IN THE SEYCHELLES COURT OF APPEAL

FRANKY WALTER SIMEON **APPELLANT**

versus

THE REPUBLIC **RESPONDENT**

Criminal Appeal No: 7 of 2001

[**Before**: *Ayoola P., Silungwe & Pillay JJ.A]*

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Mrs. A. Georges for the Appellant
Mr. Anthony Fernando, Attorney General, for the Respondent
assisted by Mr. Basil Hoareau

JUDGMENT OF THE COURT

(Delivered by Silungwe, JA)

On October 13th, 2000, the appellant was arraigned for two counts of murder and, following his trial by jury, he was acquitted on those counts but convicted of manslaughter on both counts and sentenced to concurrent terms of 15 years' imprisonment. This appeal is against the said conviction and sentence.

The fundamental issues raised in this appeal are twofold:

(1) the presiding Judge's exclusion of an expert witness for the Defence to support the defence of non-insane automatism; and

(2) the presiding Judge's failure to forewarn the Defence of his intention to put to the jury the offence of manslaughter as an alternative, thus depriving the defence of the opportunity of addressing the issue as being one for the jury to consider.

At the outset, before the appellant's trial commenced, his learned counsel put it on record that the Defence intended to call a vital expert witness who was going to come to Seychelles for the purpose. Subsequently, at the close of the case for the prosecution, the leading Counsel for the Defence in her opening address drew attention to the provisions of section 10 of the Penal Code and indicated that it was a recognised defence that a person who is deprived of his ability to know what he does cannot be found guilty of a crime. She continued in these terms:-

> "What the defence evidence would show you is that (sic) because of Mr. Simeon's relationship and association with Mr. Raymond De Silva whom you will remember from the evidence of ASP Banane yesterday, left Seychelles the day after the incident at Basin Bleu; that following the association of Mr. Simeon with Mr. De Silva, Mr. Simeon started (sic: acting) strangely, very strangely.
>
> In fact, he kept acting more and more and more strangely. The defence is not saying that Mr. Simeon was practicing witchcraft and that it went wrong and that this is why he did all the things that he did at Basin Bleu. What the defence is saying and will bring evidence to put before you is that there is a well known explanation and you will hear expert evidence on that how Mr. Simeon did what he did as an automation under the indirect influence of another personality ..."

There is no dispute that Raymond has not returned to Seychelles since his departure from the country in October 2000.

It is common cause that the appellant put forward a defence of "*non-insane automatism*" and sought to adduce expert evidence to show that the killings had occurred "*independently of the exercise of (his) will*"; in other words, his acts had been involuntary.

The facts of the case are essentially not in dispute. The appellant is a duly qualified Attorney-at-Law; and his two victims were: Marie Celine Jacqueline Pamela Pouponneau, his girlfriend/partner with whom he had cohabited for four years and had two children: Tania, a daughter; and Kurt, a son; and Greta Simeon, his mother. An associate of the appellant by the name of Raymond de Silva (Raymond) wielded what the learned presiding Judge termed "*a malefic influence on the accused*" which caused him "*to act in the manner that he did*" in killing his victims.

The appellant came to know Raymond when both attended: the same primary school; the same church; the National Youth Service; and the polytechnic. Upon completion of their A-Level education, both went in different directions in pursuit of tertiary education: the appellant went to Mauritius where he qualified as a Barrister, whereas Raymond went to Australia and there studied international affairs.

When the appellant returned to Seychelles in 1995, he joined the Attorney General's Chambers and, following his admission as an Attorney-at-Law, he went into Private Practice. He was devoted to his mother whom he desired to repay for having sent him to school and sustained him through thick and thin. Their concern and care for each other was mutual.

The appellant lived with his partner, Pamela Poponneau (Pamela) and his two children; and he was devoted to them all. His plan was to enter into holy matrimony with Pamela.

After graduation, Raymond, who was a brilliant scholar, and is characterized as a liar and selfish man, returned to Seychelles; taught at a

primary school; was unemployed for a while; sold fruits and vegetables at Victoria Market; and occupied several important positions in Government, for instance, as second secretary in the Ministry of Foreign Affairs. The learned presiding Judge described him as a "*very unsettled man.*"

During August and September 2000, Raymond and the appellant "*got closer and closer*" and spent more time together. He had lengthy discussions with the appellant about "*righteousness, apocalypse, retired slaves, etc.*" Further, they listened to reggae music which had to do with retired slaves. Raymond was carrying a "*white magic book*" with him. As a result of Raymond's influence over the appellant, the latter started divesting himself of all material possessions: he closed his bank account; he transferred all his money into Pamela's bank account; he gave away his wrist watch, mobile phone, chain and tie, as Raymond had persuaded him to believe that: anyone wearing a wrist watch "*was a slave to time*"; anyone using a mobile phone "*was a slave to information technology; (the) wearing (of) a chain signified vestiges of slavery; and (the) wearing (of) a tie "was tantamount to having a noose around one's neck.*"

Although the appellant was a man of "*very strong character and personality*", he became "*very passive and submissive*"; and "*weak-minded*", towards the end of September 2000. He even contemplated giving up his private practice upon Raymond's advice and reference to him as the "*devil's advocate.*" He wrote to the Registrar of the Supreme Court requesting that he be removed from a list of attorneys that provide legal aid services; and sought sabbatical leave of two weeks in order to make up his mind whether or not to continue as a lawyer; and to utilize that time "*for his own spiritual healing.*" In his summing-up, the learned presiding Judge told the jury that

the appellant had "*seriously contemplated abandoning everything to become a disciple of Raymond.*"

At the beginning of October 2000, the appellant spent a few days together with Raymond. According to his testimony, whilst cycling along a road on La Digue island, he saw people with "*demonic faces.*" Even tourists "*on the beach*", he continued, appeared to him "*with faces protruding canine teeth.*" His evidence that Raymond had laid hands over his head and said a prayer in the sea was corroborated by an eye witness.

One Saturday evening, the appellant was observed crossing a street, naked, and holding two men under his firm grip whom he was leading into the sea. As luck would have it, these men managed to break free, one of whom – Patrick Henriette – later testified that the appellant was possessed of enormous physical strength and that "*his eyes were red like fire.*"

As those close to the appellant (including Pamela and his mother) noticed that he was agitated; he could not sleep; he was walking about naked; and he was saying things that made no sense, they understandably became concerned over the state of his health.

On the fateful day – October 9, 2000 – the appellant's mother took him to a witch doctor in the belief that he was "*possessed*" (of an evil spirit). Consequently, the appellant had at least three herbal baths. Upon the witch doctor's advice, the appellant's mother took two large knives belonging to Gisele Sinon, her niece, and placed them criss-cross on the threshold of a door of her house. That evening, the appellant was "*definitely unwell*"; he was sweating and shaking; the whole family rallied around him with great concern, some of whom were even praying for him. As he could not bear to see anything red, he requested that everything red in colour be removed

from his sight: this was done. Besides other demands that he made, he had mirrors in the house covered. At his bidding, a music set was brought in but he could not press a "*play*" button unaided. Thereafter, as the appellant started to dance to reggae music, his legs moved "*mechanically*" and his trembling hands got locked over his head.

Subsequently, the appellant, after calling Pamela from his room without any response, came into a kitchen where she was and dragged her into the room. Moments later, Pamela was seen running into the kitchen, naked, but the appellant, who was hot on the heels, dragged her back into the bedroom. According to the testimony of Trevor Gregory Pouponneau, Pamela's then 14 year old son, the appellant was trying to force Pamela to have sexual intercourse. This piece of evidence stands alone.

Presently, the appellant seized the two knives that had been placed at the door's threshold and, holding them in his hands, he thrusted them into Pamela's back. Although Christophe Larue jumped over the appellant in order to restrain him from stabbing Pamela, his efforts were to no avail as the appellant overpowered him. Christophe observed that the appellant's face was (inexplicably) swollen and his "*body muscles*" became more prominent. When the appellant's mother, Greta, saw Pamela being stabbed, she intervened in order to rescue her but she too was set upon and stabbed by the appellant; he killed both of them.

Dr. Pasupathy Thanikachalam, a Pathologist who conducted post-mortem examinations on the bodies of Pamela and Greta, testified that Pamela had sustained at least twenty stab wounds all over her body: on the face, back, arm, chest and near her private parts; the cause of death was a stab injury to the heart. With regard to Greta, she had suffered five stab

injuries to her body one of which had cut her throat – that was the fatal injury; the other injuries were "*defensive injuries*" to her hands.

What is set out above is the basic scenario upon which the appellant's defence of non-insane automatism was premised. This defence is undoubtedly the core issue of the entire case.

Rather fortuitously, both the Prosecution and the Defence were at the outset *ad idem* that the now appellant was either guilty of murder or of nothing at all. Hence, it is little wonder that the Defence were hellbent on calling the expert witness to prop up the appellant's defence of non-insane automatism. And, in a somewhat similar vein, the learned presiding Judge, in his summing-up to the jury, expressed himself in these words:-

> "I believe I must point out to you why the defence of non-insane automatism has been raised on behalf of the accused. It is because if it succeeds the accused would be entitled to an outright acquittal."

The defence of non-insane automatism features in the appellant's grounds 2, 3, 4, 5, 6 and 7 of the appeal. The gist of grounds 2 and 3, read together, is that:-

> "The learned Chief Justice erred in law in rejecting the proposed expert testimony sought to be adduced by the appellant; and in withdrawing the issue of non-insane automatism from the jury's consideration."

It is common cause that when the Defence sought to call the expert witness on the premise that evidence of insane or non-insane automatism is a

concept which is outside the ordinary experience of jurors, the prosecution raised an objection, contending that:-

> "[A]lthough expert psychiatric evidence is usually a practical necessity in order to prove insanity or diminished responsibility it is not permissible to call an expert witness to state how, in his opinion, an entirely normal defendant's mind operated at the time of the alleged crime with regard to the question of intent."

In upholding the objection, the learned Chief Justice ruled that:-

> [I]t is unnecessary to prove the intention of a normal person by expert evidence. This is a matter well within the capacity of jurors to determine unaided by expert opinion evidence."

Arguing this appeal, Mrs. Georges strenuously contends that the defence of automatism, whether insane or non-insane, does not lie within the ordinary knowledge or experience of a lay person (such as a juror in this case). Hence, she continues, expert evidence is admissible to assist the fact-finder in drawing inferences in areas where an expert witness has relevant knowledge or experience beyond that of a lay person to show, as in the present case, that the now appellant was at the material time suffering from a condition of involuntariness which was not the product of a mental disease. She further argues that, in order to displace the presumption of mental capacity, it is usually insufficient for an accused to assert that his acts were involuntary in that expert evidence is necessarily required before an issue of non-insane automatism can be left with the jury. In support of her contention that expert evidence is admissible on the issue of "*voluntariness*", she draws attention to a catalogue of cases, including, for instance:

- **Bratty v Attorney General** (1963) AC 386;
- **R v Quick and Paddison** (1973) 57 Cr. App. Rep. 722;
- **R v Lavallee (1990)** 1 SCR 852;
- **The Queen v Falconer** (1990) 171 CLR 30;
- **The Queen v Kenneth James Parks** (1992) 2 SCR 871; and
- **Farrel v The Queen** (1998) HCA 50.

To show that non-insane automatism is a recognised defence, learned counsel for the appellant draws attention to, inter alia: **The Queen v Falconer** (supra) to which the trial Court was not referred; and **The Queen v Kenneth James Parks** (also supra). She thus maintains that the learned Chief Justice erred, not only in the exclusion of the expert witness from testifying for the defence, but also in the withdrawal of the issue of non-insane automatism from consideration by the jury.

The resolute stance taken by the learned Attorney General on the question of non-insane automatism is that the (alleged) defence is "*alien to the law*", contending that the appellant neither alleged that he was insane nor suffering from diminished responsibility at the material time. He asserts that expert evidence, being an exception to the hearsay rule, is only admissible in respect of a recognised or known science or art which is beyond the ordinary experience of judges and jurors: **Cross on Evidence**, 7th edition, page 491. For expert evidence to be admissible, he continues, it should be in relation to a defence which is recognised by law:

- **Rex v Kajuna Mbake,** East African Law Reports 1945 Vol. XII 104;
- **Eria Galicuwa,** East African Law Reports 1951 Vol. XIII 175;
- **Rudonviki**, Tanzanian Law Reports 1991 102;
- **Chard v R** (1971) 56 Cr. App. Rep. 268;
- **R v Turner** (1975) QB 834 at 841;
- **R v Wood** (1990) Crim. L. R. 264.

Expert evidence, claims the learned Attorney General, is not admissible to show the intention of an ordinary accused where no question of mental illness or abnormality is involved; and consequently, the appellant failed to "*come up with a recognisable legal defence.*" He further claims that section 10 of the Penal Code is applicable only to a case "*where the elements of non-insane automatism are satisfied.*"

One significant point that emerges from the Attorney General's argument is that, although he states on one hand that the appellant's defence of non-insane automatism is allegedly not legally recognisable, yet he acknowledges in the same breath that such defence is available in terms of section 10 of the Penal Code, provided the elements of the defence are satisfied.

Indeed, having made reference to **R v Bailey (1983) 2 ALL ER** and to section 10 of the Penal Code, the learned Chief Justice's charge to the jury proceeded as follows:-

> "By implication, it is a requirement of section 10 of the Penal Code that a person who is charged with an offence must lay the basis for the defence run on a balance of probabilities that negatives the requisite intention required for the offence.
>
> The law recognises the defence of non-insane automatism but in order for the defence of non-insane automatism to succeed the evidence must show that there was a loss of consciousness or awareness on the part of the accused which was caused by an external factor.
>
> The physical factor does not include supernatural, brain washing, psychological manipulation. I have been unable to come across any single case decided anywhere in any jurisdiction within the

> Commonwealth or elsewhere whereby psychological manipulation or brain washing, witchcraft or any supernatural means have been raised successfully in a defence of non-insane automatism. The jurisdiction in my mind for not incorporating psychological manipulation and brain washing within the ambit of the defence of non-insane automatism is clearly to prevent persons from avoiding the legal consequences of their action.
>
> Therefore, the fact that Raymond De Silva exercised a lot of influence on the accused person over a period of time can not be used as a defence by the accused because brain washing and psychological manipulation are not recognised defences by the law to negative mens rea or intention."

The fact that non-insane automatism was recognised in this case as a legal defence is not only critical but also judicially sound. There is a corpus of emerging authorities within the Commonwealth in support of the defence, prominent among them are:

- **R v Quick and Paddison** (supra);
- **R v Bailey** (1983) 2 ALLER;
- **The Queen v Falconer** (supra); and
- **R v Parks** (supra).

The term "*automatism*" connotes no wider or loose a concept than an involuntary movement of the body or limbs of a person: **Archbold, 43rd edition, paragraph 17-40.**

As a legal defence, non-insane automatism flows directly from section 10 of our Penal Code which is couched in these terms:

> "**10**. Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission

> which *occurs independently of the exercise of his will,* or for an event which occurs by accident."

(emphasis added).

For the defence to arise, it is cardinal that an act or omission occurs independently of the exercise of one's will, that is, where such act or omission is "*unwilled*" or "*involuntary.*" It follows that, under the Penal Code (in a homicide case), it is the death- causing act (or omission) which must be willed. Naturally, the notion of will imports a consciousness in the actor of the nature of the act as well as the choice to do an act of that nature. In **Regina v Radford** (1985) 42 SA SR 266, King CJ, made the following remarks:-

> "It is a basic principle of the criminal law that a person 'is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act.' If the actions which would otherwise amount to a crime are performed automatically and are not subject to the control and direction of the will, no crime is committed. The general onus which rests upon the prosecution in a criminal case extends, of course, to establishing that the acts said to constitute the crime were performed in consequence of the exercise of the will. The law recognises a presumption of mental capacity which is sufficient to establish that an accused person acted pursuant to an exercise of his will unless the presumption is displaced by evidence which leave the jury in doubt as to whether or not the actions were voluntary. The presumption does not affect the legal burden of proof which remains on the prosecution; it supplies, however, the place of evidence as to voluntariness unless displaced by actual evidence raising a reasonable doubt as to voluntariness."

See also the landmark case of **Bratty v Attorney-General for Northern Ireland** (1963) AC 386, per Viscount Kilmuir, L.C. at 407; and Lord Denning at 413.

The basis for the inference that an act done by an apparently conscious actor is willed or voluntary can be removed by evidence that the actor was not of sound mind, or was insane or was of sane mind but his act was unwilled when the act was done. As Lord Denning aptly observed in **Bratty**, at 409:-

> "No act is punishable if it is done involuntarily: and an involuntary act in this context – some nowadays prefer to speak of it as 'automatism' – means an act which is done by the muscles without any control by the mind, such as spasm, a reflex action or a convulsion or an act done by a person who is not conscious of what he is doing, such as an act done while suffering from concussion or whilst sleep-walking. The point was well put by Stephen J. in 1889: Can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing."

This is in keeping with the basic notion of criminal law, namely: that a person is responsible only for his conscious, voluntary and deliberate (or negligent) acts or omissions.

When an act is done by an apparently conscious actor, an inference that the act is willed must be drawn – not as a matter of law, but as a matter of fact – unless it can be shown that the actor, being of sound mind, has been deprived of the capacity to control his actions by some extraordinary event or unless the actor, being of unsound mind, has thereby lost the

capacity to control his actions. See **The Queen v Falconer,** (supra). Thus a man who is incapable of exercising the power of determination or choice due to mental disease or natural mental infirmity should be treated on the same basis as a man who does an act independently of the exercise of his will. In other words, an accused's involuntary act can arise by reason of mental disease or natural mental infirmity or by reason of the operation of the events upon a normal (sane) mind.

Hence the learned trial Judge's direction that:

> "The fact that Raymond De Silva had exercised a lot of influence on the accused person over a period of time cannot be used as a defence by the accused because brain washing and psychological manipulation are not recognised defences by the law to negative mensrea or intention"

failed to address the fundamental issue, namely: whether the defence evidence had raised a reasonable doubt in relation to the defence of non-insane automatism to warrant the defence being left to the jury.

On the basis of the foregoing discourse, it is evident that, where the defence of non-insane automatism is raised, premised on a malfunctioning of the mind of a transitory nature caused by the application to the body of some external factor, the use of descriptions such as: psychological manipulation, brain-washing, sleepwalking, personality disorder, dissociative state, hypo-gycaemia, physical trauma, et cetera, should not be allowed to obscure the fact that, in terms of section 10 of the Penal Code, the fundamental question is whether the act or omission in respect of which the accused has been charged occurred independantly of the exercise of his will.

In **Kenneth James Parks** (Supra) LA Forest, J., referred to the following quantum by Martin J.A., in **Rabey v The Queen** (1977) 37 C.C.C. (2nd) 461 at 477-78:

> "In general, the distinction to be drawn is between the malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factor such as, for example, concussions. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a disease of the mind if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind ..... particular transient mental disturbances may not however be capable of being properly categorised in relation to whether they constitute 'disease of the mind' on the basis of a generalised statement, and must be decided on a case by case basis."

When a defence of non-insane automatism is raised by the accused, it is incumbent upon the trial Judge to determine whether the defence should

be left to the trier of fact. In doing so, the Judge must determine whether there is some evidence on the record to support leaving the defence with the Jury. In other words, the defence must lay a proper foundation. It is not enough for an accused *merely to assert that his acts were involuntary* or that *he suffered a loss of memory.* Thus, evidence of his condition at the time of the alleged offence, supported by some expert medical opinion, will be required before an issue of non-insane automatism can realistically be said to be raised. In setting up a defence under section 10 of the Penal Code, an accused does not have to prove his condition on a balance of probabilities in order to succeed; he merely has to raise a reasonable doubt that his actions were the result of an involuntary reaction of a same mind. See **Falconer; Kenneth James Parks; Bratty,** at 413 supra..

If a proper foundation is present, the trial Judge must consider whether the condition alleged by the accused is, in law, non-insane automatism. If the Judge is satisfied that there is some evidence pertaining to a condition that amounts to non-insane automatism, then the defence can be left to the Jury. See **Rabey v The Queen** (1980) 2 SLR 513 at 519. The issue for the Jury is one of fact: did the accused suffer from, or experience, the alleged condition at the material time? As the prosecution must always prove that an accused acted voluntarily, the onus rests upon it at this stage to prove the absence of automatism beyond a reasonable doubt.

If the conduct which might otherwise be criminal is involuntary (non-insane automatism) the accused is entitled to an outright acquittal unless the involuntariness results from a disease of the mind (insane-automatism). If it results from a disease of the mind, the accused is not guilty by reason of insanity, but this is followed by detention at the President's pleasure for the purpose of safety and treatment.

A useful warning was sounded by *Dickson J.* **Rabey** at 546:

> "There are undoubtedly policy considerations to be considered. Automatism as a defence is easily feigned. It is said that the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from psychological blow."

And at 552:

> "In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime that cannot be attributed to fault or negligence on his part. Such evidence should be interpreted by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to disease requiring detention and treatment." (Emphasis furnished).

We will now turn to a consideration of using expert witnesses in cases where automatism is raised as a defence either in a Jury trial (or before a Judge alone, where this is applicable).

With regard to Jury trials, the observations of Geoffrey Lane J, (as he then was) said in the course of argument in **Chard**, (supra), at 270, are instructive:-

> "[O]ne purpose of Jury trials is to bring the Jury or a body of men and women who are able to judge ordinary day-to-day questions by their own standards, that is, the standards in the eyes of the law of theoretically ordinary reasonable men and women. That is something which they are well able by their ordinary experience to judge for themselves. Where the matters in issue go outside that experience and they are invited to deal with someone supposedly abnormal, for example, supposedly suffering from insanity, or diminished responsibility, then plainly in such a case, they are entitled to the benefit of expert evidence. But where, as in the present case, they are dealing with someone who by concession was on the medical evidence entirely normal. It seems to this Court abundantly plain, on first principles of the admissibility of expert evidence, that it is not permissible to call a witness whatever his personal experience, merely to tell the Jury how he thinks an accused's man's mind – presumably a normal mind - operated at the time of the alleged crime with reference to the crucial question of what the man's intention was. As I have already said, this applicant was by concession normal in the eyes of the law."

Obviously, **Chard's** case is distinguishable from the matter now under consideration in one important respect: sanity was not only conceded, but it was also never in dispute. In the present case, however, the appellant maintains, as he has persistently done before, that although he was sane, the act of killing his victims had occurred independently of his will. In his summing-up, the learned Chief Justice succinctly encapsulated the appellant's position thus:-

> "The accused told you that he (sic) had no recollection whatsoever of killing Pamela Pouponneau and his mother. His mind was blank for a period of time. His power of recollection was restored when the police had arrested him. The accused even told you that when he received those shots he did not feel any pain."

In his judgment, LA Forest J. in **Kenneth James Parks** said:-

> "The evidence of medical witnesses with respect to the cause, nature and symptoms, of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterised from the medical point of view, is highly relevant to the judicial determination of such ... a condition."

Hill v Baxter (1958) 1ALLER 193 at 197 is to a similar effect as **Kenneth James Parks**. There, Devlin, J, expressed himself in these words:

> "I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent."

Lavelle, Patrick Joseph Byrne (1990) Cr. App. R. 246 at 253; **Stanley Ivan Smith** Cr. App. Rep. (1979) 276 at 385 are similarly to the same effect.

What the case law above serves to illustrate abundantly is that the defence of automatism, whether it be sane or insane (let alone that of diminished responsibility), is beyond the ordinary knowledge and experience of a juror or lay person: hence, the relevance of, and the need for, expert evidence to assist the trier of fact.

When the principles discussed herein before are applied to the present case, they lead to the conclusion that the learned Chief Justice was misled by the Attorney General and misdirected himself in excluding the expert evidence proposed by the Defence. The evidence was both relevant and admissible for the purpose of proving that, at the time of the killing of Pamela and Greta, the appellant was in a state of non-insane automatism. It is, of course, another question whether the evidence of the expert witness, taken together with the rest of the evidence, would have sufficed to operate in favour of the appellant.

In the circumstances of this case, objection should not have been taken by the Attorney General to the calling of an expert witness by the defence, particularly when neither the judge nor the prosecutor had any intimation or knowledge of the evidence that the witness would have given.

In any event, the refusal to admit vital expert evidence upon which the appellant's defence of non-insane automatism rested was in breach of his fundamental right to a fair trial in terms of Article 19 of the Constitution. In a recent case of **Jean Baptiste Serret v The Republic** Criminal Appeal No. 14 of 1995, (unreported) we held that:-

> "The right of an accused to a fair trial is a fundamental right enshrined in Article 19 of the Constitution and our Courts are bound to give effect to that constitutional requirement."

In the light of the wrongful exclusion of expert evidence for the defence, it is unnecessary for us to consider the withdrawal of the issue of non-insane automatism from the Jury.

Having thus disposed of the first fundamental issue in this appeal, we now turn to the second one; to wit:

> (2) The presiding Judge's failure to forewarn the defence of his intention to put to the Jury the offence of manslaughter as an alternative, thus depriving the defence of the opportunity of addressing the issue as being one for the Jury to consider.

As previously shown, the mutual positions of both the defence and the prosecution were that this was a case of murder or nothing else. A few minutes before the Jury were charged, both Mr. Fernando and Mrs. Georges, together with their assistants, appeared before the learned Chief Justice in Chambers where the learned Attorney General, in anticipation of a specific aspect of the summing-up, urged the learned presiding Judge not to raise the issue of diminished responsibility. The Attorney General

referred to Archbold, 43rd edition, paragraph 16-67; and to **R v Kooken** (1981) 74 Cr. App. Rep. 30 where the Court of Appeal had doubted whether the trial judge has a discretion to call evidence of diminished responsibility which was really an optional defence; and that it was for the defence to decide whether the issue was one for the Jury to consider. The Attorney-General further drew attention to the fact that the prosecution had not been given an opportunity to make submissions on the issue of diminished responsibility (not to mention the defence). After the learned presiding Judge had indicated to learned counsel that if it became necessary to call evidence in respect of diminished responsibility, the defence would be alerted, the Court session resumed and a summing-up was done during which the crime for murder and an alternative crime of manslaughter, predicted upon *diminished responsibility,* were left with the Jury. The Jury acquitted the appellant of murder on both counts but returned a verdict of manslaughter in respect of Pamela and Greta.

It is quite plain that both the defence and the prosecution were taken by surprise at the summing-up in respect of manslaughter as well as at the con-committant conviction.

In **R v Hazell** (1985) Cr. App. Rep. 513, the Court of Appeal held that:-

> "[I]f a trial judge intended in his summing-up to leave an alternative charge to a jury, he should warn counsel beforehand and give them an opportunity to make submissions and, if necessary, put argument before the jury."

See also **Kooken**, supra.

Clearly, failure by the learned trial Judge to alert learned counsel on both sides of his intention to leave the alternative crime of manslaughter with the Jury so as to afford them an opportunity to respond and, if necessary, to address the Jury on the matter was a fatal misdirection.

The conclusions we have reached on the two fundamental issues render a consideration of the remaining issues unnecessary.

For the reasons given, we are constrained to hold that we cannot apply the proviso to Rule 41(1) of the Seychelles Court of Appeal Rules as a substantial miscarriage of justice has occurred and that the conviction for manslaughter on both counts is unsafe and unsatisfactory and should be set aside.

Both sides agree that, in the event of the court allowing the appeal, a retrial for *manslaughter only* may be ordered, although Mrs. Georges has strenuously argued that we should simply quash the conviction and make no order for a rehearing, thus leaving the decision whether or not to prosecute the appellant again in the hands of the learned Attorney General. We take the view, however, that a rehearing of the case is called for in the interests of fairness and the integrity of the criminal justice system, especially since the merits of the appellant's defence of non-insane automatism was not properly dealt with during the trial process.

In the final analysis, we make the following order:

(1) The appeal against the conviction for manslaughter on both counts is allowed and the said conviction is accordingly set aside. Consequently, the sentence falls away;

(2) There shall be a rehearing on the two counts of manslaughter and for the avoidance of doubt, the appellant shall remain in custody pending his trial.

E. O. AYOOLA
JUSTICE OF APPEAL

A. M SILUNGWE
JUSTICE OF APPEAL

A. G. PILLAY
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 19th day of ***April*** 2002.