>
> [64] Traditionally, an accused person has not been put on trial unless fit to plead because of 'the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing'. That statement may indicate a positive and independent right on the part of an accused not to be tried unless fit to plead. It is unnecessary to decide whether that is so. It is sufficient to approach the present matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead." (foot notes omitted)

[120] Gaudron J stated that it was in the context of the common law guarantee of a fair trial according to law that the relevant legislation was to be construed. Her Honour added that it is well settled that a statute is not to be construed as abrogating fundamental common law principles unless such abrogation is manifestly clear from the terms of the statute or as a matter of necessary implication.

[121] Hayne J observed that a criminal trial is "accusatorial and adversarial process" in which, ordinarily, "it will be for the prosecution to prove its

case and for the accused to choose the ground or grounds upon which to meet the accusation" (1997 [293]). His Honour continued (98 [294]-[295]):

> "[294] But the unstated premise from which these descriptions of the criminal trial process proceed is that the accused is fit to plead and fit to stand trial. There can be no trial at all unless the accused is fit both to plead and to stand trial. Because the question of fitness is one which affects whether the accused has the capacity to make a defence or answer the charge, it is a question for the trial judge to consider regardless of whether the prosecution or the accused raise it. In that respect it is a question which falls outside the adversarial system. Indeed, it must fall outside the adversarial system because the very question for consideration is whether there is a competent adversary.
>
> [295] In the great majority of cases, no question of fitness arises. But if it does, the question for a trial judge is whether the accused may not be fit to plead or stand trial. Only if affirmatively satisfied that the tribunal which is responsible for determining the fitness of the accused (in many jurisdictions, a jury empanelled to determine the question, but in the Australian Capital Territory a statutory tribunal) count *not* reasonably find that the accused was not fit to stand trial may the trial proceed." (footnotes omitted)

[122] After observing that the issue of fitness may arise in many ways, Hayne J said (99 [296]):

> "But once there is a 'real and substantial question to be considered', the question must be submitted to the body which is empowered to decide the question. There will be a 'real and substantial question to be considered' by this body unless no properly instructed jury (or no tribunal) could reasonably conclude that the accused was not fit." (foot notes omitted)

[123] Hayne J dissented on the issue of the role of the Federal Court on appeal. In the course of remarks on that topic, his Honour expressed the view that a conclusion by a court of criminal appeal that an accused may not have been fit to plead requires the court to quash the conviction. His Honour said that

it is "only if the appellate court is affirmatively persuaded that no tribunal, acting reasonably, could conclude that the accused was not fit," that the court may determine that no miscarriage of justice had occurred.

[124] Section 43N of the Code requires that an investigation into fitness to stand trial "must" be ordered if the Judge is satisfied that there are "reasonable grounds on which to question the accused person's fitness to stand trial." The essence of the decision required of the trial Judge is whether there are "reasonable grounds" on which to "question" fitness to stand trial. While it might be thought that this is a less stringent test than requiring a trial Judge to be satisfied that there is a "real and substantial question to be tried" with respect to fitness, unless the Judge was satisfied that a reasonable jury properly directed could not reasonably conclude the accused was not fit to stand trial, there would necessarily exist "reasonable grounds" on which to "question" fitness to stand trial. In that context, however, it remains true that the existence of a mental disorder, even a severe mental disorder, does not of itself necessarily mean that there are reasonable grounds on which to question fitness to stand trial. Similarly, the fact that an accused suffering from a mental illness conducts a defence contrary to the accused's best interests does not, of itself, necessarily mean that there are reasonable grounds on which to question fitness. The court must have regard to all the circumstances and to the criteria set out in s 43J in deciding whether such reasonable grounds exist.

Appellant's Fitness to Stand Trial

[125] In February 2004 the appellant had been found fit to stand trial. During the pre-trial hearings and trial in July and August 2004, no suggestion was advanced to the Judge that the appellant's condition had changed or deteriorated since February 2004. No suggestion was made that there was any reason to question the appellant's fitness to stand trial.

[126] Notwithstanding the absence of any mention of fitness during the trial, counsel for the appellant submitted that the Judge was in error in not ordering an investigation into fitness by reason of a combination of the following facts of which the Judge was or should have been aware:

(i) The appellant suffered from chronic Paranoid Schizophrenia.

(ii) Symptoms of the mental illness included paranoid delusions about the true identity of the appellant's legal representatives.

(iii) The illness was resistant to treatment.

(iv) The appellant possessed an extraordinary ability to mask the symptoms of his illness.

(v) A few days prior to the commencement of the trial, the appellant terminated his instructions to his solicitors.

(vi) The appellant lacked insight into his mental illness in that he did not believe he was suffering from an illness or that he needed medication.

(vii) By reason of his lack of insight, the appellant would be unable to raise a defence of insanity or diminished responsibility because he did not believe he was suffering from any form of mental illness.

(viii) The appellant was unrepresented.

(ix) The appellant failed to cross-examine any witnesses.

(x) The appellant raised for the first time in his draft address to the jury a "bizarre" defence that the Crown had not proved the body was that of Stuart Rhodes.

[127] Counsel for the appellant submitted that the earliest point at which the Judge should have been alerted to the problem of fitness was the outset of the trial when his Honour became aware that the appellant terminated the instructions of his solicitors a few days earlier. In the light of the previous episodes of delusional beliefs about his solicitors, the warning bells should have sounded that the appellant might have been suffering or have suffered from a psychotic episode.

[128] In our view, the submissions elevate the significance of termination of instructions to an unjustified level. One of the occasions on which the appellant experienced this particular delusion concerning his legal representatives occurred during the committal proceedings in December 2001. Apparently there was a second occasion which the appellant mentioned to Dr Tabart in April 2002, but there is no information as to when that occasion occurred. The trial took place over two and half years after the committal. Prior to the termination of instructions shortly before the trial, the appellant had terminated instructions in October 2003 and February 2004. There was no information before the trial Judge to suggest that those terminations, or the termination shortly before the trial, occurred as a result

of a psychotic episode or a delusion that the legal representatives were persecutors in disguise. There was no material before the Judge to suggest that such a delusion occurred at any time after December 2001.

[129] In addition, the appellant's contention that the termination of instructions should have rung the alarm bells for the Judge is contradicted by the evidence of Dr Robertson given on 18 February 2004 during the investigation before the jury into the appellant's fitness to stand trial. Asked whether the discharging of the appellant's lawyers by the appellant on a previous occasion was a significant matter, Dr Robertson replied:

> "Well, I think that demonstrates frankly that he understands his rights."

[130] Dr Robertson did not suggest that the termination of the instructions was a warning sign of a psychotic episode or delusion concerning the identity of the legal representatives.

[131] As to the significance of the failure to cross-examine, this was not the case of a person who did not understand the nature of the charge or the evidence or who was incapable of comprehending the issues or of exercising a right to cross-examine. The appellant is an intelligent person who plainly demonstrated that he was able to understand those matters and to cross-examine if he wished to do so. While the failure to cross-examine Crown witnesses in the presence of the jury was not in his best interests, that failure did not in itself demonstrate that the appellant was unfit to stand

trial. It was a failure by an intelligent person who conducted himself appropriately throughout the trial and demonstrated a good understanding or procedures and issues that arose during the trial. The appellant demonstrated a capacity to cross-examine.

[132] The failure to cross-examine is to be considered in conjunction with what counsel described as the "bizarre" defence that the Crown had not proved the identity of the deceased person. While that line of defence was contradicted by strong evidence of identity, it was not totally irrational or indicative of a mental condition giving rise to a question as to the appellant's fitness to stand trial. A doubt about the identity of the deceased could have led to a doubt that the appellant was implicated in the death. Against all the other evidence pointing positively to fitness to stand trial, in our view the raising by the appellant of the defence of identity of the deceased was not such as to call into question the appellant's fitness to stand trial.

[133] Counsel for the appellant placed considerable emphasis on the appellant's lack of insight into his condition and, therefore, his lack of capacity to raise a defence of insanity or diminished responsibility. While this is not a specific criteria identified in s 43J, for present purposes we will assume that a lack of such a capacity would prevent the appellant from being fit to stand trial. If a person was unable by reason of mental illness to raise the defence of that mental illness, it might be said that the person would be unable to give instructions to legal counsel.

[134] The appellant's lack of insight into his condition was before the jury in February 2004. In the context of that lack of insight, Dr Wake gave evidence that the appellant would understand the concepts of the various defences available to accused persons. He said the appellant would understand the defence of mental impairment as a concept. Asked if the appellant would be able to give objective instructions to counsel to raise mental impairment as a defence, Dr Wake replied:

> "I think he would be able to do that, but I think it would be very unlikely given what I've said about his view of whether he is sick or not sick."

[135] Dr Tabart was asked about the appellant's ability 12 months earlier to give instructions to legal counsel in view of his lack of insight into his illness. Dr Tabart responded:

> "Well, I think one obvious area is the fact that because he didn't believe that he has a mental illness, often you know a mental illness itself can be a mitigating or explanatory model for this person's particular behaviour at the time of the offence. So without his awareness that his mental illness could affect his behaviour, it would sort of reduce the armamentaria so to speak of his defence to mount an argument of mental illness for the court – so I think that's one you know obvious area."

[136] Dr Robertson gave evidence that the appellant would appreciate the existence of a number of different alternative defences that might be appropriate. As to mental impairment and how the appellant could cope with instructing counsel as to that defence given he does not have an insight into his illness, Dr Robertson responded:

> "Well, I mean I think that because he doesn't believe he has a mental illness, I believe that his instruction to counsel is consistent in that he does not want to go down the mental impairment route. And he understands he has that right. He's always made it quite clear, and he's been consistent in this, absolutely consistent, that he will be pleading not guilty. And he's always told me, he is not guilty of the crime and he wants to gets this trial out of the way and plead his innocence. So, he has that right … ."

[137] Dr Westmore confirmed that the appellant has little or no insight into the nature or extent of his illness. As to how the lack of insight would affect the appellant's fitness to stand trial, Dr Westmore expressed the following view:

> "His lack of insight would have affected his ability to enter a plea or to consider a mental – to consider the full range of defences which won't be available to him to the charge that he faced."

Subsequently in evidence Dr Westmore questioned whether by reason of the lack of insight the appellant had the capacity to make the decision as to whether to use the illness as a possible defence. He expressed concern that if the appellant offered a non-psychotic defence which was rejected, he would be severely disadvantaged by not being able to consider that mental illness may have played a role in the commission of the offence. The evidence of Dr Westmore continued:

> "A. … And that's my concern about his fitness, that he doesn't have the capacity to consider all his options and may therefore be disadvantaged ultimately at the end of the process.
>
> Q. However if he were to maintain that explanation that was his choice, then that would be a perfectly reasonable choice to make, wouldn't it?

A. If the choice was made in the absence of mental illness then it would be a free choice, but if the – if its not a matter of choice. Because he doesn't have an insight into the mental illness and cannot even consider that as being a possibility then that's a different issue.

Q. I understand that but someone might have the insight and know they could raise that sort of defence and decide they didn't want to?

A. Absolutely and that might be quite a different matter to the one we're considering today. If a patient has a mental illness and insight into the mental illness, but their illness is in remission and they say I choose not to use that defence, even though it won't be available to me, that's quite a different matter from Mr Heffernan's case."

[138] In the face of that evidence, in February 2004 a jury found the evidence did not establish that the appellant was unfit to stand trial. Nothing changed in that regard between the verdict of the jury in February 2004 and the trial in July 2004. In addition, bearing in mind that in February 2004 the appellant instructed counsel that he was fit to stand trial and that the appellant was adamant at trial that he did not wish to pursue a mental illness defence, it is a reasonable inference that if the appellant had been represented at trial he would have instructed his counsel not to raise the question of his fitness to stand trial or defences of insanity and diminished responsibility. While the defence would undoubtedly have been better presented if the appellant had been legally represented at trial, the fact of representation would not have altered the nature of that defence and would not have caused the introduction of a defence based upon mental illness. In our view, there is no basis for a conclusion that the appellant was unfit to be tried by reason of

the fact that he lacked insight into his mental illness and, therefore, did not raise a defence based on his mental illness.

[139] In considering the duty of the trial Judge, the criteria by which the appellant's fitness to stand trial would be determined must not be overlooked. In summary, s 43J of the Code provided that a person is unfit to stand trial if the person is unable to understand the nature of the charge, unable to plead and exercise the right of challenge, unable to understand the nature of the trial, unable to follow the course of the proceedings, unable to understand the substantial effect of evidence that may be given or unable to give instructions to legal counsel. Far from raising reasonable grounds on which to question whether the appellant fitted within any of the criteria, all of the evidence and the material to which we have referred established that the appellant was able to understand and undertake the matters identified in s 43J.

[140] On this appeal, the appellant did not seek to lead evidence bearing upon either his fitness to stand trial or his mental state at the time the deceased was killed. In our opinion, on the material available to the Judge, there was no basis upon which the Judge could be satisfied that there were reasonable grounds on which to question the appellant's fitness to stand trial. The matters raised by counsel on behalf of the appellant did not, either individually or in their combination, give rise to an occasion pursuant to s 43N to order an investigation into the appellant's fitness to stand trial. When regard is had to all of the material, in our view a reasonable jury

properly directed could not reasonably have concluded that the accused was not fit to stand trial.

Defences – insanity and diminished responsibility

[141] In substance, counsel for the appellant urged that the trial Judge erred in not leaving the defences of insanity and diminished responsibility to the jury because the "evidentiary material" in the form of the answers during the record of interview "clearly disclosed the existence of Mr Heffernan's mental illness and the fact that he was not medicated at the time of the murder". On this basis it was argued that regardless of the attitude of the appellant, there being evidence upon which a jury could properly find the appellant not guilty by reason of insanity or guilty of manslaughter by reason of diminished responsibility, the Judge was under a duty to leave the defence for the consideration of the jury.

[142] The principles are not in doubt. If there was evidence from which a reasonable jury properly directed could conclude that either of those defences had been made out, regardless of the attitude of the appellant the Judge would have been under a duty to leave those defences to the jury: *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ with whom Windeyer J agreed; at 132-133 per Menzies J; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162 per Gibbs CJ, Wilson, Brennan and Deane JJ; *Fittock v The Queen* (2001) 11 NTLR 52 at [33] per Angel, Mildren and Riley JJ.

[143] Counsel for the appellant was unable to refer to any authority which supported his proposition that the statements of the appellant in the police interview that he suffered from schizophrenia and had not taken his medication for three weeks amounted to evidence from which a reasonable jury properly directed could draw the necessary conclusions. The failure to find such authority is not surprising. In order for either defence to be made out, the evidence had to be capable of supporting a conclusion on the balance of probabilities that at the time of the killing:

(i) The appellant was in a state of abnormality of mind, being an abnormality arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease, illness or injury; and

(ii) In respect of insanity, that the abnormality of mind was such as to deprive the appellant of the capacity to understand what he was doing, or of capacity to control his actions or of capacity to know that he ought not do the act or killing; or

(iii) In respect of diminished responsibility, that the abnormality of mind was such as to substantially impair the appellant's capacity to understand what he was doing, or his capacity to control his actions or his capacity to know that he ought not do the act of killing.

[144] As we have said, the only material before the jury was the appellant's statement that he suffered from paranoid schizophrenia and had not taken his

medication for three weeks. There was no material before the jury, either in the police interview or otherwise, explaining the particular effects of the appellant's mental illness at about the time of the killing. Nor was there any material before the jury as to the effects of not taking the medication, either generally or at about the time of the killing. Mere knowledge that the appellant suffered from schizophrenia and had not taken his medication for three weeks could not amount to evidence of an abnormality of mind arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury. In addition, there was no evidence that an abnormality of mind deprived the appellant of the relevant capacities or substantially impaired the appellant's relevant capacities.

[145] In both insanity and diminished responsibility cases, medical evidence is required to establish that the abnormality of mind arose from or was induced by the limited categories defined by the statute: *Reg v Byrne* [1960] 2 QB 396 at 403; *R v Whitworth* [1989] 1 Qd R 439 at 447, 457; *Ryan v The Queen* (1996) 90 A Crim R 191 at 195 (per Hunt CJ at CL (with whom Grove and Allen JJ agreed)); *R v McMahon* (2004) 8 VR 101 at [3]; *R v Jeffrey* [1967] 2 VR 467 at 473-474, 481, 484. There must also be evidence that the appellant was suffering from an "abnormality of the mind" at the relevant time and that this caused, or was likely to have affected, his capacity in the manner contemplated by the provisions of s 35(1) or s 37: *R v McMahon*. In some of the cases, there is discussion about the fact that evidence was deliberately not led on those issues by the appellant's counsel, but that

relates to the question of whether or not the appeal Court would receive evidence on the topic which was not led at trial. In this case, the appellant was, through his own choice, unrepresented but there is, even now, no attempt to put evidence before us that the appellant was insane or suffering from diminished responsibility at the time of the homicide. In *Green v R* (1939) 61 CLR 167 at 175 Latham CJ observed:

> "If … there being no elements of fraud, mistake or surprise, an accused person has, by himself or by his legal advisers, deliberately decided to set up a particular defence, he cannot complain as of a miscarriage of justice for the sole reason that, that defence having failed, he comes to the conclusion, or a court comes to the conclusion, that he might have succeeded if he set up another defence. Thus, if an accused person deliberately chooses to abstain from calling evidence which is available to him, it cannot be said that the course of justice has miscarried for the sole reason that it cannot be asserted with certainty that the result would have been the same if such evidence had been given."

[146] Notwithstanding these comments, there might be an exceptional case where the court would interfere, for example, if the choice was made by someone not fit to stand trial. No such exceptional case was made out on this appeal.

[147] For these reasons, in our opinion the trial Judge would have been in error if he had directed the jury to consider either insanity or diminished responsibility. In the absence of evidence with respect to the essential features of those defences, directing the jury in those terms would have invited inappropriate speculation by the jury. Even if the defences were in the same category as other defences in respect of which there is no burden of proof on an accused and the Crown must disprove the defence, in our

view the material before the jury would have been incapable of raising the existence of either defence as a reasonable possibility.

[148] In the context of whether the Judge should have ordered an inquiry into fitness to stand trial and left the defences to the jury, counsel for the appellant sought to draw comfort from the remarks of the Judge when sentencing the appellant. The Judge observed that although the appellant presented as an intelligent person quick to grasp points when they are explained to him, the appellant continued to have an incomplete or even relatively little insight into or appreciation of his psychiatric condition and the need for medication. His Honour remarked that on reflecting on the appellant's demeanour during the course of the lengthy trial, it appeared to his Honour that the "phenomenon of "masking" referred to by Dr Tabart in his evidence may well be continuing."

[149] As to the appellant's mental state at the time of the killing, his Honour said:

> "The circumstances are such that it is difficult to escape the conclusion, despite your consistent protestations at trial that you did not seek to rely upon any mental health aspects as relevant to your defence, that your actions may, at least to some extent, have been affected by your condition of paranoid schizophrenia. This is particularly so as, on your own concession to the police, you had not been taking the medication that had been prescribed for you for a period of some three weeks."

[150] It is not surprising that the Judge held these concerns. They were, however, in the nature of speculation as to possibilities. A concern that the appellant may have been masking his symptoms during the trial does not in itself, nor

in combination with all of the material available to the Judge, give rise to reasonable grounds on which to question the appellant's fitness to stand trial.

[151] Similarly, the concern of the Judge that the appellant's actions in cutting the throat of the deceased may, to some extent, have been affected or influenced by his mental illness is natural and obvious. Such a concern would necessarily arise from the information available to the Judge and the fact that the appellant was unrepresented at the trial. However, the existence of such concern does not lead to a conclusion that there was evidence fit to go to the jury with respect to the defences of insanity or diminished responsibility. Nor does it lead to a conclusion that in some way the trial was unfair or that a miscarriage of justice has occurred.

Prosecutor's duty

[152] The complaint raised for the first time on appeal that a miscarriage of justice occurred by reason of the failure of the prosecution to adduce evidence of the appellant's mental state at the time of the killing and subsequently is based upon the fundamental proposition that the Crown has a duty to present to the jury all relevant and credible evidence know to the Crown. Counsel submitted that although there was no misconduct by the prosecutor, applying the duty to the unique circumstances of the case under consideration, the failure of the Crown to lead medical evidence denied the jury of the

opportunity of hearing credible evidence relevant to a number of issues namely intent and issues of insanity and diminished responsibility.

[153] Again, the principles are not in doubt. They were examined in depth by the High Court in *Apostilides* (1984) 154 CLR 563. The principles were revisited by the High Court recently in the context of a suggested duty to present medical evidence concerning the mental health of an accused person in *Subramaniam v The Queen* (2004) 211 ALR 1. Counsel also referred to the observations concerning the duty of the prosecutor in *Whitehorn* (1983) 152 CLR 657. It is unnecessary to embark upon a discussion of those well established principles.

[154] This is not a case in which an accused person was unaware of relevant material in the possession of the Crown. The appellant had copies of all the medical reports. He was aware that the defences of insanity and diminished responsibility were available to him. The appellant made a choice not to use that material in his defence.

[155] As we have said, counsel for the appellant submitted that the appellant lacked the capacity to make an informed decision with regard to the defences of insanity and diminished responsibility because he did not believe that he suffered from a mental illness. However, the appellant knew that the medical material was available to be used as a defence even if he did not believe that he suffered from a mental illness. He was aware of the consequences of a finding that he was not guilty on the ground of insanity.

The fact that the appellant did not believe that he suffered from a mental illness did not necessarily mean that he lacked the capacity to make a decision as to whether to rely upon a defence involving mental illness. Obviously, as the doctors observed, the appellant's lack of insight into his illness would make it very difficult for him to avail himself of such a defence, but the appellant is an intelligent person and displayed a capacity during the trial to make relevant and appropriate decisions.

[156] It is unnecessary to examine the parameters of the duty of the Crown, either generally or in connection with the leading of medical evidence against the wishes of an accused. In the context of an accused represented by counsel, Underwood J (as he then was) undertook a helpful discussion of the issues involved in the Crown leading such evidence against the wishes of an accused in *R v Jeffrey* (unreported Supreme Court of Tasmania, delivered 20 February 1991).

[157] In the circumstances discussed, in our opinion the duty of the Crown did not extend to calling medical evidence against the wishes of the appellant. The Crown prosecutor made a judgment that the material in the possession of the Crown did not support the defences of insanity or diminished responsibility. The Crown disclosed all the material available to it. Copies of the medical reports were provided to the appellant. The Crown offered to make the doctors available for consultation with the appellant on a confidential basis. The Crown also offered to call the doctors to give evidence on the voir dire or before the jury. In the presence of the appellant, the Crown prosecutor

was at pains to ensure that the appellant knew he could avail himself of the defences of insanity and diminished responsibility and that the Crown would ensure that the medical evidence in relation to those defences was made available to the appellant.

[158] In our opinion there can be no criticism of the way the prosecutor conducted the trial or discharged the duty of the Crown. This ground of appeal is not made out.

Conclusion

[159] The appeal is dismissed.
