

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A),M. Twomey (J.A),J. Msoffe (J.A)]

CriminalAppeal SCA34/2015

(Appeal from Supreme Court DecisionCR4/2015)

Neddy Labrosse

Appellant

Versu
s

The Republic

Respondent

Heard: 02 August 2017

Counsel: Mr. N. Gabriel for the Appellant

Mr. G. Thachett and Mr. A. Subramaniam for the Respondent

Delivered: 11 August 2017

JUDGMENT

A.Fernando (J.A)

1. The Appellant appeals against his conviction for murder by the Supreme Court on a trial by Judge before a Jury.

Charge:

2. The Appellant had been charged with the murder of his 9 year old son Alister Labrosse on the 13th of January 2015. According to the evidence led at the trial Alister died by drowning at sea. The Appellant had been convicted by an 8 to 1 verdict of the Jury. The single Juror had returned a verdict of manslaughter.

Difficulties Counsel assigned to defend the Appellant had to face in conducting the defence:

3. At the very outset we wish to point out that the Counsel who had been assigned by Court to defend the Appellant had been at a disadvantage as the Appellant had not instructed him. The Appellant had dismissed the Counsel who appeared for him at the beginning of the case and informed Court that he does not want a lawyer and that he would stand by himself. When asked by Court as to the reason why he wanted to stand by himself the Appellant's answer had been "My reason is myself". Since this case was a murder case, the Supreme Court had then assigned Counsel to defend the Appellant on the basis of Legal Aid.

4. We note from the Record that Counsel assigned to defend the Appellant had expressed his difficulties in defending the Appellant at several stages of the trial. Prior to cross examining the father of the Appellant who had been called by the Prosecution as a witness, Assigned Counsel had told the Appellant's father "It is very important that you answer my questions so that it can shed light on what really happened because your son is not talking to me and I have no way of ascertaining what happened". At the close of the case for the Prosecution Assigned Counsel had informed Court that the accused (*Appellant*), ever since he had been appointed as Assigned Counsel had refused to speak to him. At a certain stage of the defence case Assigned counsel had complained that he has to defend someone with his hands tied at the back. We have to bear this in mind when determining this appeal, especially in considering whether Counsel for the Appellant had been in a position to put up an appropriate defence on behalf of the Appellant, namely that of diminished responsibility. This has become an issue in this case because the Respondent in its Heads of Argument has taken up the position that diminished responsibility was not raised by the defence at the trial. We cannot determine this appeal on the basis that it was the duty of the Appellant to properly instruct his Counsel especially when we note some abnormal behaviour on the part of the

Appellant. Even persons like the Appellant are entitled to a fair hearing guaranteed by article 19(1) of the Constitution.

Grounds of Appeal

5. The Appellant has raised the following grounds of appeal:
 - i. The learned trial Judge erred, in law and in fact by relying on insufficient evidence to convict the Appellant. By doing so, he did not put to the jury sufficiently or at all the case for the Appellant.
 - ii. The learned trial Judge erred in his summing up by not directing the jury sufficiently or at all on the legal implications of hearsay evidence and the legal implication of *res gestae*.
 - iii. The learned trial Judge erred in failing to put to the jury the state of mind of the Appellant and failed to direct the jury properly on the alternate verdict of manslaughter which was open to the Appellant.
 - iv. In all the circumstances of the case the conviction of the appellant for murder was unsafe and unsatisfactory.

6. An examination of the grounds of appeal shows that the main thrust of the appeal is the Judge's failure to direct the Jury on the alternative verdict of manslaughter on the basis of the state of mind of the Appellant, and this becomes clear since ground (iii), which is a specific ground has not been placed as an alternative to the other grounds of appeal. Further grounds (i), and (iv) are linked to ground (iii). Counsel for the Appellant in the Skeleton Heads of Arguments filed on behalf of the Appellant before this court has confirmed this position by stating, that the learned Trial Judge had failed to direct the Jury on the alternative verdict of voluntary manslaughter on the basis of diminished responsibility. Counsel for the Appellant further confirmed at the hearing before us that the main thrust of the appeal was the Judge's failure to direct the Jury on the alternative verdict of manslaughter on the basis of diminished responsibility.

Evidence in Brief of the Prosecution Case:

7. The first witness to be called by the Prosecution was PW 1, Dr. Paresh Barra, who testified about the post mortem examination (PME) done and the post mortem report (PMR) prepared by Dr. Sandra Aguillar, who did the autopsy on the body of the deceased. Dr. S. Aguillar had left the country by the time the trial commenced. According to the PME, the deceased, Alister Labrosse, was 9 years of age and his cause of death is given as “Asphyxia due to bilateral severe pulmonary edema as a consequence of drowning. There had also been severe generalized visceral congestion of the internal organs”.
8. PW 1 had stated that the slight brownish discolouration on the right side of the face may be because of some injury, a hit or fall; but it is not very clear to say what exactly would have caused this. According to PW 1 the brownish marks on the ventral side of the right forearm may be a post mortem injury or may be because of holding the hand tightly or tying the hand for a long time to something. However according to the Memo on Agreed Facts, P 15, signed by both counsel for the prosecution and defence; WPC K. Faure, who had examined the body soon after the incident, had said that “there were no visible marks on the body”. We have gone through the photographs of the dead body produced as exhibits and do not see any noticeable marks on the body of the deceased. These are the very photographs from which Dr. Barra had made his observations.
9. On being asked the specific question whether it could be natural drowning or some forceful drowning the doctor had said “It is very difficult to say whether it was forceful drowning because marks of external injury are not very significant. So forceful drowning it does not appear to be the cause however it cannot be ruled out.” (verbatim).
10. PW 1 had been questioned about a mark that was seen on photographs 28 and 29 that had been produced, which shows a ligature mark on the neck of the Appellant.

According to PW 1 this could be “homicidal and suicidal” (verbatim). Since PW 1 could see only the mark on the front aspect of the neck he had not been able to express a definitive opinion. The mark according to PW 1, could have been caused by a nylon rope or a thin electric wire.

11. PW 1, under cross-examination had said that he could only speculate since he had not carried out the post mortem examination himself. A Court in my view should not attach any weight to evidence as to the possible cause of an external injury, when a doctor different from the one who did the post-mortem states, that he can only speculate as to the possible cause of such injury and when the injury is not very significant. PW 1 had said “forceful drowning does not appear to be the cause although it cannot be ruled out”. The learned Trial Judge should have directed the jury that this type of evidence should not be acted upon, especially in the absence of an eye witness account of forceful drowning.
12. Dr. Anna Yurkina, a Psychiatrist attached to the Victoria Hospital had been called by the Prosecution as a witness for the prosecution (PW 3). Her expertise had not been challenged by the defence and she had stated that she had seen the Appellant on the day after the alleged incident, namely on the 14th of January 2015. She had found a “trace of the rope on his neck” and the Appellant had complained of “unstable mood”. She had seen him again on the 17th of January because he had been hitting his head on the wall, while in police custody. On this occasion he had been “slightly goaded and distant sometimes express ongoing wish to die” (verbatim). It had been reported to the Psychiatrist that the Appellant had attempted to commit suicide on the 23rd of December 2014 and the 13th of January 2015. According to the records at the Psychiatric Ward at the Victoria Hospital the Appellant had been seen by a doctor on the 23rd of December 2014 in relation to the suicidal attempt that day.
13. The Psychiatrist had diagnosed the Appellant to be of “Emotionally Unstable Personality Disorder and of impulsive type.” According to the Psychiatrist “it is a

psychiatric disease, a disorder is underline of his nature” (verbatim from the Court Record). She had been of the view that the Appellant needs psychological counselling but that there was no need for medication. These patients according to her have problems with the mood and motions and they need a Psychologist to teach them how to control their motions. If they do not seek help this type of incident cannot be prevented. At the conclusion of her Report which had been produced as P 13 by the Prosecution, PW 3 had stated: “Based on the above history and mental state examination, Mr. Neddy Labrosse (*Appellant*) was diagnosed with Emotional Unstable Personality Disorder, Impulsive Type. Suicidal attempts (23.12.14; 13.01.15). The disorder is enduring in nature and not amenable to medication. He is fit to stand trial.” (verbatim)

The learned Trial Judge had posed the following question to the Psychiatrist:

“Q. From your expertise when a person has had a psychological problem does that person remain in the state throughout his life or does he become normal and then occasionally

A. Yes this kind of personality disorder it is characterised by these swing moods. So sometimes when no bad family issues its okay they are okay, they communicate well, stable mood everything is okay. When something happened their mood is changing and they got these problems.” (verbatim from the Court Record)

It appears that the reason the Psychiatrist’s evidence had been led as part of the Prosecution case was to show that the Appellant was fit to stand trial. In doing so it has become clear that the Appellant suffered from an abnormal mental condition, which had been acknowledged by the learned Trial Judge.

14. The main witness for the prosecution was Ms. Juliette Confiance (PW 4), the mother of the deceased Alister, and the concubine of the Appellant. She had stated that the deceased was 9 years of age and his father is the Appellant. She had been living with the Appellant for 12 years and their relationship had not been easy.

Having said that the Prosecutor had without any objection from the defence or interruption of Court gone on to lead evidence tending to show the violent disposition of the Appellant towards PW 4 over a period of time, which amounts to leading evidence of bad character. The learned Trial Judge had referred to this evidence in his Summing Up. There is likelihood that the Jury was prejudiced against the Appellant as a result of this.

15. On the morning of the incident PW 4 had told the deceased not to go fishing with his father if he requests of him. This is because; whenever PW 4 and the Appellant had arguments he had threatened to drown the children. He had threatened to drown the deceased and their daughter on 4 separate occasions. She had gone on to say that the Appellant had attempted once to drown her by throwing her into the sea when she was once with him in the boat and had pushed her underwater. On being questioned by the Prosecuting Counsel she had also said that she imagined that the Appellant could harm her but not the children “because he loves them so much”. The Appellant had told her on the morning of the incident “that his mind was not at rest” but according to PW 4 “there was no anger with him” at that time. She had realized that he needed help.

16. Around noon the Appellant had called her on her mobile 2761038 from his mobile 2607917 and told her that he was going to drown the deceased. She had then reported the matter to the Central Police station which had advised her to go to the Mont Fleuri Police Station. When she was near the Mont Fleuri Police Station the Appellant had called her again and asked her to meet him at the small beach at Roche Caiman. He had told her not to alert the police and if she does so, the deceased would be gone forever. During these calls PW 4 had heard the deceased saying “Daddy stop don’t do it” and overheard the Appellant saying that “your mother does not love me anymore”. Whether deceased uttered this when the Appellant tried to commit suicide by drowning himself or drown the deceased is not known.

17. PW 4 had reported the matter to the Mont Fleuri police station and then rushed off to the small beach at Roche Caiman. The police had assisted her to get to that beach. When she went to the beach the Appellant was not there and then she had gone to the Jetty to look for the Appellant's boat, which is normally moored there. At the Jetty a boy by the name of Gino Charles had called the Appellant and said that the police were looking for him. On hearing that the Appellant had called PW 4 to state that she would not see either him or Alister (the deceased) again and wished them good bye. She had then been taken to the Mont Fleuri police station. While she was there, the Appellant had called her to say that he had already drowned Alister and tied him to a rope on the boat. The Appellant had told her that he had tied a rope around his neck and was ready to go to the prison. When these utterances were being made she had switched on the loud speaker on her mobile on the instructions of the police and what the Appellant said had been heard by the police officers who were at the Mont Fleuri police station.

18. Later on she had gone to Petit Paris and seen the body of the deceased on the lawn of the Appellant's grandmother's house, covered with cloth. She had filed a complaint at the Family Tribunal on the 5th of January 2015 stating that each time the Appellant had an argument with her, the Appellant had threatened to drown the children and this had been recorded in the Case Registration Form of the Family Tribunal which was produced as P 14.

19. Under cross- examination PW 4 had said that the Appellant loved the deceased more than the other children and he does not beat children. She had admitted that the Appellant "does not consume alcohol nor does he smoke cigarettes or drugs". She had admitted that the Appellant provided money for the family and gave pocket money to the children. She had said that when the incident happened she had separated from the Appellant and the problem with the Appellant was that she did not want to get back to him. She had denied visiting a witch doctor at Mont Fleuri.

20. ASP A. Essack (PW 5) had testified to the effect that when he was Station Commander at the Mont Fleuri police station, PW 4 had come around 1 pm on the day of the incident, to the Mont Fleuri police station crying and shouting out on the phone “don’t kill, don’t harm”. He had heard a voice say over PW 4’s phone which had been placed on speaker on the instructions of the police, on three separate occasions between 1 to 3 PM on the day of the incident “You have had a sexual relationship with another person while you are with me. Cunt of your mother. I have told you not to go to the police”; “He has already died. He has been tied to the boat”; “I am at Petit Paris. Go and look at your child. I have finished with him. I am ready to go to prison”. According to PW 5, it appeared the speaker was at sea as he could hear the wind blowing. PW 5 had said he did not know who was calling, but PW 4 had told him that it was the Appellant who was speaking.
21. ASP J. Dogley (PW 7) testifying before the Court had stated that while he was at Mont Fleuri police station, he heard a voice say over PW 4’s phone which had been placed on speaker “Juliette come over at Petit Paris, I have already killed my son and I am prepared to go to prison.” This was at 3 PM on the day of the incident. PW 7 had said he did not know who was calling but PW 4 had told him that it was the Appellant who was speaking.
22. M. Andre, a police officer attached to the maritime Police of Seychelles, (PW 6), had seen the Appellant with the deceased on a boat going in the direction of Eden Island from the ex-coast guard around 1 PM on the day of the incident. He had searched the area later on, in another boat but could not find the Appellant’s boat. Later he had spotted the same boat on the beach at Petty Paris and seen the Appellant in it with the body of the deceased inside the boat. He had tried to give first aid to the deceased but he was not responsive. He had said the sea was rough that day.
23. The prosecution had called Terrance Labrosse, the father of the Appellant as PW 10. PW 10 had stated that the deceased was the son of the Appellant, the Appellant

loved most. On the afternoon of the incident he had seen the Appellant on a boat but had not seen anyone with him. He had tried to talk to the Appellant but he had not answered and PW 10 had thought he was “under pressure”. The Appellant had been having problems with PW 4. The Appellant when questioned by PW 10 as to whether he drowned his son has said: “Daddy the only son I loved the most can I do something like that. I was going to drown myself but the child jumped after me to try and save me.” The Appellant had told him that he would never kill his son. The deceased had told him that if his father were to drown himself he would also drown himself. PW 10 had advised the deceased not to do such a thing and had advised his son the Appellant not to kill himself over a woman. The sea had been “a bit rough” that day. There is no evidence however that the Appellant made an attempt to save the deceased, in the sea that was said to be rough, by PW 6 and PW 10.

24. PW 11, Sylvie Labrosse, the sister of the Appellant, testifying as a prosecution witness, had said that on the 23rd of December 2014 the Appellant had sent a text message to say that he was going to drown himself as he was having problems with PW 4. The deceased had also once told her that if his father, the Appellant were to drown himself he would kill himself along with his father. She had admitted that she had not said this in her statement.
25. The evidence of PW 10 shows that the Appellant was of an impulsive type, who had problems with his moods and motions. He fits in ideally to the description given by PW 3, namely: “this kind of personality disorder it is characterised by these swing moods. So sometimes when no bad family issues its okay they are okay, they communicate well, stable mood everything is okay. When something happened their mood is changing and they got these problems.”
26. Georges D’Offay (PW 12), the Director of Sales and Customer Experience at Cable & Wireless testifying for the prosecution had stated that telephone number 2607917 was registered in the name of the Appellant. According to P 25 produced before the Court, which is a Record of all incoming and outgoing calls received and made,

including SMS on mobile phone 2607917 produced by PW 12; 2607917 had called 2761038 (an Airtel number), which PW 4 had claimed was her mobile number, between the hours 11.31 to 15.20 on 13th January 2015 on, 38 occasions.

Evidence in Brief of the Defence Case:

27. The Appellant had made a Dock Statement. After narrating about the strained relationship he had with his wife in almost eleven A4 sized pages, of recorded proceedings and being cautioned by the Learned Trial Judge that he had to speak about the charge levelled against him, for which a defence had been called; the Appellant had said in answer to Court:

“I wanted to talk about it but ‘they’ prevented me from talking about it, so I prefer not to talk about it”

“I was coming to talk about it, but ‘they’ do not want me to speak about it”

“My mind was troubled. I heard screaming in my mind. I said that my mind was troubled. I heard only screams in my mind, whistling. It hurts me to talk about it.”

And finally said:

“I haven’t killed my child. I love my child so I haven’t killed him. When I jumped out of the boat he jumped behind me. And I love him, I cannot kill him. And my mind was not in a right state at that time on the day of the incident.”

The Appellant had not clarified whom he referred to as “they”. The question is was he referring to the voices he heard screaming in his mind?

28. His long narrative going into eleven, A4 sized pages of recorded proceedings, prior to making these statements were all centered around a relationship he had with

another woman; his partner's (PW 4) accusations that he had fathered a child with that woman, which he continually denied and the insistence of PW 4 that the Appellant tell the child not to call the Appellant 'Father'. It was also about PW 4 taking him to a woman who spoke also in Malagasy, and who, from the narrative of the Appellant was delving in witchcraft. He had been taken to a dark room lit with candles, where both the Appellant and PW 4 had been asked to cut a pack of cards and the woman had cut around the joints of PW 4 with a blade. The woman had given PW 4 a white piece of paper with the Appellant's name written on it with a red marker. At the woman's house the woman had given PW 4 ashes, claimed to be from a burnt black chicken. Coming back home PW 4 had drunk water after boiling some water and placing the piece of paper in it and thrown the ashes inside the house. The purpose according to the Appellant's narrative of PW 4 taking him to this woman, appears to be, was to ensure that the Appellant would not leave PW 4. The Appellant says that he tried to leave PW 4 and go to his mother with his child but he could not do so.

29. PW 4 had then started taking him to Barrel discotheque where PW 4 encouraged him to get drunk and she danced with another man. This had become a frequent occurrence and his suspicions that PW 4 was having an affair with that man continued to get stronger, leading to continuous arguments and the Appellant had gone on speaking about this in seven, A4 pages as seen from the recorded proceedings, until the learned Trial Judge had told the Appellant to restrict himself to the charge laid against him.

30. The mother of the Appellant, Mrs. M. M. Camille testifying for the defence as DW 1, had stated that when she questioned the Appellant, no sooner he came out of his boat, as to why he drowned her grand-son the deceased, rather than himself, the Appellant had replied in the presence of his father that he had not drowned his son. The Appellant had told her "Mum I love my son how can I drown him". The Appellant had told her that he was going to commit suicide and she had seen a mark of a big rope around his neck. With the aim possibly of contradicting DW 1, the

Prosecuting Counsel had then referred her to a part of the statement made by DW 1 to the police on the day of the incident, which she admitted and wherein she had stated “...and then Naddy (*Appellant*) told me that he did not drown Alister (*deceased*) and that he loves Alister, He had put a rope in his neck and then jumped and that Alister had jumped by himself”, and thereby corroborated PW 10. She had further clarified this by saying that the Appellant had told her that when he jumped off the boat, the deceased followed. Thus the version that the deceased jumped into the sea when the Appellant attempted suicide had been expressed soon after the incident and thus gives credibility to such version. She had said that when she saw him he was not normal. “His mind was not there and he was not in his usual state”. According to DW 1 the deceased body was not tied with a rope. She had also testified in relation to an incident on the 23rd of December where the Appellant had attempted to commit suicide by drowning himself at sea. She had said that the Appellant was very fond of the deceased. DW 1 had also said that there were problems between PW 4 and the Appellant because he had fathered another child by another woman.

31. The Dock Statement of the Appellant gives a picture of a man who was very jealous of his wife and who clearly had a mental problem, unless he was faking it. The prosecution has not argued that he was faking and the very fact that they called a psychiatrist (PW3) to testify that the Appellant was fit to stand trial is an acknowledgement that the Appellant had a mental problem.
32. We see no merit whatsoever in ground (ii) of appeal as there was no hearsay evidence relied on by the Judge in directing the Jury in his summing up. The only item of evidence which may amount to *res gestae* has been dealt with at paragraph 16 above and we are of the view that this item of evidence could not have caused any prejudice to the Appellant. We therefore dismiss ground (ii) of appeal.
33. In view of the evidence itemized above there is no doubt in our minds that Appellant had caused the death of the deceased by an unlawful omission, thus satisfying the elements of the offence of murder as set out in section 193 of the

Penal Code, subject however to section 196A of the Penal Code. The learned Trial Judge had correctly summed up to the Jury on the elements of murder as set out in section 193 of the Penal Code, placing emphasis on causing of death by an unlawful omission. Although the learned trial Judge had directed the Jury to consider whether the Appellant was guilty of involuntary manslaughter if they were of the view that one of the elements of murder, namely, malice aforethought had not been made out; he had failed to direct them to consider whether the Appellant was guilty of voluntary manslaughter on the basis of diminished responsibility under section 196A (3) of the Penal Code, which is the compliant underground (iii) and somewhat under grounds (i) and (iv).

34. **Section 193 of the Penal Code** reads as follows:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”.

35. An unlawful omission according to **section 192 of the Penal Code** *“is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm”*. There is no evidence in this case that the Appellant forcibly drowned the deceased. The Appellant’s utterances heard over the phone at the Mont Fleuri Police Station that he had killed the deceased may well amount to him taking responsibility for the death of the deceased whom he loved very much, when taken in conjunction with the evidence of PW 4 at paragraph 15 above; PW 10 whose evidence is referred to at paragraph 23 above, the dock statement of the Appellant referred to at paragraph 27 above and the evidence of DW 1 referred to at paragraph 30 above. The Appellant’s conduct of taking his 9 year old son, the deceased, out to the middle of the ocean and attempting to commit suicide, regardless of the consequences that may befall his son, the deceased; certainly is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life which satisfies the actus reus element of the offence of murder, as correctly pointed out to the Jury by the learned Trial Judge.

36. **Sections 202 and 203 in Chapter XX of the Penal Code** sets out the duties of persons relating to the preservation of life and health as follows:

“ 202. It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and he is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty. (emphasis added)

203. It is the duty of every person who, as head of a family, has charge of a child under the age of fourteen years, being a member of his household, to provide the necessaries of life for such child; and he is held to have caused any consequences which result to the life or health of the child by reason of any omission to perform that duty, whether the child is helpless or not. (emphasis added)

37. **Section 199 (e) of the Penal Code** defines causing of death as follows: “A person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death, if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons”.(emphasis added). Thus even if one were to go along with the Appellant’s version of the deceased jumping into the sea on seeing him jump into the sea, it is clear that the actus reus of murder has been established.

38. **Malice aforethought has been defined in section 196 of the Penal Code** as follows:

“Malice aforethought shall be deemed to be established by evidence proving any

one or more of the following circumstances:-

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”

The evidence in this case shows there was malice aforethought on the basis of section 196 (b). As stated earlier the Appellant ought to have known that if he committed suicide in the middle of the ocean there was a probability that his 9 year old son would die or grievous harm would be caused to him, despite the fact that he may have wished that it may not be caused. This is more so because the deceased had threatened to kill himself if the Appellant were to die.

39. Thus all three elements of murder have been established by the Prosecution in this case, namely that the Appellant caused the death of the deceased by an unlawful omission with malice aforethought and the learned Trial Judge’s directions to the Jury on those lines cannot be faulted.
40. As stated earlier the main thrust of the appeal is the Judge’s failure to direct the Jury on the alternative verdict of manslaughter on the basis of the state of mind of the Appellant. Counsel for the Appellant has expanded on this in the Skeleton Heads of Argument filed on behalf of the Appellant to say that the learned Trial Judge should have directed the Jury on diminished responsibility and his failure to do so was a fatal irregularity.
41. Under our Penal Code even if all the elements of murder are satisfied if it is shown the accused was at the time of the killing suffering from diminished responsibility he shall not be convicted of murder but instead liable to be convicted of

manslaughter. **Section 196A of the Penal Code** defines diminished responsibility as follows:

“(1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury)as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(2) On a charge of murder it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable to be convicted of murder shall be liable instead to be convicted of manslaughter. In such a case the court instead of or in addition to inflicting any punishment which it may inflict on a conviction for manslaughter, may order the convicted person to be detained in custody during the President’s pleasure and thereafter he shall be detained in such custody as the President shall from time to time direct.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.”

42. Section 196A (2) undoubtedly states that it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder. This flows from the presumption of sanity set out in section 12 of the Penal Code. Section 12 states: *“Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”* Attempts to argue that the burden placed on the defence under the identical provision in section 2 of the Homicide Act 1957 of UK, contravenes article 6(2) of the European Convention on Human Rights which guarantees the presumption of

innocence(similar to the right to innocence guaranteed by article 19(2)(a) of the Constitution of Seychelles); were rejected outright by the Court of Appeal in **Lambert, Ali and Jordan [2001]1 WLR 211**. Following dicta in **R VS DPP, ex parte Kebeline** the Court stated that the Convention did not prevent exceptions to the normal burden of proof provided an appropriate balance was struck between the general interest of the community and protection of the rights of the individual. Article 19(10)(b) of our Constitution provides that article 19(2)(a) shall not be held to be inconsistent with anything contained in any law necessary in a democratic society (in this instance the Penal Code) to the extent that such law imposes upon any person charged with an offence the burden of proving particular facts.

43. In this case, however, it is the Prosecution that had sought to lead evidence as to the state of mind of the Appellant by calling a Psychiatrist, as PW 3. This evidence has not been challenged by the defence. The evidence of PW3 itemized at paragraphs 12 and 13, the evidence of PW 4 itemized at paragraph 17, the evidence of PW 10 itemized at paragraph 23 and the evidence of DW 1 itemized at paragraph 30; clearly shows that the elements of section 196A (1) have been proved by the Prosecution itself in this case. This is further established by what the Appellant told the Court, on being cautioned to restrict himself to the charge levelled against him in making his dock statement, as itemized at paragraphs 27 to 29.

44. Thus, there was nothing more for the defence to prove in this regard.

45. **Archbold 2012 at 19-67** states: “*Where...there was unchallenged medical evidence of abnormality of mind and consequent substantial impairment of mental responsibility, and no facts or circumstances appeared which could displace or throw doubt on that evidence, a conviction for murder is liable to be quashed and a conviction for manslaughter substituted.*”

46. The Republic in their Heads of Argument has submitted “that the defence never raised any issues with the state of mind of the accused regarding diminished responsibility or otherwise”. We are conscious of the fact that in **R Vs Cambell**

(C.F.) 84 Cr. App. R. 255, CA citing R VS Kooken, 74 Cr. App. R. 30, the Court of Appeal expressed the view that it should be left to the defence to decide whether the issue of diminished responsibility should be raised at all. In Kooken the court very much doubted whether the trial judge has discretion to call evidence of diminished responsibility. In the case of **Franky W. Simeon VS The Republic [Criminal Appeal No. 7 of 2001]** this Court placing reliance on Kooken, allowed the appeal because the Trial Judge failed to alert counsel on both sides of his intention to leave the alternative crime of manslaughter on the basis of diminished responsibility with the Jury so as to afford them an opportunity to respond and if necessary address the Jury on the matter. That is because the defence put forward by the accused in that case was one of **non-insane** automatism. As the court indicated in Kooken, diminished responsibility was really an optional defence, and, at least in cases where the defence was represented by counsel, it seemed that the most that a trial judge should do if he detected, or thought that he detected, evidence of diminished responsibility was to point this out to defence counsel, in the absence of the jury, so that the defence could decide whether they regarded the issue as one for the jury to consider. (**Archbold 2012 – 19-67**).

47. This case is different from Kooken and Franky Simeon as it is the Prosecution itself that led evidence of the mental abnormality of the Appellant at the trial. The third and fourth grounds of appeal raised in this case have to be viewed in terms of article 19(1) of the Constitution which guarantees to the Appellant “a fair hearing”. Taking into consideration the mental state of the Appellant as evinced by the evidence of PW 3, PW 4, PW 10 and DW 1, the behaviour of the Appellant when the plea was taken as stated at paragraph 3 above, the difficulties the defence Counsel experienced at the trial as stated at paragraph 4 and from the contents of the Appellant’s dock statement, it is clear that this was a case where the failure of the learned Trial Judge to direct the Jury on diminished responsibility would necessarily have caused an injustice to the Appellant and was in breach of his fundamental right to a fair hearing in terms of article 19 of the Constitution.

48. In **R VS Fairbanks [1986] 1 WLR 1202**, it was said that “In any criminal prosecution for a serious offence there is an important public interest in the outcome”. In **R VS Coutts [2006] UKHL 39** it was said “*The public interest is that, following a fairly conducted trial, defendant should be convicted of offences which they are proved to have committed and should not be convicted of offences of which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to a greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge” (**Von Stark VS The Queen [2000] 1 WLR 1270; Hunter and Moodie VS The Queen [2003] UKPC 69**).*

49. In **Bullard VS The Queen [1957] AC 637 Lord Tucker** said: “Every man on a trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.” In **Von Starck VS The Queen [2000] 1 WLR 1270 Lord Clyde** said: “The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial...It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial

whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them.”

50. In the Australian case of **Pemble VS The Queen [1971] 124 CLR Barwick CJ** said: “*Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury in the circumstances of the case upon the material before them find or base a verdict in whole or in part. Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused.” We find on a perusal of the summing up, that the learned Trial Judge not only failed to direct the jury on diminished responsibility but failed to advert to the relevant facts which showed the mental status of the Appellant.*

51. This Court held in the case of **Cinan & Anor VS The Republic [2013] SLR 279** that “*the rule is that in murder cases, the trial judge’s duty is to sum up the evidence of both the prosecution and the defence and to leave to the jury the decision on a verdict. By evidence what is meant is, all evidence that warrants an assessment to be made in order to arrive at a conclusion. When evidence of factors that impinge on the mens rea of the parties is clearly obvious in the evidence, it is the judge’s duty to bring this to the attention of the jury and to direct their minds to the possibility of an alternative verdict”*. The Court further stated that “*the duty of a trial judge sitting with a jury over a murder charge against a defendant is normally*

to direct the jury on alternative verdicts unless the facts are so clear that such a need does not arise”.

52. The decision in **R VS Byrne [1960] 2 QB 396, 44 Cr. App. R. 246** which expounded on the meaning of section 2 of the Homicide Act, 1957, of the UK is of relevance in interpreting section 196A of our Penal Code as the wording in the said two sections are identical, word to word. In the UK, the present law on diminished responsibility is to be found in **section 52(1) of the Coroners and Justice Act 2009** (came into force on 4th October 2010) which has no application here, as Seychelles is a sovereign State and since we can only be guided by our section 196A of our Penal Code. The relevant parts of the decision in Byrne, are referred to below:

“(a) ‘Abnormality of mind’,... means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. The expression ‘mental responsibility for his acts’ points to consideration of the extent to which the accused’s mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will power to control his physical acts”.

(b)“whether the accused was at the time of the killing suffering from any ‘abnormality of mind’...is a question for the jury. On this question medical evidence is, no doubt, important, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there is other material before them which, in their good judgment, conflicts with it and outweighs it.” “The etiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent

causes or induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence...”

(c) “Assuming the jury are satisfied on a balance of probabilities, that the accused was suffering from ‘abnormality of mind’ from one of the causes specified in the parenthesis of the subsection the crucial question nevertheless arises: was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This is a question of degree and essentially one for the jury. Medical evidence is of course relevant, but the question involves a decision not merely whether there was some impairment but whether such impairment can properly be called ‘substantial’ a matter upon which juries may quite differ from doctors”

(d) “The step between ‘he did not resist his impulse’ and ‘he could not resist his impulse’...is one which is incapable of scientific proof... the jury can only approach in a broad, commonsense way...”

(e) “Inability to exercise will power to control physical acts, provided that is due to abnormality of mind from one of the causes specified in the parenthesis of the subsection, is ...sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be sufficient.”

53. We can take judicial notice of the fact that ‘Emotionally unstable personality disorder’; of which the Appellant had been diagnosed of by PW 3, is one of ten personality disorders defined in the **International Classification of Mental Diseases (ICD–10)**. It is called borderline personality disorder in the **DSM-IV** and **DSM-V** classification system and is still sometimes referred to as such by professionals in the UK. It is an established category of personality disorder in the **American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders 4th edition (DSM-IV) classification and in DSM 5th edition (DSM-5) classification**. ‘Emotionally unstable personality disorder’, is characterized by a definite tendency to act impulsively and without consideration of the consequences; the mood is unpredictable and capricious. The impulsive type is characterized predominantly by emotional instability and lack of impulse control.

There is a pattern of sometimes rapid fluctuation from periods of confidence to despair. There is a particularly strong tendency towards suicidal thinking and self-harm.

54. In **R VS Gomez 48 Cr. App. R 310, CCA** it was held that the mental abnormality need not have existed from birth. In **Vinagre [1979] 69 Cr. App R 104** the accused was said by the medical witness to be suffering from ‘Othello Syndrome’, i.e. unfounded suspicion that his wife was having an affair, and successfully pleaded diminished responsibility with which verdict the Court of Appeal was unable to interfere. In this case the dock statement of the Appellant suggests that the Appellant probably was suffering from ‘Othello Syndrome’. The word “substantially” has been held to mean something more than ‘trivial’ or ‘minimal’ but short of ‘total’. The Jury should be able to conclude that the accused’s abnormality of mind was the real cause of his conduct and not necessarily the sole cause of it. It was held in **R VS Ramchurn [2010] 2 Cr. App. R. 3** the word “substantially” is one which Jury members should approach using their common sense.

55. In view of what has been stated at paragraphs 41-54 above, we are of the view that the Judge’s failure to direct the Jury on the alternative verdict of manslaughter on the basis of diminished responsibility was a fatal irregularity as a properly directed Jury on the facts of this case, taking into consideration the evidence of the Psychiatrist (PW 3), the evidence of PW 4, PW 10, DW 1, the dock statement of the Appellant and his behaviour at the trial would have most probably in our view returned a verdict of manslaughter on the basis of diminished responsibility. In the case of **R VS Brennan [2014] EWCA Crim 2387** the Court of Appeal overturned the murder conviction based on the jury verdict of manslaughter and substituted a conviction of manslaughter because there was no rational or proper basis for the jury to reject the un-contradicted and unchallenged expert evidence of the consultant psychiatrist who had said that Brennan suffered from ‘Emotionally Unstable Personality Disorder’ and Schizotypal Disorder’. The Court was of the opinion that although in criminal trials cases are decided by juries and not by

experts; they must base their conclusions on the evidence. Davies LJ said: *“There can...be no room for departure from so fundamental a principle as the second principle. It reflects the very essence of the jury system and of a just and fair trial. But the first principle, whilst most important and undoubtedly descriptive of the general position, is also capable...of admitting of degree of qualification in a suitably exceptional case...Suppose, for example, a matter arises exclusively within the domain of scientific expertise; suppose, too, that all the well qualified experts instructed on that particular matter are agreed as to the correct conclusion and no challenge is made to that conclusion. Can it really be said that the jury nevertheless can properly depart from the expert as to that conclusion on that matter: simply on the basis that it is to be said, by way of mantra, that the ultimate conclusion is always for the jury? We would suggest not. Where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so.”*

56. In **R VS Matheson [1958]1 WLR 474** the Court of Criminal Appeal quashed Matheson’s murder conviction and substituted it with one of manslaughter on the basis of diminished responsibility, since the jury had rejected the uncontradicted medical evidence of three medical experts, that Matheson was suffering a mental abnormality, without any basis. Lord Goddard CJ had said, where there was unchallenged evidence of medical abnormality and where there were no facts or circumstances appear that can displace or throw doubt on that evidence, then the court was bound to say that a verdict of murder is unsupported by the evidence. The Lord Chief Justice was careful to say that this was not a case of the courts usurping the role of the jury. **R VS Bailey [1961] Crim LR 828** is another case where the Court of Appeal quashed the conviction of murder and substituted it with a conviction for manslaughter on the basis of diminished responsibility, because the jury had rejected the evidence of three medical experts without any evidence before them, by way of facts or circumstances to throw doubt on the medical evidence.
57. In this case the learned Trial Judge had not left the alternative verdict of manslaughter on the basis of diminished responsibility to be considered by the jury.

We therefore hold with the appellant on his main ground of appeal, namely ground (iii). Grounds (i) and (iv) are linked to ground (iii). To send this case back for a re-trial would in our view cause an injustice both to the Appellant and PW 4. We therefore in exercise of the jurisdiction of the Court of Appeal under article 120(3) of the Constitution and the powers of this Court under rules 31(1) and (5) of the Court of appeal Rules 2005, have decided to quash the conviction of the Appellant for murder and substitute it with a conviction for manslaughter under section 196A (3) of the Penal Code.

58. **Article 120(3) of the Constitution states:** “The Court of appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is brought...” **Rule 31 (1) of the Court of Appeal Rules 2005** reads as follows: “Appeals to the Court shall be by way of re-hearing and the court shall have all the powers of the Supreme Court together with full discretionary power to receive further evidence by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner.” **Rule 31 (5)** states: “In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised..” (emphasis added)

59. The substitution of the conviction of murder with that of manslaughter under section 196A (3) of the Penal Code would necessitate us to determine a suitable sentence for the Appellant. The punishment for manslaughter has to be determined in accordance with section 195 read with section 196A (4) of the Penal Code. Section 196A (4) has been referred to at paragraph 40 above. **Section 195 of the Penal Code** states: “*Any person who commits the felony of manslaughter is liable to imprisonment for life.*” Ordering the convicted person to be detained in custody during the President’s pleasure in our view would be in cases where the convict is a psychopath and is prone to kill again and is likely to be a danger to the public.

60. In determining an appropriate sentence we have looked into sentences by the UK courts where the law on diminished responsibility was identical to ours before 2009 and somewhat similar to ours thereafter. In **R VS Slater [2005] EWCA Crim 898, [2006] 1 Cr App R (s) 3** the Court of Appeal reduced the sentence of detention from 6 years to 4.5 years, for a 20 year old man convicted of manslaughter on the basis of diminished responsibility, of a 91 year old woman, he and his wife had to look after 24 hours a day. The Court opined that determining the sentence in cases of manslaughter on the basis of diminished responsibility are extremely difficult as there are many factors to consider. In **R VS Wainfor [1985] 7 Cr app R (s) 231** a man was convicted of manslaughter on the basis of diminished responsibility for causing the death of his 3 year old son by hitting him on the head several times on a single occasion. The appellant was intellectually sub-normal. The Court of Appeal reduced his sentence from 5 years to 3 years imprisonment. In **R VS Jewsbury [1981] 3 Cr App R (s) 1** the Court of Appeal upheld a 3 year sentence of a man who stabbed his wife to death due to depression brought on by his wife's infidelity, accepting that his responsibility had been substantially impaired. In **RVS Sexton [2000] 2 Cr App R (s) 94** the appellant was in severe financial difficulties and the family home was in danger of being lost, but he could not bring himself to tell this to his wife. He claimed to have killed her in order to save her from the trauma of loosing her family home. Medical evidence showed that he had been suffering from reactive depression. The Court of appeal reduced the sentence from 5 years to 3 years.
61. In **Derekis [2005] 2 Cr. App R (S) 1**, the Court of Appeal reduced the sentence of six years to three and a half years, of a 54 year old woman who was suffering from a moderately severe depressive illness with associated anxiety and insomnia at the time of stabbing the victim who was her neighbour, over a dispute of playing loud music after 11 pm. She had no previous convictions. In **R VS Norman [1981] 3 Cr App R 377** the appellant had pleaded guilty to the manslaughter, of a woman with whom he had been living, on the basis of diminished responsibility. He had strangled her after she had made some remarks to him during a meeting following the separation. There was psychiatrist evidence that the appellant was liable to give

way to quick tempers but did not constitute a danger to anyone. The Court of Appeal reduced his sentence from 9 years to five years. In **R VS Davies [1983] 5 Cr App 4**, the appellant, a woman of 45 pleaded guilty to manslaughter by reason of diminished responsibility. She had shot her husband dead while suffering from severe reactive depressive illness, following the deterioration of her relationship with him. She was sentenced to two years.

62. In **Chambers [1983] 5 Cr App R (s) 190** the accused had stabbed his wife 23 times, for having left him taking their child with her, after going to the house of his mother-in-law, where his wife was staying. He had pleaded guilty to manslaughter on the basis of diminished responsibility. There was medical evidence that the appellant at the time of the killing was suffering from anxiety, depressive state which substantially impaired his mental responsibility for his actions. The Court of Appeal reduced his sentence from 10 to 8 years. **Leonard J** in the case of Chambers said:

“In diminished responsibility cases there are various courses open to a Judge. His choice of the right course will depend on the state of the evidence and the material before him. If the psychiatric recommend and justify it, and there are no contrary indications, he will make a hospital order. Where a hospital order is not recommended, or is not appropriate, and the defendant constitutes a danger to the public for an unpredictable period of time, the right sentence will, in all probabilities, be one of life imprisonment.

In cases where the evidence indicates that the accused’s responsibility for his acts was so grossly impaired and his degree of responsibility for them was minimal, then a lenient course will be open to the judge. Provided there is no danger of repetition of violence, it will usually be possible to make such an order as will give the accused his freedom, possibly with some supervision.

There will however be cases in which there is no proper basis for a hospital order; but in which the accused’s degree of responsibility is not minimal. In such cases the judge should pass a determinate sentence of imprisonment, the length of which will depend on two factors: his assessment of the degree of responsibility and his view

as to the period of time, if any, for which the accused will continue to be a danger to the public.”

63. In the local case of **R VS Norcy Dick [Criminal Side 4 of 1995]** the accused had bashed his baby girl’s head on the road surface three times causing the baby’s brain to smash out and threw the baby’s lifeless body over a shop’s counter on the shop floor where it lay until the police arrived. The accused who was charged with murder pleaded guilty to a charge of manslaughter that was subsequently preferred against him, on the basis he was suffering from such defect of mind that brought him within the ambit of section 196A of the Penal Code. It had not been possible to carry out a psychiatric examination of the accused at the material time, due to his violent behaviour. However from the observations Dr. Sherril, the psychiatrist made when the accused was brought to her, she was able to testify that he was “labouring under severe mental stress indicative of serious mental disorder”. According to Dr. Sherrill there was a likelihood that the accused may kill again as he had a tendency to think that people are against him. A Clinical psychologist Miss M. Belmont had stated that the accused suffered from impulsiveness which is a personality disorder. His wife had testified that her husband loved his daughter “very very much”. The accused had been sentenced to 7 years.
64. In the Norcy Dick case the learned Chief Justice had cited the cases of **Davies (1974)** and **Tenconi (1972)**, referred to in ‘**Thomas on Sentencing**’, both cases of manslaughter on the basis of diminished responsibility. In Davies the accused who had caused the death of his wife while suffering from ‘severe depression of psychotic intensity’, had been sentenced to 2 years. Davies who had made a determined but unsuccessful attempt to commit suicide had killed his wife who was mentally ill because he was concerned that she would not be able to fend for herself after his death. The Court was of the view that there was no risk of future homicide. In Tenconi the accused who had caused the death of his partner while suffering from a ‘mild degree of depressive illness’, had been sentenced to 3 years.
65. In the local case of **The Republic VS Donald Hoareau [1982] SLR 87**, the accused who was charged with murder pleaded guilty to a charge of manslaughter on the basis of diminished responsibility under section 196A of the Penal Code. The

accused had hacked the deceased with a knife when the deceased continued to tease him. The deceased had sustained multiple injuries to his head and the upper part of his body. The learned Trial Judge had been satisfied that on the facts of that case and because of diminished responsibility the accused was not liable to be convicted of murder but liable instead to be convicted of manslaughter. The accused suffered from an abnormality of mind arising from a condition of retarded development of mind. He had a mental age of an 8 to 9 year old although aged 45 years. The learned trial Judge after considering the facts of the case, the state of mental health of the accused, the fact that he had no previous convictions and had been detained for a period of nearly 6 months prior to conviction had imposed a sentence of imprisonment of 5 years and 6 months.

66. In this case we have no recommendation from a psychiatrist for a hospital order. We do not think, on the facts before us that the Appellant constitutes a danger to the public for an unpredictable period of time, and thus should be sentenced to life imprisonment. In this case the evidence indicates that the Appellant's responsibility for his acts was so grossly impaired and his degree of responsibility for them was minimal and there is no danger of repetition of violence. From the evidence before the Court what is undisputed is that the Appellant's liability for the death of his son stems from the fact that he had, with no regard to the possible consequences, taken his 9 year old son to the middle of the ocean and attempted to commit suicide, being aware of the fact that his son had told him that if the Appellant were to take his life he too will die. The Appellant's liability for causing the death of his son was as stated at paragraph 35 above, on the basis of an unlawful omission. We therefore sentence him for a period of five years. The period of two years and seven months and twenty-eight days the Appellant has spent in custody in respect of the offence, shall be deducted from this sentence, in accordance with article 18(14) of the Constitution.

I concur:. M. Twomey (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017