MURDER: THE ABNORMAL MIND – MAD OR JUST BAD

This discussion explores some difficult issues concerning the interaction of law and psychiatry in the context of the defence of diminished responsibility in murder trials. It suggests that the uncertainty of the science, and of the criminal law, combine with certain rules of criminal procedure and punishment to create a situation where mentally abnormal accused persons who kill are put through an unnecessary life and death gamble in the criminal process. It ends with a plea to both the legal and psychiatric professions to pause and think of more creative and acceptable ways to deal with a defence of mental abnormality to a charge of murder.[1]

Michael **HOR**
LLB (Hons) (National University of Singapore),
BCL (Oxford), LLM (Chicago);
Professor, Faculty of Law, National University of Singapore

I. A moment of anguish

1 Some of the most disturbing cases a student, teacher, observer or practitioner of the criminal law will ever have to come across have to do with murder prosecutions where a plea of diminished responsibility is raised. Someone, for no particularly convincing reason, kills another. A government psychiatrist testifies on oath for the Prosecution that the accused is not suffering from any serious mental illness. A defence psychiatrist swears to the opposite – that the accused was indeed labouring under a serious mental disorder. The judge, torn between two experts, and not a psychiatrist himself, has to decide one way or the other – and he does so almost invariably in favour of the psychiatrist called by the Prosecution. The Defence fails. The accused is duly convicted of murder and condemned to die.

2 One cannot help but feel a sense of anguish. It is true that someone has been killed and society is rightly concerned. But the person punished and executed for it appears to have done so under

1 An earlier version of this article was presented at the Singapore Medico-Legal Seminar 2007 on 20 October 2007. The author would like to thank the Medico-Legal Society of Singapore for creating the opportunity to organise these reflections.

circumstances in which, apparently, no normal person would have killed. Nor is there normally any serious attempt to escape detection and capture by the police. Examples from the law reports abound: the domestic maid who killed her friend because she would not take some rather inconsequential things back to their home country for her;[2] the soldier who shot his superior officer to death for inflicting a relatively minor punishment for a military infraction;[3] the man who stabbed his sister-in-law to death because she had made sexual advances and "nagged" him;[4] the person who killed brutally in order to get a Rolex watch to give his girlfriend.[5] The record for the defence psychiatrist winning the day was, until very recently, especially dismal.[6] In two recent cases, *G Krishnasamy Naidu v PP*[7] and *PP v Juminem*,[8] the courts created quite a stir by ruling in favour of a plea of diminished responsibility notwithstanding the testimony of the prosecution psychiatrist. But has anything really changed?

II. "Substantial impairment": ambiguous but inevitable?

3 Although the seemingly more potent defence of "unsoundness of mind" still exists,[9] it has been virtually eclipsed by "diminished

2 *Contemplacion v PP* [1994] 3 SLR 834. Contemplacion killed a fellow domestic maid and a four-year-old boy (according to the trial judge, to cover her tracks), cleaned up and went back to the apartment where she was working, had lunch and washed up, waiting, as it were, for the police to pick her up. Her execution caused a major diplomatic row with the Philippines, and one wonders whether the uncharacteristic avoidance of a murder conviction in some later domestic maid cases like *PP v Juminem* [2005] 4 SLR 536 (successful diminished responsibility plea) and *PP v Sundarti Supriayanto* [2004] 4 SLR 622 (successful provocation plea) had something to do with a desire to avoid a recurrence of that. The author certainly does not mean to suggest that the court in these later cases were unduly influenced by political considerations. These cases are juxtaposed only to raise the possibility that perhaps Contemplacion could have been dealt with in the same manner as the later decisions without any significant sacrifice to law and order.

3 *Chia Chee Yeen v PP* [1991] SLR 312. When the accused national serviceman was punished with weekend confinements, he armed himself with an M16 rifle and two revolvers (in apparent imitation of a television action hero), blew off the top of the skull of his superior officer and then tried to kill himself, and when he failed collapsed to the ground groaning that he wanted to die.

4 *Chua Hwa Soon Jimmy v PP* [1998] 2 SLR 22. There was an eerie similarity with Contemplacion in that Jimmy also viciously attacked his four-year-old nephew after killing his sister-in-law.

5 *Tengku Jonaris Badlishah v PP* [1999] 2 SLR 260. The accused whacked his victim repeatedly on the head with a hammer in the course of stealing money in order to buy his girlfriend a Rolex watch.

6 The author could not find any other reported decision apart from *G Krishnasamy Naidu v PP* [2006] 4 SLR 874 and *PP v Juminem* [2005] 4 SLR 536 in which a contested plea of diminished responsibility succeeded.

7 [2006] 4 SLR 874.

8 [2005] 4 SLR 536.

9 Penal Code (Cap 224, 1985 Rev Ed) s 84.

responsibility",[10] a defence introduced much later into the Penal Code.[11] Unsoundness of mind, also referred to as insanity,[12] is a defence to any criminal charge, and the result of a successful plea is an acquittal. Yet it is not difficult to understand why it has been almost abandoned.[13] The acquittal here is not like any other – it entails indefinite detention "at the pleasure of the President". This is a cure worse than the disease,[14] unless it is a capital charge the accused is facing. Quite apart from this, it has proven to be almost impossible to establish the primary requirement of the defence – the mental disease must have caused in the accused an incapacity of knowing what he or she is doing, or that it was "wrong or contrary to law".[15] This exclusive reference to what appears to be total destruction of cognitive capacity is so particular and so extreme that it is, as a matter of defence strategy, never used in a murder charge in preference to diminished responsibility. It is more difficult to establish than diminished responsibility and the result of a successful plea is not clearly more advantageous, for the accused can hope that in course of sentencing in a successful diminished responsibility defence, the court might give something rather more palatable than indefinite detention.[16]

---

10 Penal Code (Cap 224, 1985 Rev Ed) s 300, exception 7.

11 The defence of unsoundness of mind was in the original Code imported from India in 1871, while diminished responsibility was introduced in Singapore in 1961 following its debut in the UK a few years earlier.

12 Singapore law does not use the term "insanity", but its use has become so notorious that it has probably become an acceptable short-hand for the more verbally unwieldy "unsoundness of mind".

13 The plea is still employed for other capital offences, under, for example, the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) and the Arms Offences Act (Cap 14, 2008 Rev Ed), where, curiously, diminished responsibility is not available, but with no success in the reported cases.

14 Although, logically, the seriousness of the risk of indefinite detention must depend on how the executive discretion of release is exercised in practice, nothing is known about release statistics when unsoundness of mind was the only option for the mentally disordered offender. With that defence falling into almost complete disuse with the introduction of diminished responsibility, there is unlikely to be any practice to speak of in the last 47 years.

15 It remains a conjecture, but one is tempted to think that the introduction of diminished responsibility has somehow made psychiatrists reluctant to testify that the requirements of unsoundness of mind have been fulfilled – it does seem statistically improbable that the reported cases since 1961 for murder show no instance where a psychiatrist was willing to say that a particular offender was of unsound mind within the meaning of s 84.

16 From the viewpoint of public interest, however, it is not at all clear why an offender who is suffering from diminished responsibility ought to receive a finite sentence. It is obvious from the reported cases that those who succeed under this partial defence are suffering from very serious mental disorders for whom an indefinite detention might be thought to be more suitable. This structural problem has found judicial expression in the words of Choo Han Teck J in *PP v Dolah bin Omar* [2001] 4 SLR 302, and more recently in *PP v Han John Han* [2007] 1 SLR 1180. The problem with a finite sentence is that a judge has to predict at the outset whether the offender will, and how long it will take him to, recover sufficiently to be released without danger to those around him. If the judge is too optimistic, then

(*cont'd on the next page*)

4 The focus then shifts to diminished responsibility – what does it mean? Essentially there are two elements – a condition and a consequence. The condition is that the accused must be suffering from an "abnormality of the mind", and the consequence it must have on the accused is that this condition is such that responsibility for his or her actions is "substantially impaired".[17] The first element has come to require, at least, some credible professional opinion that the accused is suffering from a recognisable psychiatric disorder. The disorder must have been described, categorised and named by the psychiatric profession. This is the law's way of managing the need to distinguish between serious and frivolous claims of mental disability. There are problems with these requirements (discussed below) as they have to deal with how abnormality of the mind is to be proved, rather than what it means. It is the second element which is more difficult to pin down. One is immediately struck by how vague this formulation is. It is difficult to imagine any other defence being couched in this open-ended fashion. First, what is clear is that the straightjacket requirement of total impairment of the cognitive faculties (found in unsoundness of mind) is gone – and that opens the door to other kinds of impairment – principally, volitional impairment. This, it appears, is crucial – for time and again we see from the reported cases that it is agreed by all that the accused knew what he was doing and that it was wrong, but because of some mental disorder, it is argued by the Defence that the accused could not exercise self-control to a normal degree.

5 The problems begin when we try to unpack the substantial impairment element. Logically, we first need to know with a reasonable degree of precision the manner in which, and the degree to which, the mental disorder has in fact affected the accused's ability to exercise self-control. This is properly the province of expert psychiatric testimony. Putting aside the complication that in the difficult cases experts will flatly contradict one another, even if there were only one expert to consider, how can we expect him or her to formulate a helpful answer? Self-control is not measurable in discrete units, and it is difficult to expect the expert to use terms other than those of unhelpful generality – "a lot", "a little", and the like. More than that, it would seem that the state of science is such that the mechanics of self-control are not sufficiently understood to enable experts to say with any degree of confidence how (and to what degree) a particular mental illness has affected the power

---

the offender will be released while he might still be a danger to others; if the judge is too conservative, then the offender will have to be detained unnecessarily. This is not the place to propose anything structurally fundamental, however, one idea is to have only one defence along the lines of diminished responsibility, but one which gives the court a discretion whether to give a finite sentence, or to detain indefinitely.

17 Penal Code (Cap 224, 1985 Rev Ed) s 300, exception 7.

of self-control, except perhaps for the clearest of cases. The court has sometimes said that the line is between "could not resist" and "did not resist", albeit admitting that the distinction is difficult to draw in practice.[18] Even if the matter is as conceptually simple as this, it is not clear that the psychiatrist has the tools to be able to say that it was one or the other in the borderline cases. However, the situation is a little more complicated than this as the defence does not require a total loss of self control, only a substantial one. Thus, an impulse which is substantially more difficult for the accused to resist because of mental disorder is enough, although it may be that with Herculean effort, he or she may be able to resist it. Here is where the psychiatric uncertainty merges with the legal ambiguity – when does impairment become substantial? Courts over the years have appealed to "common sense" and the like,[19] but is there any common sense about such patently uncommon situations? Judges, presumably, have little personal experience with mentally disordered people who kill. More than that, we are all painfully aware that the level of self-control one can expect varies enormously from one person to the next. To one who is not given to jealousy, even a little jealousy is substantial. To one who is rather more prone to it, a lot more is required to attain that label.

6 It is painful to see the courts struggling with these twin uncertainties: prosecution counsel pressing psychiatrists to explain with a high (and scientifically unreasonable) degree of precision exactly how a particular mental disorder has affected self-control; and judges and lawyers asking psychiatrists to declare whether there was substantial impairment.[20] But neither the lawyers nor the psychiatrists are to be blamed, for the law appears to force them to behave in this way. Is there a solution? It is doubtful that if an easy answer to our problems were at hand, it would not have been implemented already. The root of the problem is beyond the law and lies in our deep ambivalence about what a psychiatric disorder really is, and the extent to which it ought to excuse – or to be trite – our inability to resolve the question of when someone is mad and not bad, and when he is not mad and merely bad. On the one hand, we are not prepared to abolish the mental disorder defences entirely[21] – we have the instinct that there is something to be said for treating mentally abnormal people with more compassion than normal. On the other hand, there is the concurrent fear that we might be lumping the mentally disordered with the simply evil offender. It is

18 *Chua Hwa Soon Jimmy v PP* [1998] 2 SLR 22 at [32], quoting with approval the famous UK case of *R v Byrne* [1960] 2 QB 396.

19 *Chua Hwa Soon Jimmy v PP* [1998] 2 SLR 22 at [31], quoting with approval *R v Llyod* [1967] 1 QB 175.

20 Witness the tragi-comedic cross-examination of the defence psychiatrist in *G Krishnasamy Naidu v PP* [2006] 3 SLR 44 at [204]–[206].

21 The author knows of no jurisdiction which does not contain a mental disorder defence of some kind or other.

often the case that a particularly brutal and senseless killing invokes in us, at the same time, both condemnation – of someone who can be so evil as to do such a thing – and compassion – that no sane person would have behaved in that fashion. Thus, the law strikes a compromise and draws a line vague enough to evolve with changing conceptions of what mental disorder is and when it ought to excuse. Happily or unhappily, that is perhaps the best we can do in terms of defining when mental disorders should excuse,[22] unless and until we can make some headway towards resolving the twin uncertainties of the science and the law.

7 In the author's view, these uncertainties lie at the heart of a recent and remarkable prosecution where the Court of Appeal disagreed with the trial judge on a finding of diminished responsibility in the context of "morbid jealousy". Krishnasamy Naidu was charged with the murder of his wife. She had had a string of sexual liaisons with a number of men, and each time there was an escalating cycle of violence – she would deny the affairs only to be beaten into admitting them by the husband, he would then forgive her and they would live in apparent harmony for a while until the next affair. Ultimately, he stabbed her to death when he could no longer beat a confession out of her because of a personal protection order. Woo J in a very precise and clinical judgment[23] ruled that although he thought that the accused was suffering from "morbid jealousy", and, therefore, the first element of "abnormality of the mind" was satisfied, he did not think that this particular mental disorder produced an effect on the mind of the accused sufficient to substantially impair his responsibility. The reason was obvious – what the accused had done was not in any way particularly exceptional in the context of the history of infidelity in the relationship. There was little to distinguish between the accused and someone who was normally jealous.[24] Choo J, who wrote the judgment

22 The elegant minimalism of Macaulay's original draft (*Introductory Report Upon the Indian Penal Code* 1837), which is certainly no worse than the current definition of unsoundness of mind or diminished responsibility, is, in the author's view, better in the sense that it does not try (in vain) to focus on the specifics of mental disability and responsibility which we cannot at the moment resolve: "Nothing is an offence which a person does in consequence of being mad or delirious at the time of doing it." See, however, the contrary and more optimistic view of Stanley Yeo, "Improving the Determination of Diminished Responsibility" [1999] SJLS 27, who feels that things will improve if courts paid more attention to the precise requirements of the defence. However, if that could realistically be done, it would likely have already been done – lawyers need no reminding to pay attention to statutory language, and when they do not, there is likely to be a good reason why.

23 *PP v G Krishnasamy Naidu* [2006] 3 SLR 44.

24 Woo J's conception that what happened in this case was not at all abnormal should have opened up the possibility of the accused using the alternative defence of provocation (Penal Code (Cap 224, 1985 Rev Ed) s 300,exception 1) – that the deceased's history of infidelity had provoked him to kill. But it was apparently unavailable because there was a significant time gap between the last act of provocation and the killing – the provocation, no matter how intense and

(*cont'd on the next page*)

for the Court of Appeal,[25] thought otherwise – someone who suffers from morbid jealousy, and who killed out of that jealousy, must necessarily have had his mental responsibility substantially impaired. The truth is that it is impossible to decide which court was right given the apparently uncertain state of psychiatric knowledge on the disorder. It appears that certainly not all who suffer from morbid jealousy kill, so to what extent do they retain the power of self-control? Woo J thought that although he was willing to believe that the accused was abnormally jealous, there was nothing to indicate the extent to which it had affected his power of self-control – was he asking too much of psychiatry? Choo J felt that as morbid jealously is a major mental illness, it must somehow have had the effect of substantially affecting his power of self-control –was he asking too little?

8 This does not mean that we ought simply to wring our hands in despair. Although there does not appear to be much we can do about the definition of diminished responsibility, there is much else we can do to make the best of a less than satisfactory situation – and to these other issues we now turn.

III. "Abnormality of mind: Who says?

9 Most contentious cases never actually get to the second element of substantial impairment. Almost all diminished responsibility pleas fall by the wayside of the first element of an "abnormality of mind". If the prosecution or government psychiatrist accepts that the accused is suffering from a serious mental disorder, then the charge will be, or will be reduced to, one of culpable homicide not amounting to murder. The accused will normally be so relieved to have escaped a murder conviction that he or she will usually plead guilty, and the only remaining issue will be the question of sentence.[26] It is only when the prosecution psychiatrist is unpersuaded, and when the Defence manages to procure an expert to testify in contradiction to the prosecution psychiatrist, that the case becomes contentious.[27] This is the scenario much dreaded by judges, and for good reason. The reason why psychiatrists are permitted to testify in the first place is that judges are untrained in psychiatry and not sufficiently familiar with the expertise

prolonged would not have been "sudden" as required by the Penal Code. It is unfortunate that the unduly parsimonious formulation of the defence of provocation made it necessary for diminished responsibility to do the work of giving a way out of a murder conviction for an obviously "meritorious" offender.

25 *G Krishasamy Naidu v PP* [2006] 4 SLR 874.

26 See the brief description of the difficulties of diminished responsibility sentencing in n 16.

27 This issue is discussed in greater technical detail in Michael Hor, "When Experts Disagree" [2000] Singapore Journal of Legal Studies 241.

to make the relevant inferences as to whether or not the accused is suffering from a *bona fide* mental disorder.[28] Yet in a situation where two experts clash, the judge is expected to be able to tell which of them has the better opinion.

10 What tools are available to assist the essentially amateur judge in performing this task? If we look at the reported decisions, we find a dismal procession of prosecutions where the defence psychiatrist ends up being disbelieved.[29] Obviously the judges are using some sort of criterion – but what? It is here that what the courts say they are doing is not particularly helpful. The professed grounds for a court almost invariably believing in the prosecution psychiatrist are many, but most, if not all, bear the marks of being *ex post facto* excuses rather than real reasons. Save for the most clear-cut of cases, where perhaps the Defence is only putting up a token plea, the truth of the matter is that the judge has no sensible way of deciding between two plausible expert views.[30] One can only surmise that the criterion being used by judges to prefer the prosecution psychiatrist over the defence psychiatrist is what could be called a presumption of prosecution expert reliability, or to put it another way, a presumption against defence expert reliability. In short, the prosecution psychiatrist is preferred simply because the Prosecution has called for his or her expert evidence. This in turn rests on certain assumptions about either expert. To make the point starkly, the prosecution psychiatrist is seen to be neutral, a government officer with nothing to gain or lose by the way he or she testifies. The defence psychiatrist, on the other hand, is seen as partisan, someone whom the Defence has been able to persuade to come to court to testify in its

28 It is a theoretical possibility that a judge might be faced with only one expert witness testifying either for or against a defence of diminished responsibility (or perhaps with no expert witness at all). Those situations are rare indeed in practice – and one might go so far as to say that if a serious issue of diminished responsibility arises on the facts, it would be rather derelict of either the Prosecution or the Defence not to bring in expert witnesses. In such situations, it might be thought that the suggestion here that the court should have the power to appoint a neutral expert is all the more urgent.

29 In close to half a century of the use of diminished responsibility in Singapore, there has only been one clear reported case of the court preferring the testimony of the defence psychiatrist – the case of *PP v Juminem* [2005] 4 SLR 536, discussed below.

30 It is true that, in theory, the judge may test the opinion of the experts against other evidence adduced in the trial. If, for example, one expert bases his or her views on a particular fact which, on the evidence, the judge finds not to exist, then this would be good grounds to prefer the opposing expert. This kind of situation does happen, but usually not when the experts are competent. A closely-related problem is that the facts a psychiatrist might rely on in forming an opinion – for example, that the accused was hearing a disembodied voice telling him or her to do something – is notoriously difficult for both the psychiatrist and the judge to assess, for it boils down to whether or not the accused's self-report of his symptoms is fact or fabrication. This would technically bring the rule on the burden of proof (discussed below) into play and again the accused will be the loser.

favour, perhaps even reluctantly. It is not that this is never the case,[31] but to apply such assumptions to every situation, as it appears to have been done, is dangerous. Psychiatrists, like all professionals, cannot be entirely free from intellectual bias of some kind. It must be that psychiatrists, like lawyers and judges, are only human and known to favour or disfavour certain views and judgments. Compound that with the uncertainty of the science and we can clearly see the folly of assuming that prosecution psychiatrists are always to be preferred. Likewise, it is no less unsafe to assume that all defence psychiatrists will somehow twist or massage the facts or the science to suit a plea of diminished responsibility.

11 Nor can the judges be blamed if they do make such assumptions. The rules governing expert testimony force them to choose between two conflicting psychiatric opinions. It would not be much less ludicrous for a judge to either presumptively prefer the defence psychiatrist, or to use no presumptions at all – how then will the judge decide? Bricks, it is written, cannot be made without straw.[32]

12 A word needs to be said about the two recent cases in which the plea of diminished responsibility actually succeeded, apparently against all odds. *G Krishnasamy Naidu v PP*[33] is not really a typical situation of a government psychiatrist testifying for the Prosecution and another psychiatrist in private practice testifying for the Defence. The peculiar feature in this case is that it was the government psychiatrist first assigned to the accused who supported the plea of diminished responsibility. The Prosecution was apparently not satisfied, perhaps on grounds similar to the ones which moved the trial judge. It was the Prosecution who had to go shopping around for another psychiatrist. The real "breakthrough" was in *PP v Juminem*[34] where in a "head on" clash, the trial judge preferred the testimony of the defence psychiatrist. Although this is all very refreshing, what are we to make of it? It is not at

31 Much is made of the fact that the defence may well "shop around" for a favourable psychiatrist until one is found. However, at least this author knows precious little about how government psychiatrists are chosen for particular offfenders. It is more than possible that an administrative quirk could make the difference between life and death for the offender – if, for example, in *G Krishnasamy Naidu v PP* [2006] 4 SLR 874, described below, the second government psychiatrist (who was of the view that the accused was not suffering from an abnormality of mind) had been the first one to be assigned to the accused, the other more favourable opinion of the other government psychiatrist (who by a stroke of luck was chosen first) would never have surfaced – with the result that the defence would almost certainly have failed. One can only wonder how many accused persons have been executed because they were simply unlucky to have been assigned a particular government psychiatrist.

32 Exodus 5.

33 [2006] 4 SLR 874.

34 [2005] 4 SLR 536.

all clear what was so special about *PP v Juminem*. This is certainly not to imply that the trial judge was wrong to choose the defence psychiatrist, but only that there seems to be no convincing reason why trial and appeal judges in all the previous contentious reported cases for almost 50 years have decided otherwise. Could it be that at least one judge is signalling that he no longer abides by the usual assumptions? If so, what other criterion is he going to use? It also remains to be seen whether his brethren will follow his lead.[35]

13 It is here that both professions – the legal and the psychiatric – have to talk to each other and come up with more creative solutions. The prevailing "adversarial" philosophy of pitting one expert against another, useful as it is in some situations, and unavoidable as it is in others, plays out pretty pathetically in the context of diminished responsibility. It is beyond the scope of this discussion to offer a detailed alternative acceptable to all parties. Here, only a rough example is offered – that of a "neutral" court-appointed expert, or better still several experts, chosen from a panel of respected psychiatrists. This

35 One factor much relied on in the cases rejecting a plea of diminished responsibility is "planning and rational behaviour" in the course of the killing. In *PP v Juminem* [2005] 4 SLR 536, the Prosecution unsurprisingly pressed upon the court that the two accused persons had planned the killing and even faked a robbery to throw the police off the scent. Choo Han Teck J displayed an admirable openness of mind in holding that a person with a depressive disorder "did not necessarily lose their capacity to think nor would they necessarily lose the ability to carry out complex tasks". Someone with an abnormality of mind in the form of a depressive disorder need not, according to his Honour, be "stark raving mad". Yet how is the court to tell apart a rationally behaving person who is suffering from a depressive disorder and one who is not. Common sense seems to tell us that an abnormal mind must express itself in abnormal behaviour. Choo J was evidently aware of this apparent and handy touchstone of sanity for he went on to say that "evidence of planning cannot be lightly dismissed". If rational behaviour can be this or that, it can no longer be evidence of sanity or otherwise – why indeed can it not be dismissed? It is interesting that in the later Court of Appeal decision in *Took Leng How v PP* [2006] 2 SLR 70 where yet again the plea of diminished responsibility was rejected and the defence psychiatrist disbelieved, the portion of Choo J's pronouncements quoted was the observation that "evidence of planning cannot be lightly dismissed". This author is not at all confident that the Court of Appeal as constituted in *Took Leng How v PP* would have been quite so sympathetic to Juminem's plea of diminished responsibility. The reason why an appeal was not pursued by the prosecution in *Juminem* is not in the public domain. A peculiarity in *PP v Juminem* is that the prosecution psychiatrist (through no fault of his own) was not aware of the existence of a diary kept by the accused when he first interviewed the accused. It would be a pity if this decision were to be explained away entirely on this basis. It is suggested that it was a clash of experts nonetheless as the prosecution psychiatrist maintained his opinion even after he was made aware of the diary, and he testified to that effect at the trial. If he had thought that a further interview was necessary, it was open to him to have requested it. No doubt, a strategic lesson to be learnt from this case is that, if a similar situation were to present itself, the prosecution psychiatrist should conduct another interview whether or not he feels it is necessary or desirable.

neutral expert or committee of experts will study the report or testimony of both prosecution and defence experts,[36] and perhaps even commission further investigations and interviews in order to make a reasoned representation to the court.[37] Just as the most respected of the legal profession are appointed as judges to resolve disputed questions of law, so too should our most respected psychiatrists be heard on contested diagnoses of mental disability. The judge, for constitutional reasons, may be left with the final decision, but at least there will be material beyond the two diametrically opposed opinions of the experts called by the parties.[38]

14 Lawyers need to abandon their adversarial fetish – satisfactory adjudication of a plea of diminished responsibility is not about who has the better performing expert, but about whether or not the accused was actually suffering from serious mental illness. Once the "trial by combat" attitude is gone, the psychiatrists will not feel the pressure to present their opinions, as one would suspect they are now tempted to do, in very categorical terms – either in favour of or against a diagnosis of mental illness. What the court needs to hear is their real unadorned opinion – what they are certain of, what they merely suspect and what doubts remain even after they have reached a conclusion.[39]

---

36 That the Defence should retain the right to call its own expert is clear, for the latitude given to the accused as to the conduct of his or her defence should not be taken away unnecessarily. At the very least, the participation of a defence expert cannot harm the integrity of the proceedings.

37 Choo J was obviously not very happy with the expert evidence in *PP v Juminem* [2005] 4 SLR 536 at [23] although he was careful not to blame the doctors. His Honour was less than happy that both psychiatrists spent only two hours each with the accused, could not communicate with the accused in a language which the accused was proficient in and conducted their interviews in less than ideal circumstances. Yet, under our present adversarial practice, he had no choice but to make do with the evidence presented. Our notional expert panel could be given the power to correct these shortcomings.

38 This is not an easy solution, but it will be a significant improvement to what we are doing now. For example, the issue of whether the expert panel can be cross-examined will have to be settled. The author's own preliminary view is that the neutral expert plays a role closer to that of a judge than a witness – judges of course cannot be cross-examined. In any event, the judge retains the ultimate power to decide, a decision which is appealable. Practical difficulties may also attend the task of constituting the expert panel – which might be complicated by the parties trying to get onto the panel a psychiatrist whom they think will be favourable to them. The same dynamics also affect the constitution of a judicial tribunal, but we somehow manage acceptably.

39 The judges are partly to be blamed for this kind of "defensive testimony" – they have been known to nit-pick on seemingly inconsequential "lapses". In *Lim Chwee Soon v PP* [1997] 2 SLR 60, the defence psychiatrist, Dr Douglas Kong, was taken to task for using phrases like "suggestive of", "would appear to be exhibiting", "not inconsistent with" and the like – needless to say, the court chose to reject his evidence. Dr Kong is none other than the ground-breaking defence expert who persuaded the court in *PP v Juminem* [2005] 4 SLR 536 several years later. Gone is

(*cont'd on the next page*)

IV. When in doubt – convict?

15 There is one other device which the law prescribes for cutting the knot of conflicting expert testimony – and this is the "burden of proof". The law provides for a situation where the evidence adduced or testimony presented does not end up in a clear picture of what happened – the party which bears the burden of proof loses. It has been the consistent holding of the court that for diminished responsibility, the burden of proof is on the accused who must prove on a balance of probabilities that he was labouring thereunder.[40] If what has been said about clashing expert testimony is true – that it will be unusual if one psychiatrist will be clearly more convincing than another, then the Defence will never in the normal course of events ever be able to prove that its psychiatrist is to be believed over the prosecution psychiatrist. The pathetic record of defence success might be attributable to this technical rule of evidence, and if indeed that were the case, there must be something wrong with it. It just makes no sense for the law to give the defence with one hand, and then to take it away in practice with the other. It is not known to what extent this rule of evidence has actually influenced the phenomenon of courts "rejecting" defence expert testimony, but the court has certainly used it, if only rhetorically, in support of its conclusions.[41]

16 What then is to be done? The simple answer is that the issue of diminished responsibility is to be treated no differently from any other element of the crime. Just as the burden is on the Prosecution to prove beyond a reasonable doubt that the mental and physical elements of a crime are present, so too must it prove that the accused was not labouring under diminished responsibility. To put it another way, the accused is entitled to an acquittal for murder if reasonable doubt exists

---

the tentative language, but one wonders whether the earlier more circumspect Dr Kong was the more forthright one.

40 This is simply stated as a fundamental truth in all the cases which have had anything to say about it – for just one example, see *Took Leng How v PP* [2006] 2 SLR 70 at [56]. This is discussed in some detail in Michael Hor, "The Presumption of Innocence – A Constitutional Discourse for Singapore" [1995] SJLS 365 at 376–378.

41 The phrasing of the precise finding of the trial judge in *Took Leng How v PP* [2005] 4 SLR 472 is instructive. Lai Kew Chai J first held that the accused had "failed to prove on a balance of probabilities" that he was suffering from a mental disorder. His Honour also went on to hold that the accused "was not suffering from an abnormality of mind". The burden of proof being on the accused, there was no need to make an affirmative finding that the accused was not suffering from a mental disorder. It almost seems to be that the judge, someone of unmatched experience on the bench, was not altogether happy to say that the defence was rejected because he was not sure (as he was entitled and bound to do under the law) – he appeared to have been moved by the additional ethical duty to say that he believed that the accused was not suffering from a mental disorder.

as to his or her mental responsibility. There is just no reason for diminished responsibility to be treated any differently.[42] It must also be ethically troublesome to some that our law prescribes the death penalty for someone about whom there is reasonable doubt concerning his or her mental responsibility, and it is to the brooding presence of the death penalty that we finally turn.

V. A matter of life and death?

17 Perhaps the most important factor in the diminished responsibility equation is given only a passing mention in almost all court judgments. Like some ominous deity, it is never seen but ever present. It is hard to escape the feeling that the fierce forensic battles that are fought over diminished responsibility are fuelled by the very high stakes that are involved. It literally is a matter of life and death – a successful plea relieves the accused of a mandatory sentence of death. The whole idea of a mandatory death sentence has come under heavy criticism internationally with a number of leading constitutional courts looking with distinct disfavour on it. It has been challenged without success in Singapore, but the unease is not likely to die down.[43]

18 One might have thought that for anyone to be ethically comfortable with a mandatory death penalty, one has to be very sure that the prerequisite processes which precede it are almost watertight. Only those against whom the mental and physical elements of the crime

42 The Court of Appeal decision in *Took Leng How v PP* [2006] 2 SLR 70 is a good illustration of how counter-intuitive our law on the burden of proof is. There were two live issues on appeal – whether or not the accused was suffering from a mental disorder, and whether or not it was the accused who caused the death of his alleged victim. On the second issue of causation, the court described the burden on the Prosecution to prove guilt beyond reasonable doubt as a "fundamental principle" – and Kan Ting Chiu J (dissenting on this point) would have given the benefit of the doubt (that the victim could possibly have died in the course of a fit and not because of injuries inflicted on her by the accused) to the accused. In the same breath, as it were, the court could say, without batting an eye, that it was "trite" that the accused "must satisfy" the court that he was suffering from an abnormality of mind. What then is the "fundamental principle" which says that an accused person for whom reasonable doubt exists as to whether he caused death is to be acquitted, but which at the same time decrees that an accused person for whom reasonable doubt exists about whether he is suffering from mental disorder is to be treated as if he does not so suffer, and so suffers the penalty of death?

43 The courts have had to deal with a constitutional challenge twice – once in *Ong Ah Chuan v PP* [1980-1981] SLR 48, and once more in *Nguyen Tuong Van v PP* [2005] 1 SLR 103. The result was the same in both cases – the mandatory death provisions survived the attack – but in the intervening 25 years, an unremarkable if not entirely convincing stand had become an embattled one. The use of the death penalty in Singapore is discussed in Michael Hor, "Death, Drugs, Murder and the Constitution" in *Developments in Singapore Law 2001–2005* (Singapore Academy of Law, 2006) ch 11.

are proven are to be subject to it. All who are entitled to a defence afforded by the law are to be exempt from it. Yet, if there is any substance at all to the discussion that has gone before, it is patently not the case under our present rules and practice of criminal law and procedure. The uncertainty of the science combined with the prevailing presumption of prosecution psychiatrist reliability and the rule that it is the Defence who must prove diminished responsibility conspire to create a very real possibility that someone who is indeed of diminished responsibility might very well be made to suffer death – for a successful plea, even for the deserving, and even with the two recent defence-favourable decisions, is still very much of a gamble.

19 The cases which are particular disturbing are those where someone with no ostensible record of mental disease simply goes berserk and kills under circumstances in which no normal person would kill. Some prominent examples have been listed earlier. The law very conveniently proclaims that it is not necessary to prove motive to establish murder. That may well be so, but surely the absence of any remotely rational motive must, at least in almost all cultures and societies (and certainly ours), indicate very strongly that the accused must be suffering from some kind of mental disorder. Psychiatrists at trial then argue over whether the accused comes under one of the recognised categories of mental illness, as they must, to be true to their science. The prosecution psychiatrist will say that the accused is absolutely sane or that he or she is only mildly disturbed, because not enough of the published diagnostic criteria are satisfied. The defence psychiatrist often struggles to fit the accused into one of these "formal" classifications of mental disorders. The court disbelieves the defence psychiatrist because of this and the accused hangs. One cannot help but think that perhaps something has been missed – because not enough is known at the moment about that particular kind of disorder, or because the psychiatrist and defence counsel did not present their arguments in a way which appealed to the judge.

20 That which ought to be done is again very simple, and that is to lift the mandatory sentence of death, thereby freeing the court to exercise a discretion in sentencing.[44] The court may then give effect to the intuition that "something has been missed", although the accused does not seem to fit neatly into any recognised mental disorder. The sentence of death can then be avoided, and the accused incarcerated,

44 This possibility is not at all fanciful – Macaulay's draft did not have (and the parent Indian Penal Code has never had) a mandatory death penalty for murder. It is unknown till this day why it was changed on the passage from India. The discretionary death penalty for kidnapping under the Kidnapping Act (Cap 151, 1999 Rev Ed) has also worked out without difficulty, and without any apparent detriment to the cause of deterring kidnapping.

perhaps with the liberty of resurrecting claims of mental disorder in another forum when the science catches up. All this is of course futile if we insist on executing the accused with dispatch. It is true that a discretion might also be exercised for the undeserving, as well as the deserving. If indeed the particular accused is malingering, it is no great danger to society that he or she is not executed, for it is not conceivable that someone who kills, albeit under suspicion of mental incapacity, will, for a very long time, be allowed to roam the streets unfettered. But it is a great ethical cost indeed if we execute someone who the science of psychiatry might one day deem to be suffering from a recognised mental disorder.

21 The imposition of the death penalty, and in particular a mandatory one, rests on assumptions of process-infallibility, or near infallibility – that we always, or almost always, get our judgments, both psychiatric and legal, about diminished responsibility right. What this article has tried to show is that there are now so many ways in which we can get it wrong. It is a posture of humility, and not arrogance, that we must adopt.