[2012] JMCA Crim 55

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 106/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

STEPHEN FRAY v R

Mrs Jacqueline Samuels-Brown QC for the appellant

Miss Sanchia Burrell for the Crown

20, 21 and 22 June, 29 July 2011 and 23 November 2012

HIBBERT JA (Ag):

[1] On 19 April 2009 the Sir Donald Sangster International Airport in Montego Bay in the parish of Saint James became the focus of attention both nationally and internationally. Shortly after 10:00 pm the appellant, who was armed with a firearm, by the use of force and menaces, entered a restricted area of the airport and made his way onto an aircraft which was operated by Canjet Airlines and which had landed shortly before. On board were crew and passengers who were

en route to Santa Clara in Cuba. The appellant demanded to be flown out of Jamaica.

[2] During this dramatic episode which lasted for hours the appellant robbed passengers and crew members and shot at the pilot of the aircraft. The appellant was eventually disarmed by one of the flight attendants when members of the security forces boarded the aircraft. He was removed from the aircraft and subsequently charged with committing several offences. He was indicted in the Western Regional Gun Court for the following offences: count one for illegal possession of firearm; count two for illegal possession of ammunition; counts three to seven for assault; count eight for shooting with intent; and counts nine and 10 for robbery with aggravation.

[3] At the conclusion of the trial before the Honourable Mrs Justice Sarah Thompson-James the appellant was found guilty on counts one, two, five, six, seven, eight, nine and 10. On count one he was sentenced to be imprisoned for 18 years, on count two for two years, for one year in respect of each of counts five to seven, for 21 years on count eight, and for 20 years on each of counts nine and 10. All of sentences were ordered to run concurrently.

[4] On 29 July 2011 we dismissed the appeal against conviction. We allowed the appeal against sentence, in part, by setting aside the sentences imposed on counts one, nine and 10, and substituting a sentence of 15 years imprisonment in

respect of each of those counts. We then promised to put our reasons in writing, and now do so.

[5] His appeal against his convictions and sentences was supported by the following supplemental grounds of appeal for which leave to argue was granted:

> "1. The learned trial judge erred in failing to find the Appellant guilty but insane as sufficient and cogent evidence was produced to establish the defence.
>
> 2. The learned trial judge erred in finding that there was conflict between the evidence of the two (2) Psychiatrists who testified as in fact no such conflict or inconsistency arose on their evidence.
>
> 3. The learned trial judge failed to take into account and/or to apply the provisions of section 25 of the Criminal Justice Administration Act and in so doing the Appellant was deprived of an available defence and accordingly there has been a miscarriage of justice.
>
> 4. The evidence of both Psychiatrists who testified is supportive of the Appellant being insane as defined by law at the time of [sic] offence and the learned trial judge erred in failing to so find.
>
> 5. The learned trial judge erred in finding that the Appellant's condition of schizophrenia is not enough reason to provide a defence to the charge (page 1090)
>
> 6. The learned trial judge's finding that the Appellant was not insane at the time he committed the offence is unreasonable and is not supported by the evidence.

7. The issue of automatism arose for consideration and determination on the evidence. The learned trial judge erred in not considering this defence and resolving it in the Appellant's favour accordingly he was deprived of a verdict of acquittal and there has been a miscarriage of justice.

8. In analyzing the Appellant's conduct relative to criminal liability for the commission of the offence the learned trial judge failed to take into account the character evidence led on his behalf and/or misinterpreted the legal significance of character evidence.

9. The learned trial judge failed to direct herself as to the impact of character evidence at the trial whereby the Appellant was deprived of the benefit of a verdict in his favour.

10. The sentence of the Court is manifestly excessive as the learned trial judge failed to ascribe any or any sufficient legal significance to the [sic] inter alia,

    a. The uncontroverted evidence [sic] good conduct prior to the offence.

    b. The accused had no previous conviction.

    c. The accused's age at the time of the commission of the offence.

    d. The uncontroverted evidence as to his psychiatric condition at the time of the trial.

    e. The evidence as to the type of treatment and care needed by the Appellant having regard to his medical/psychiatric condition."

[6] These grounds may be considered under various heads. Ground three concerned the law which is applicable to the return of a special verdict. Grounds one, two, four, five and six dealt with the evidence pertinent to the mental capacity of the appellant and its assessment by the judge. Ground seven addressed the issue of an alternative verdict of automatism. Grounds eight and nine concerned the treatment by the judge of the evidence of good character, and ground 10 dealt with sentence.

[7] Consistent with the supplemental grounds of appeal which were filed, Mrs Samuels-Brown QC, in her submissions to this court mounted no challenge to the findings of fact made by the learned trial judge concerning the acts done by the appellant. Instead, she challenged the finding by the judge that at the time of the commission of those acts, the appellant was not insane. She submitted that the proper verdict should have been 'guilty but insane'. Mrs Samuels-Brown also submitted that on the basis of the evidence presented to the court at trial, the defence of automatism also arose and was not considered by the judge. In addition, Mrs Samuels-Brown submitted that the learned trial judge's summary and analysis of the evidence were neither balanced nor fair, and that she failed to apply the evidence of the doctors as to the appellant's mental condition and his explanations more proximate to 19 April 2009, rather than to his testimony at trial after he had been on medication.

The Law

[8] The return of a verdict of the nature suggested by Mrs Samuels-Brown is provided for by section 25E of the Criminal Justice (Administration) Act (the Act). The relevant provisions state:

> "25E - (1) Subject to subsection (2), where in any indictment or information any act or omission is charged against any defendant as an offence and -
>
> (a) it is given in evidence on the trial of the defendant for that offence that the defendant is suffering from a mental disorder so as not to be responsible according to law for his actions at the time when the act was done or omission made; and
>
> (b) it appears to the Resident Magistrate, Judge or the jury, as the case may require, before whom the defendant is being tried, that the defendant did the act or made the omission charged, but was suffering from a mental disorder as aforesaid at the time when the act was done or omission made, the Resident Magistrate, Judge or the jury shall return a special verdict to the effect that the defendant was guilty of the act or omission charged against him, but was suffering from a mental disorder as aforesaid at the time when the act was done or omission made.
>
> (2) A Resident Magistrate, Judge or jury, as the case may require, shall not return a special verdict under subsection (1) except upon the written or oral evidence

> of two or more duly qualified medical practitioners, at least one of whom is an approved medical practitioner."

These provisions replaced the previous section 25 of the Act which was repealed by Act 1 of 2006 entitled "An Act to Amend the Criminal Justice (Administration) Act", and which came into operation on 1 March 2007. The present section 25E(1) is essentially the same as the former section (25)(2), but significantly, the words 'suffering from a mental disorder' replaced the word 'insane'.

[9] Neither the word 'insane' nor the term 'mental disorder' have been defined in the Act. In section 2 of the Mental Health Act, however, the following appears:

> " 'mental disorder' means -
>
> (a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or
>
> (b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour."

[10] The culpability of persons with mental disorders for criminal acts committed by them had, for a long time, been the subject of debate in the English courts. The main issue was whether or not such persons had the requisite *mens rea* to make them criminally liable for acts committed by them.

[11] This issue really gained prominence after the trial of Daniel M'Naghten for the murder of Edward Drummond. Daniel M'Naghten, acting under the delusion that he was being persecuted by the Tories and persons within the Roman Catholic Church, shot and killed Edward Drummond, whom he thought was Sir Robert Peel. The issue of his sanity arose in the trial, during which, evidence was adduced from a medical practitioner and others on his behalf to prove that he was not, at the time of committing the act, in a sound state of mind. At the conclusion of the trial a verdict of "not guilty" on the ground of insanity was returned.

[12] This verdict and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony became the subject of debate in the House of Lords. Consequently, it was decided to obtain the opinion of the judges on the law governing such cases. To obtain this opinion, five questions of law were propounded to them. They were:

> "1st What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?
>
> 2d What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is

> charged with the commission of a crime (murder, for example), and insanity is set up as a defence?
>
> 3d In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?
>
> 4th If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?
>
> 5th Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?"

From these questions, and the answers supplied, what are now known as the M'Naghten Rules were formulated (see **M'Naghten's** Case (1843) 10 Cl & F 200; (1843) ER Vol 8 ER VIII 718).

[13] The answers to questions 2 and 3 were given together and provide the crucial passage in the response given by Tindale CJ (on behalf of the other judges except Maule J who refrained from giving his opinion). At page 210 the answers, in part read as follows:

> " In all cases of this kind the jurors ought to be told that every man is presumed to be sane, and to

> possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong."

[14] In 1883, no doubt as a result of the **M'Naghten** rules, the Trial of Lunatic Act was passed. Section 2(i) of that Act, as amended by the Criminal Procedure (Insanity) Act 1964 provides:

> "where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity."

This provision clearly shows the retention of the position that such persons would be held to lack the *mens rea* necessary to attach culpability to them and as such not guilty verdicts would be returned. This marks the significant difference between the English position and that which obtains in Jamaica where a guilty verdict is returned. It is in this context that the Jamaican statutory provision must be looked at.

The Evidence

[15] At the trial the prosecution adduced evidence from police officers and security guards who were on duty at the airport. They stated that when efforts were made by them to prevent the appellant from gaining unauthorized entrance to restricted areas, he either brandished the firearm he had in his possession when he arrived at the airport or raised his shirt to expose the firearm which was tucked in his waistband. Consequently, he was able to make his way through the restricted areas and gain access to the aircraft.

[16] The prosecution also adduced evidence from crew members who were on board the aircraft. The pilot of the aircraft testified that while he was programming the flight management computer for the trip to Cuba, a flight attendant came into the cockpit and spoke to him. He then went to the forward galley where he saw a man who was later identified as the appellant. With the use of profanities, the appellant ordered him to close the forward boarding door. Upon being told by the pilot that he was going to summon the police the appellant raised his shirt to reveal the presence of a firearm at his waist. When the pilot further resisted the order to open the door the appellant removed the firearm from his waist and pointed it at the pilot's forehead. He said he had to leave Jamaica that night and accused the pilot of lying when the pilot said he had no fuel. The appellant then ordered the pilot to punch in the code to unlock the cockpit door. When this order was disobeyed the appellant placed the muzzle of the firearm at the pilot's neck and said he was god and he likes to take lives.

[17] The pilot further testified that after a security officer who was attached to Canjet came on board the aircraft, they, with a flight attendant pleaded with the appellant to release the passengers. These pleas went unheeded; instead, the appellant ordered the pilot from the aircraft to obtain fuel for the aircraft. When the pilot refused the appellant pointed the firearm at the head of the security officer. The pilot retreated briefly then attempted to return to the galley whereupon the appellant fired a shot at him. The pilot fled from the aircraft.

[18] The evidence of the pilot was supported by that of the security officer. He stated that after the pilot fled, the appellant continued to make efforts to gain entrance to the cockpit. Eventually the door to the cockpit was opened and members of the Jamaica Defence Force entered the galley and thereafter the appellant was taken into custody. During cross-examination the security officer stated that the appellant at times referred to himself as god, the genius and the man in charge. He also stated that the appellant at first indicated that he wanted to be taken to Cuba. Thereafter he stated that he wanted to go anywhere except Jamaica.

[19] A flight attendant also gave evidence supporting that which was given by the pilot. She further stated that after the shot was fired the appellant continued to make attempts to gain entrance to the cockpit. Later he took money from the passengers and ordered them from the aircraft. He demanded fuel for the aircraft and said if he did not get it people were going to die. She said that while they

were on the aircraft she had general conversations with the appellant who spoke about his girlfriend, showed pictures of her and asked questions about the plane. At all times he had the firearm in his hand. He told her that if she wanted to continue to enjoy life she would have to follow all his instructions. After a while the appellant passed her to look through the window of the aircraft. She then saw police officers on board and she grabbed the appellant's hand, twisted it and took the firearm from his grasp.

[20] The prosecution also adduced evidence from Dr Kevin Goulbourne, a consultant psychiatrist. He conducted a psychiatric evaluation of the appellant. He had three sessions with the appellant. During the first session on 28 May 2009 the appellant spoke of being watched by a "bug" and of society being against him and wanting to kill him. He admitted going onto the aircraft without a ticket and carrying a firearm to ensure that he got on the plane. He, however, denied being on the aircraft illegally. Dr Goulbourne stated that during that interview the appellant showed some amount of impairment of judgment.

[21] Dr Goulbourne had another session with the appellant on 10 June 2009. At that session the appellant stated that he wanted to leave Jamaica because people were after him. The final session was on 19 June 2009. During that session the appellant maintained that persons helped him to get on board the aircraft. He also stated that a "chip" programmed him to do what he did. At the end of the sessions Dr Goulbourne concluded that the appellant was suffering from a

psychiatric disorder which could be either schizophrenia or schizophreniform, which are different psychiatric disorders although they have similar symptoms. He described a psychotic disorder as one in which there is a disturbance in a person's appreciation of reality. These signs are abnormal perceptions and abnormal thought processes, and these may influence one's behaviour and speech. Dr Goulbourne concluded that, not having seen the appellant before 28 May 2009, he could not say that the appellant was on 19 April 2009 suffering from a mental disorder. This was as a result of his opinion that the incarceration of the appellant was a contributing factor to his condition at the time of the examination. During cross-examination Dr Goulbourne agreed that based on the appellant's account, his actions were influenced by a delusion.

[22] The appellant gave evidence on his own behalf. He stated that on 19 April, 2009 he was feeling a lot of mixed feelings. He said, "I was angry, sad, depressed and felt like I was in a dark place at the time." He said he had voices in his head telling him "stuff" and that he thought that they were watching him and wanted to kill him. He further said that the "voices programme" told him to get out of Jamaica so he began to plan how to get out. He said because the people who controlled the "programme" wanted to kill him he broke into his father's gun safe and took the gun.

[23] In continuing his evidence, the appellant said that he went to the airport. At the airport he got help from employees and the "voices programme". He said

that while he was on board the aircraft a security officer came and tried to distort his mission. He further said that the pilot, the security officer and one of the flight hostesses were "trying to get me upset and trying to confuse me, trying to manipulate my situation". As a result, he said, "I took my gun and fired it into the roof of the boarding". He also stated that he asked the security officer and the pilot to close the airplane door and they did not comply. That was before the shot went off and the pilot ran off the plane. He denied being abusive to persons on the aircraft.

[24] The appellant also stated that he had been hearing voices for about five years. It was, however, not serious until two years before the trial when he found himself even more depressed and having constant headaches. This, he said, he discussed with his sister Dominique.

[25] During cross-examination the appellant admitted that while he was on the aircraft he used expletives and that he had the gun in his hand; he denied pointing it at anyone and that his intention was to hijack the aircraft. He stated that when he boarded the aircraft his intention was to go to Canada where his girlfriend lived. The appellant recalled being on board the aircraft for about seven hours but in answer to most suggestions put to him relative to the prosecution's case, his answer was, "I can't recall."

[26] Nathan Robb also gave evidence on behalf of the defence. He stated that he had known the appellant for about 18 or 19 years. They attended infant, pre-

school and high school together. He stated that on 18 April 2009 he saw the appellant at the Doctor's Cave Beach. They greeted each other then the appellant left him and said he was going for a swim. He further stated that on 19 April 2009 he was taken on a ramp to the cockpit of the aircraft and from there he spoke to the appellant with a view to calming him. He said the appellant was angry and when he asked him what was going on, the appellant said that he, Nathan, knew what was going on and that he could see what was happening.

[27] Dominique Fray, the sister of the appellant, also gave evidence of the appellant's behaviour. She stated that in late 2008 she started to notice a change. He told her he was depressed because his friends were leaving him to attend school abroad. Additionally, he was being pressured by family members to improve his way of life and many of them thought something was wrong with him. She also stated that on occasions she saw him knocking the side of his head and said that he thought people were speaking about him and watching him. He also thought there were cameras watching him. During cross-examination she stated that on 19 April 2009 she saw the appellant at their home up to about 8:30 or 9:00 pm.

[28] Earl Fray, the father of the appellant, also gave evidence. He said that prior to 19 April 2009 the appellant had no psychiatric examination and that the appellant had a girlfriend who lived in Canada. He stated that up to 19 April 2009 the appellant was happy and played football up to about 1:00 pm on that day. He

first noticed that the appellant was absent from the house on 19 April 2009 at about 9:00 pm after he discovered that his firearm was missing.

[29] Also giving evidence on behalf of the appellant was Dr Wendel Able, a consultant psychiatrist. He stated that he first interviewed the appellant on 25 April 2009 for 34 minutes and also interviewed members of his family for about one hour. During the interview the appellant appeared depressed. He spoke of being programmed and said he went on the plane to get away from the programme. Dr Abel also said that his interview with family members of the appellant revealed that two of the appellant's uncles were diagnosed with schizophrenia. At the end of his interviews he diagnosed the appellant as suffering from a paranoid type of schizophrenia. He further opined that on 19 April 2009 the appellant's mental state was abnormal and that that was as a result of the psychotic feature associated with his paranoid schizophrenic illness.

[30] Dr Abel again examined the appellant on 17 September 2009 before he commenced his testimony. He found marked improvement in the appellant's condition and stated that the appellant then accepted the fact that he had a paranoid schizophrenia and recognized the need to take his medication.

[31] During cross-examination Dr Abel stated that he took into account that the psychotic features he noticed in the appellant may have been triggered or exacerbated by the fact of his incarceration. He, however, stated that his opinion was guided by information gathered during the interview with the appellant's

family members. He agreed that in order to conclude that the appellant's behaviour on 19 April 2009 was, as he described it, "grossly psychotic, abnormal and bizarre", he interviewed no independent witness. He spoke to no one who was present at the airport and who observed the appellant's behaviour. Dr Abel also stated that he, having received a detailed medical history from the appellant's family members, thought it unnecessary to request the appellant's medical records as there was no previous psychiatric history. He further agreed that the majority of the information as to the appellant's gross, psychotic disorder came by way of reports from the family and from the examination of the appellant and that none was obtained from an independent source.

Analysis

[32] The learned judge, after considering the evidence adduced by the prosecution, at page 1062 of the transcript stated, "On the totality of the evidence I find that the evidence presented by the prosecution is reliable." She further stated that she accepted the evidence of the witnesses, which provided the factual bases for count one for illegal possession of firearm, count two for illegal possession of ammunition, counts five, six and seven for assault, count eight for shooting with intent and counts nine and 10 for robbery with aggravation.

[33] Having considered the evidence pertaining to the acts done by the appellant the judge then proceeded to consider the evidence as it related to the mental

state of the appellant at the time the acts were done. At page 1088 of the transcript the judge stated:

> "I find nothing irrational about Stephen's movement throughout the airport. In fact, I find that Stephen knew what he was doing, I find that Stephen knew what he was doing was wrong by the mere fact that Stephen used the word, broke into my father's safe. Stephen know [sic] that breaking in was wrong … Stephen knew also that he should not have the gun because he did not expose it. He did not expose it. He had it concealed… that's a devious behaviour of breaking into the safe, removing the weapon, concealing it on his person means that Stephen was aware that what he was doing was wrong."

[34] At page 1090 the judge said:

> "I have looked at the evidence and on a balance of probability [sic] I do not find that on the 19th April 2009, the accused was or may have been suffering from a mental disorder or a defect in reasoning so he did not know that what he was doing was wrong. The defence on the ground of insanity has not established that at the time of the commission of the offence he was labouring under such a defect of reasoning of the mind and do [sic] not know the nature and quality of the conduct he was doing or if he did, did not know that what he was doing was not [sic] wrong."

[35] Before us Mrs Samuels-Brown challenged the finding of guilt in respect of the charges for illegal possession of firearm and ammunition. She submitted that there was no evidence on which the judge could find that there was an intention or the part of the appellant to possess the firearm and ammunition. She further

submitted that the judge could not, as she did, properly use the evidence of the appellant concerning his acquisition of the firearm to determine his mental state at the time. This, Mrs Samuels-Brown submitted, was because of the fact that the evidence was given five months after the event and after he had been on medication.

[36] To support this submission Mrs Samuels-Brown cited the decision of the English Court of Appeal in ***Regina v Stephenson*** [1979] 3 QB 695. In that case the appellant who suffered from schizophrenia was charged with and convicted of the offence of arson. On appeal it was held:

> "that the appeal should be allowed, for the jury had not been left to decide whether the appellant's schizophrenia might have prevented the idea of danger entering his mind at all."

[37] The court, however, at page 704 stated:

> "The mere fact that a defendant is suffering from some mental abnormality which may affect his ability to foresee consequences or may cloud his appreciation of risk does not necessarily mean that on a particular occasion his foresight or appreciation of risk was in fact absent. In the present case, for example, if the matter had been left to the jury for them to decide in the light of all the evidence, including that of the psychiatrist, whether the appellant must have appreciated the risk, it would have been open to them to decide that issue against him and to have convicted."

[38] We found that there was an abundance of evidence from which the judge, the tribunal of fact, could find that the appellant intended to possess the firearm and ammunition. The evidence from the persons who were assaulted (the pilot, the security officer and the flight attendant) certainly supported such a finding. We found no merit in Mrs Samuels-Brown's submission that the evidence of the appellant could not properly be used to determine his intention. His evidence of having broken into his father's safe and taking the firearm and ammunition also provided clear evidence of his intention to possess the firearm and ammunition.

[39] The treatment of the evidence of Drs Goulbourne and Abel by the judge was also subject to criticism by Mrs Samuels-Brown. She submitted that on the evidence of the doctors and the other witnesses the special verdict ought to have been returned. She further submitted that the judge erred when she stated that there was a conflict between the evidence of Dr Goulbourne and Dr Abel.

[40] The learned judge quite clearly stated in her summation that she, in arriving at her decision, considered not only the evidence of the doctors, but all other evidence presented and which was relevant to the appellant's state of mind. She carefully analyzed the evidence presented and made her findings in a reasoned manner. We could find no grounds on which to disturb the findings of fact which were made. We agreed with the submissions made by Miss Burrell that in spite of the medical evidence it was still open for the judge to return the verdict which she did. For this submission Miss Burrell relied on ***R v Matheson*** [1958] 2 All ER 87.

In dealing with the question of diminished responsibility, Lord Goddard CJ at page 89 said:

> "While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not and indeed could not disturb their verdict…"

Miss Burrell also cited ***R v Walton*** (1976) 27 WIR 55 in which the Barbados Court of Appeal considered **Matheson** and expressed a similar position.

[41] We were unable to agree with Mrs Samuels-Brown that the judge erred in stating that there was a conflict between the evidence of Dr Goulbourne and that of Dr Abel. The judge at page 1041 of the transcript, after pointing out that both doctors opined that the appellant was suffering from schizophrenia stated:

> "… where their evidence, I might say raised certain amount of conflict in relation to the accused's reasoning ability at the time of the commission of the alleged offence, it is for me to decide whose evidence and whose opinion I accept, if any, bearing in mind that this evidence relates to only part of the case…"

Again at page 1078 the judge said:

> "However, there is a divergence in their evidence as to the state of mind of the accused at the time of the commission of the offence… Dr. Goulbourne was unable to say whether the accused was ill at [sic] time… Dr. Abel, on the other hand, was adamant in his testimony that on the 19th of April, 2009 the accused was grossly psychotic."

Clearly, the evidence supported these statements. Dr Goulbourne, because he did not examine the appellant on 19 April 2009 and had not interviewed any persons who had observed the appellant during the incident, said he could not give an opinion of the mental state of the appellant at the time. Dr Abel, who was in a somewhat similar position, insisted that he could.

[42] The other area which was described as a conflict by the judge pertained to the assertion by the appellant that he was god and that he was the "baddest" man. Dr Abel stated that that indicated a delusion of grandeur. Dr Goulbourne, on the other hand, stated that a person who is armed with a gun and facing unarmed persons might use such words, not because of a mental disorder, but merely to express his power over them. Based on the evidence we found no fault with the judge's comments.

[43] It must be borne in mind that before the special verdict may be returned there must be evidence from which it can be concluded that the appellant suffered from a disorder of the mind and that the disorder was of such a nature that the appellant would not be responsible according to law for his actions at the time when the acts were done. The judge, not only considered the evidence of the doctors, but took into consideration the evidence of the appellant's behaviour, before, during and after the time when the acts were committed. We believed that her examination and analysis of the evidence were careful and thorough and could not be faulted.

Automatism

[44] In written submissions Mrs Samuels-Brown submitted that on the basis of the evidence of Drs Goulbourne and Abel the defence of automatism arose and should have been considered by the judge. This submission was misconceived as it runs counter to previous judicial pronouncements. In ***Bratty v Attorney General for Northern Ireland*** [1961] 3 All ER 523 it was held by the House of Lords that:

> "Where the only cause alleged for an unconscious or involuntary act is defect of reason from disease of the mind within the **M'Naghten** rules and the jury reject a defence of insanity there is no room for the alternative defence of automatism."

In this case the defence was based solely on the assertion that the appellant was, at the time when the acts were committed, suffering from a mental disorder so as not to be responsible according to law for the acts done by him. This defence having been rejected by the judge, there was therefore no basis for considering the question of automatism.

Character

[45] Another area of complaint by Mrs Samuels-Brown concerned the treatment by the judge of the evidence of good character. The judge in dealing with this stated:

> "Now the accused brought witnesses to court to speak about how good…, that he was a well-mannered person, that his mommy said that he would be the first to enquire about her welfare. I have

> listened to these witnesses who have spoken of his positive qualities. Of course, his good character by itself cannot provide a defence to a criminal charge. Yes, it is evidence which I can take into consideration to decide whether or not to believe his evidence, as against the background of a person's good character. But, of course, the offence was in fact committed."

It is to be borne in mind that the reasoning of a judge sitting alone requires a different treatment from a summing up to a jury and need not be as expansive - see ***R v Simpson, R v Powell*** [1993] 3 LRC 631. Especially in light of the absence of any challenge to the evidence of the acts done by the appellant, we agree with Miss Burrell that the judge showed an appreciation of the purpose of character evidence and adequately considered it.

Sentence

[46] Finally, Mrs Samuels-Brown submitted that in light of the appellant's age, his good character and the fact that he was diagnosed as suffering from schizophrenia, the sentences imposed were manifestly harsh and excessive. She prayed in aid the decision of this court in ***R v Jason Rowe*** (1993) 30 JLR 96. In that case the appellant who had a history of psychiatric treatment killed his girlfriend and seriously injured his mother and sister. He pleaded guilty to manslaughter by reason of diminished responsibility and was sentenced to life imprisonment. At the hearing of the appeal fresh evidence was adduced in the form of a psychiatric report that the psychosis was in substantial remission. The court allowed the appeal, set aside the sentence and substituted a sentence of

seven years imprisonment. Mrs Samuels-Brown urged the court to find a similarity between the **Jason Rowe** case and the instant case as it related to the improvement in the mental state of the appellant.

Conclusions

[47] We carefully examined the reasoning of the learned judge and for the reasons already stated we found that the appeal against conviction should be dismissed. In respect of the appeal against sentence, we accepted Mrs Samuels-Brown's submission relative to count one for illegal possession of firearm and counts nine and 10 for robbery with aggravation. Accordingly, we set aside those sentences and substituted sentences of 15 years imprisonment on each of those counts. We considered that the offences for which the appellant was convicted were of a most serious nature and therefore resisted the submissions relative to the sentences on counts two, five, six, seven and eight. We accordingly affirmed those sentences. Sentences should commence on 8 October 2009.