



Neutral Citation Number: [2017] EWCA Crim 190

Case No: 2016/05551/B1 & 2016/05552/B1

**IN THE COURT MARTIAL APPEAL COURT**  
**ON A REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION**  
**ON APPEAL FROM A COURT MARTIAL AT BULFORD**  
**(THE JUDGE ADVOCATE GENERAL)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/03/2017

Before:

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION**  
**THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION**  
**MR JUSTICE OPENSHAW**  
**MR JUSTICE SWEENEY**

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Between:

Regina  
- and -  
Alexander Wayne Blackman

**Respondent**

**Appellant**

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Jonathan Goldberg QC, J Israel and S Kong for the Appellant  
Richard Whittam QC and Katherine Hardcastle for the Respondent  
Hearing date: 7-8 February 2017  
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**Approved Judgment**

## The Court:

### 1. Background

1. On 15 September 2011 a badly wounded insurgent was killed in Helmand Province, Afghanistan, by the appellant, Alexander Blackman, then an Acting Colour Sergeant in the Royal Marines. He was in command of a multiple (or group) of the Royal Marines serving as part of the British Armed Forces stationed at Command Post (CP) Omar.
2. In September 2012, unofficial video footage taken by one of the multiple was found during the course of the investigation of an unrelated matter. That led to the recovery of a total of six clips which set out in clear detail what had happened to the insurgent. Thereafter a decision was made to charge the appellant and other members of his multiple with murder; his defence was that the insurgent was already dead when he shot him. Although the civilian courts had jurisdiction in respect of a murder alleged to have been committed by a British citizen overseas, a decision was made that instead of being arraigned before the ordinary courts of justice, he should be tried by a court martial.
3. The trial before the court martial commenced on 23 October 2013 before the president, a lieutenant colonel in the Royal Marines, the Judge Advocate General (as the judge advocate) and six other members comprising two other marine officers, three Royal Naval officers and a Royal Naval warrant officer. On 8 November 2013 the court martial found the appellant guilty of murder but acquitted the two other marines against whom proceedings had been pressed to trial. No psychiatric report had been obtained before the trial and no psychiatric evidence was called at the trial.
4. For the purposes of sentence, the defence obtained a psychiatric report from Dr Orr who examined the appellant for 2 hours on 22 November 2013. In his report dated 27 November 2013, Dr Orr concluded that the appellant may have been suffering from a combat stress disorder which had gone undetected; Dr Orr made clear that combat stress was no defence to criminal misconduct, but could be considered as an extenuating factor in relation to punishment. The appellant was subsequently sentenced to life imprisonment with a minimum term of 10 years, less time on remand.
5. An appeal against conviction was made to this court in 2014 on the grounds then advanced which related to the status of the court martial system and the compatibility of its procedures with the European Convention on Human Rights. The court dismissed the appeal against conviction. It allowed the appeal against sentence, substantially influenced by the psychiatric evidence of Dr Orr. Having regard to all the circumstances, including the effect upon him of the nature of the conflict in Afghanistan, the nature of the command he exercised and the extreme nature of the stress, the minimum term was reduced to one of eight years: *R v Blackman* [2015] 1 WLR 1900, [2014] EWCA Crim 1029.

6. Subsequently the Criminal Cases Review Commission (CCRC) was asked to consider, on the basis of voluminous further information (including a Ministry of Defence report known as the Telemeter Report), a reference of the conviction and sentence to this court. On 6 December 2016 the Criminal Cases Review Commission issued a press release announcing that the Commission would refer the case to this court; on 15 December 2016 the Commission sent its report to this court.
7. There were three grounds for the reference on conviction:
  - (i) Further psychiatric evidence obtained since the court martial showed that both at the time of the killing and at the time of the court martial, the appellant was suffering from an adjustment disorder, a recognised medical condition. On that basis, there was available to the appellant the partial defence of diminished responsibility so that his conviction for murder should be quashed and either a conviction for manslaughter by reason of diminished responsibility should be substituted or a retrial ordered.
  - (ii) The Judge Advocate General had failed to leave the verdict of unlawful act manslaughter for consideration by the Board.
  - (iii) Possible incompetence by the former defence team (in particular in relation to its failure properly to investigate the appellant's mental health and so discover the potential partial defence).
8. The appellant sought to add further grounds on which the CCRC had declined to make a reference:
  - (i) The partial defence of loss of control.
  - (ii) What was said to be improper cross-examination of the appellant by the then leading counsel for the prosecution which should have been stopped.
  - (iii) Fresh evidence of a pathologist in relation to the deceased insurgent's apparent condition when he was shot.
9. At two hearings on 16 and 21 December 2016 for directions and to hear an application for bail, the court decided to order expedition and to hear first the ground of the reference and the appeal relating to diminished responsibility, allowing the appellant, if he was unsuccessful on that ground, to pursue the other grounds which would take much longer to prepare for the appeal. It did so on the following basis made expressly clear by the conclusion of the hearings in December 2016:
  - (i) The prosecution did not contest the psychiatric evidence relied on by the CCRC and the appellant, all of which was to the effect that the appellant was suffering at the material times from an adjustment disorder. The prosecution made clear it did not intend to call any psychiatric evidence. It also accepted that the psychiatric evidence

was admissible under the provision in the Courts Martial Appeal Act 1968 equivalent to s.23 of the more familiar Criminal Appeal Act 1968 (as amended), even though no such evidence had been considered during the trial prior to the verdict. The issue for the court would be whether the mental disorder might have or had substantially impaired the responsibility of the appellant.

- (ii) The court should consider whether on all the evidence relating to diminished responsibility the verdict was unsafe. If it concluded that the verdict was unsafe, a retrial could be ordered.
  - (iii) As an alternative to ordering a retrial, if the court concluded on the evidence that the killing was the result of substantial impairment by reason of an abnormality of mental functioning, it would be invited to consider substitution of a verdict of manslaughter by diminished responsibility on the basis that the appellant accepted he intended to kill or cause serious bodily harm to the insurgent. Such a basis was a prerequisite to the substitution of such a verdict, as diminished responsibility only arises if an intention to kill or cause really serious bodily injury is found.
10. The hearing of the appeal was fixed for February 2017 on the basis set out. As leading counsel originally instructed on behalf of the prosecution at the court martial and on the appeal was unavailable, new leading counsel was instructed. Because of a perceived lack of clarity in the appellant's pre-hearing submission on the issues set out in paragraphs 9 9(ii) and 9(iii), the issue was raised at the commencement of the hearing of the appeal. Having had the advantage of legal advice, express confirmation was given by the appellant that, if the court was satisfied that the partial defence of diminished responsibility was established, it could (and should) proceed to substitute a verdict to that effect, recognising that to do so could only be on the basis that the appellant intended to kill the insurgent: the other grounds of appeal (both referred and which the appellant had sought to add) would be abandoned. The prosecution, by leading counsel, agreed with that course. Having considered all the material, we consider that to have been an entirely realistic and sensible course to adopt.
11. The principal evidence at the hearing of the appeal comprised the video clips of the killing mostly recovered from the camera of the marine who took them, the evidence before the court martial, the psychiatric evidence and fresh evidence relating to the conditions under which the appellant served and the appellant's service and medical history.

## **2. The evidence in relation to the killing of the insurgent**

### *(a) The deployment of the appellant and the command structure*

12. In September 2011, the appellant was 37 years old having been a regular soldier for over 13 years, ultimately serving with J Company, which was one of three rifle companies in 42 Commando Group of the Royal Marines. He had served in Iraq in 2003 and again in 2004 and 2006.

13. He was deployed to Afghanistan in 2007 for 6 months. In March 2011, he was deployed a second time as part of what was known as Operation Herrick 14 where he served (save for a break in the UK between 15 and 31 July) until 12 October 2011.
  14. The main British base was at Camp Bastion, near the provincial capital of Helmand Province, Lashkar Gah. 42 Commando Group was responsible for an Area of Operations known as 'Nadi Ali North'; it was located at Forward Operating Base Shazad, in South-West Helmand Province; it was under the operational command of Lt Col Murchison from April to October. 45 Commando Group was responsible for the area of operations known as 'Nadi Ali South' under the command of Lt Col Lee. In early September 2011, the two areas of operation were merged under the command of 45 Commando Group; Lt Col Lee assumed ultimate command of 42 Commando Group and, thus, J company. The officer in command of J Company was Major McCully until May 2011 when he was severely injured; it then became Major Fisher.
  15. The outlying bases included CP Talaanda, CP Omar and Temporary CP Toki. The appellant was the commander of CP Omar.
  16. Radio communications for J Company were based at Shazad. Different posts were able to communicate with each other and with headquarters using a 385 Bowman radio network, although over shorter ranges members of J Company used 'Personal Role Radio' (both of which were available to the appellant at the material time). J Company also had the use of a Persistent Ground Surveillance System (PGSS) balloon which consisted of a camera supplying a live feed of images into the Operations Room at Shazad which was relayed into the Operations Room at Camp Bastion. The camera could be directed from Shazad and used to zoom into particular areas of interest.
- (b) *The facts of the killing as they appeared on 15 September 2011*
17. On 15 September 2011 insurgents attacked CP Talaanda using small arms fire. The operations room at Shazad observed through the PGSS two persons believed to be armed insurgents in the region of CP Talaanda. An Apache helicopter from Camp Bastion, with the call-sign 'UGLY-51', was called in. One of the insurgents was located in an open field. The helicopter opened fire and fired a total of 139 rounds of 130mm ammunition at that insurgent. Those watching the operation, including the pilot and those at Shazad, thought that he could not have survived.
  18. Nevertheless, a foot patrol of around eight marines, led by the appellant, which had been crashed out that afternoon (following a routine patrol in the morning) to carry out an unconnected search, and which was on its way back to CP Omar, was ordered to undertake what was called a battle damage assessment, that is to say to see what the effect of the helicopter's attack had been and to report what they had found. The helicopter was ordered to stay in the vicinity to provide top cover and to look for other insurgent activity on the ground.

19. The patrol located the insurgent who was lying in the middle of the field. He was badly wounded but still alive. The appellant and another marine (who thereafter guarded the insurgent with his pistol) approached the insurgent and recovered his AK 47, two magazines and a hand grenade. The rest of the patrol remained at the side of the field until that was safely completed.

(c) *The video footage*

20. As we have mentioned, video footage of the killing was found a year later. The appellant did not know, at the time, that the events were being videoed. Six clips of that video formed the principal evidence against him. His case was that he believed that the insurgent was already dead. The most important were clips 4 and 5.

21. Clip 4 showed:

- (i) The sound of the helicopter in the vicinity throughout.
- (ii) Other members of the patrol joining the appellant and the guard by the insurgent, who is clearly alive. They swear at him – which the appellant did nothing to stop. At 00:00:19, where the transcript reads “*Why couldn’t (you/he) just be fucking dead*”, one of the marines starts to drag the insurgent away towards the side of the field.
- (iii) Ten seconds later, the insurgent is briefly dropped to the ground. His face, bloodied clothes and open eyes can be clearly seen. One of the marines leans towards him and says “*You’re browners fella*”.
- (iv) After a few seconds the insurgent is lifted again and transported far more quickly, as one of the marines says “*Don’t give a fuck about you son.*” The insurgent makes high-pitched sounds of discomfort and one of the marines tells him to “*Stop fucking whingeing*”.
- (v) At 00:00:45 the insurgent is dropped again. One of the marines swears at him. The appellant says “*Right, get him closer in so PGSS can’t see what we’re doing to him*” and “*Get him right in*”. The insurgent is moved a few more feet and, after some discussion, a marine drags him again and throws him down on his back in a clear area at the side of the field, close to the tree line. The insurgent winces in pain.
- (vi) The marines take up positions around the insurgent in a semicircle. The appellant asks at 00:01:32 “*Anybody want to do first aid on this idiot?*”, to which others respond “*No*”. The guard continues to point his pistol at the insurgent. Somebody says “*I’ll put one in his head if you want*” and someone else makes another suggestion (the detail of which is inaudible). There is then laughter, and someone says “*Take your pick*”. After a few seconds the appellant comes closer and stands over the body, saying “*No, not in his head, ‘cause that’ll be fucking obvious.*”

- (vii) Shortly afterwards the appellant says “*I don’t know where that AH [helicopter] is mate.*”
  - (viii) The camera is then switched off.
22. The evidence at the court martial of two of the members of the multiple was that clip 5 began one or two minutes after clip 4. It starts with the appellant speaking on the radio explaining that the insurgent has a sucking chest wound. The sound of the helicopter can still be heard in the background.
- (i) The insurgent is now lying on his front. His shirt has been lifted up and three wounds can be seen in his back which is smeared with blood. The cameraman says “*We’ll patch him (with) an FFD [First Field Dressing].....That’ll do won’t it*”.
  - (ii) At 00:00:21 one of the marines asks “*Where’s that – (where’s that Ugly) [the helicopter] now?*” The appellant replies “*He’s over there and he can fucking see us.*”
  - (iii) At 00:00:41 the guard stands over the insurgent and points his pistol at him. The appellant speaks on the radio, and suggests the insurgent may be dead.
  - (iv) One of the marines, referring to the helicopter, says “*He’ll be on – be behind those trees in a minute*”.
  - (v) At 00:01:03 the cameraman bends down closer to the insurgent with a First Field Dressing, saying “*For fuck’s sake, I cannot believe I’m doing this*”. Another marine replies, apparently referring to the helicopter, “*Wait a minute, just pretend to do it, til he’s behind them trees*”.
  - (vi) At 00:01:08 a marine says “*Al, just strangle him*” to general laughter, and another saying “*Yeah that might...*” Five seconds later, the appellant says: “*Yeah, he’s past. Fuck it, he’s past.*” He then reports this on the radio and promises to try and collect biometric data.
  - (vii) While he is doing so, the cameraman begins to apply the First Field Dressing to the insurgent and the guard bends down and brings his pistol closer to the insurgent’s body. At 00:01:43 the cameraman says “*Wait Jack*”.
  - (viii) At 00:01:51 and 00:01:59 the insurgent moves his head.
  - (ix) At 00:02:03 there is a discussion between the cameraman and the guard about the fact that the insurgent had had a grenade in his possession. They swear at the insurgent and one of them says “*Yeah, maybe we should pump one in his heart.*”
  - (x) At 00:02:28 the insurgent is turned over onto his back. His body and face can be seen covered in dried grass. His eyes are open. The

appellant says *“Er he’s dead. Don’t waste your fucking FFDs on the cheeser. Take it off him. Right, get the – get the HIIDE camera out, see if you can get a picture of him.”*

- (xi) At 00:02:48 the appellant’s pistol can be seen in its holster at his waist and the helicopter can no longer be heard [it had been tasked to turn its attention to a compound].
  - (xii) A short time elapses, during which the appellant is speaking on the radio. The camera rests on the insurgent at 00:03:05. His right arm can be seen to move and he is visibly breathing.
  - (xiii) At 00:03:16 the appellant, who has now drawn his pistol and is looking up at the sky asks *“Where is the CAT, Ugly call sign?”* The cameraman replies *“It’s gone that way. Went South, mate.”*
  - (xiv) The appellant immediately crouches down and aims his pistol at the centre of the insurgent’s chest, fires once at point blank range, and immediately stands back up. The insurgent’s legs, which are bent at the knee, begin to move left and right. His upper body and arms then start to writhe, and his head shakes back and forth. His breathing starts to become laboured.
  - (xv) After watching for 15 seconds and adjusting his backpack, the appellant says *“There you are, shuffle off this mortal coil, you cunt.”*
  - (xvi) He kneels down to get something from his backpack, and after another 10 seconds at 00:03:50 says *“It’s nothing you wouldn’t do to us. Obviously this doesn’t go anywhere, fellas. I’ve just broke the Geneva Convention”*. The insurgent continues to writhe as these remarks are made.
  - (xvii) The cameraman tells the appellant *“If anything gets heard, mate, it’s as a warning shot went down.”* The appellant then uses the radio to confirm that the insurgent is *“Fully dead now.”*
  - (xviii) The camera is then switched off.
- (d) *The conclusion of the court martial based on that evidence*

23. The court martial set out in its reasons for its decision on sentence a number of findings against the appellant as to the deliberate nature of the killing:

“[The insurgent] had been seriously wounded having been engaged lawfully by an Apache helicopter and when [the appellant] found him he was no longer a threat. Having removed his AK47, magazines and a grenade [the appellant] caused him to be moved to a place where [the appellant] wanted to be out of sight of [the] operational headquarters at Shahzad so that, to quote what [the appellant] said: ‘PGSS can’t see what we are doing to him.



“He was handled in a robust manner by those under [the appellant's] command clearly causing him additional pain and [the appellant] did nothing to stop them from treating him in that way. When out of view of the PGSS [the appellant] failed to ensure he was given appropriate medical treatment quickly and then ordered those giving him some first aid to stop.

“When [the appellant was] sure the Apache helicopter was out of sight, [the appellant] calmly discharged a nine millimetre round into his chest from close range. [The appellant's] suggestion that [he] thought the insurgent was dead when [he] discharged the firearms lacks any credibility and was clearly made up after [he] had been charged with murder in an effort to concoct a defence. It was rejected by the Board.

“Although the insurgent may have died from his wounds sustained in the engagement by the Apache [the appellant] gave him no chance of survival. [The appellant] intended to kill him and that shot certainly hastened his death.

“[The appellant] then told [his] patrol they were not to say anything about what had just happened and [the appellant] acknowledged what [he] had done by saying [he] had just broken the Geneva Convention. The tone of calmness of [his] voice as [he] commented after [he] had shot him were matter of fact and in that respect they were chilling.”

24. In making those findings in relation to the appellant's conviction, the court martial relied on the video clips and the other evidence before it. That is not surprising for whatever might now be said about the appellant's mental health and his responsibility for what he did, his conduct and that of the marines reveals that the insurgent was believed to be alive, after which the appellant shot him at close quarters. In dismissing the appeal against conviction this court observed at paragraph 33 of its judgment:

“There is sufficient support from the video (which we have seen) and the transcript of the video that preclude us in any way from going behind those findings.”

25. The most experienced of the psychiatrists who gave evidence before us, Dr Joseph, confirmed that such a conclusion could properly be reached in the absence of psychiatric evidence:

“I think to decide it was a cold-blooded killing, you would attach most of the weight to the video evidence, and you would say then that how he describes his state of mind – well, there doesn't seem to be any evidence of that on the video. It is all chat and banter, and we are going to take that at face value, and that means he is not under any stress, it's just a tour, they've come across this man, they're not worried about any other insurgent being there, they don't seem to be particularly

concerned about their welfare. So, the majority of the attention would go on the video, and the prosecution would say, "Well, look, you just have to watch the video", and everything else is just constructed post-first conviction. You just look at that video and the video speaks for itself."

26. However, as we have made clear, the court martial had no psychiatric evidence at the time it convicted the appellant. Although it had Dr Orr's report at the time of sentence, this report appears to have had no material influence on the conclusions.

27. As Dr Joseph explained:

"I have looked at that video a number of times, and I don't accept that that video accurately and truly reflects his mental state at the time – or I think it would be dangerous to assume that."

28. It is important to underline that this view does not undermine the conclusion we have expressed as to the appropriate inferences to be drawn from the video but, rather, goes to the impact of the appellant's mental health on his rationality and self-control. We therefore turn to examine the full psychiatric evidence before us on the mental state of the appellant at the time of the killing of the insurgent to determine whether the conclusion reached by the court martial, as principally derived from the video clips, did in fact show his actual mental state at that time.

### **3. The psychiatric evidence as to mental state at the time of the killing**

(a) *The psychiatrists*

29. The psychiatric evidence was from:

(i) Professor Neil Greenberg, after qualifying as a doctor, had served from 1994 with the Royal Navy as a medical officer. He became a member of the Royal College of Psychiatrists in 1999 and held specialist registrar posts in psychiatry. Between 2007 and 2009, he worked as the uniform lead for mental health research for the UK Armed Forces and from 2009-2013 was the co-director of the Academic Centre for Defence Mental Health. He served with two Royal Marine Commando Units; in 2007 and 2010 he was deployed to Afghanistan. Since 2013, he has been Professor of Defence Mental Health at King's College London. He had been instructed on behalf of the appellant prior to the application to the CCRC. He was a very impressive witness.

(ii) Dr Philip Joseph has been a consultant forensic psychiatrist since 1989. He has very great experience having assessed over 800 persons charged with homicide. He is recognised as a leader in his field. He was instructed by the CCRC and, after reaching his own conclusion, considered the reports that Dr Orr and Professor

Greenberg had written. He agreed with both. He was, as the members of the court know from their own experience of his evidence in other cases, an extremely impressive and impartial witness.

- (iii) Dr Orr, a consultant psychiatrist, had been chief executive of the Oxfordshire mental healthcare trust, a medical director of a unit at St Andrews Healthcare and a lecturer in psychiatry.
30. Each prepared a medical report in connection with the reference by the CCRC; all three produced a joint statement shortly before the trial answering questions that had been put on behalf of the prosecution. Professor Greenberg and Dr Joseph gave evidence before us in the course of which they were cross-examined and answered questions from the court. It had been intended that Dr Orr would give evidence, but he was unwell at the time of the hearing; he provided a further report.
31. Although some comments were made in the pre-hearing submissions made by the prosecution as to the way in which the psychiatric evidence had been funded, no criticism was in fact made by the prosecution of the integrity, reputation or standing of the psychiatrists.
- (b) *Adjustment disorder and its symptoms*
32. The evidence of the psychiatrists was that the appellant was suffering from an abnormality of mental functioning at the time of the killing. It arose from an adjustment disorder of moderate severity. An adjustment disorder is a recognised medical condition, which is defined in the International Classification of Diseases, 10<sup>th</sup> edition (ICD-10), F43.2 as:
- “A. Experience of an identifiable psycho-social stressor, not of an unusual or catastrophic type, within one month of the onset of symptoms.
- B. Symptoms or behavioural disturbance of types found in any of the affective disorders (except for delusions and hallucinations), any disorder in F4 (neurotic, stress related and somatoform disorders) and conduct disorders, so long as the criteria of an individual disorder are not fulfilled. Symptoms may be variable in both form and severity.”
33. The symptoms include depressed mood, anxiety, worry, a feeling of an inability to cope, plan ahead or continue in the present situation, with some degree of disability in performance of the daily routine. The symptoms vary considerably; some suffer very mild symptoms; in a few cases the symptoms can be very severe resulting in suicide or a heinous act. In most cases the disorder resolves within 6 months of the stressing circumstances having dissipated.
34. The symptoms of an adjustment disorder could be masked and not apparent. Often an adjustment disorder was not apparent to the person suffering from it.

A person with an adjustment disorder, as with other mental disorders, could plan and act with apparent rationality.

(c) *The absence of a report prior to trial and conviction*

35. The psychiatrists stated that they were surprised that no psychiatric report was requested prior to the conviction. Nonetheless, it was routine for them to reach a conclusion relying on historical information and a mental state examination. In the case of the appellant this was explained by his personality which was such that he would not link his poor sleep and irritability to a psychological condition; Dr Joseph also concluded that the appellant would not want to rely on a psychiatric defence because of the stigma that was perceived to attach to it. This is consistent with the disclosed note of a conference that the appellant's then leading counsel had with him, dated 10 June 2013, which records that counsel observed that psychiatric assessment would only inform a board of the background "rather than be evidence that you behaved in an out of character manner" with which proposition the appellant agreed, saying it would be "a created scenario".

#### **4. The principles relating to the assessment of substantial impairment of responsibility**

(a) *The legal test.*

36. The governing legal principle for the partial defence of diminished responsibility is set out in s.2 of the Homicide Act 1957 as amended by s.52(2) of the Coroners and Justice Act 2009:

"(1) A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which— (a) arose from a recognised medical condition, (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and (c) provides an explanation for D's acts and omissions in doing or being a party to the killing

(1A) Those things are— (a) to understand the nature of D's conduct; (b) to form a rational judgment; (c) to exercise self control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

37. In *R v Golds* [2016] UKSC 61, [2016] 1 WLR 5231 the Supreme Court, through the judgment of Lord Hughes with which all agreed, held that the meaning of substantially was to be understood not in the sense of "present rather than illusory or fanciful, thus having some substance" but "important or weighty", as in "a substantial meal" or "a substantial salary" or "significant and appreciable".

(b) *The role of the psychiatrists in answering the critical question*

38. Each of the psychiatrists was of the view that the adjustment disorder was in the circumstances of this case capable of substantially impairing the appellant's ability to form a rational judgement or exercise self-control.
39. Each of the psychiatrists went further. They examined the evidence under what we can conveniently summarise as five headings:
- a. The evidence relating to the appellant.
  - b. The circumstances in which he was operating at CP Omar.
  - c. The other evidence in relation to the day on which the insurgent was killed.
  - d. Other events before and after the killing relevant to his mental state.
  - e. The evidence of the appellant.
40. Each expressed the view that, if asked, he would on the basis of the evidence which each had carefully and critically considered conclude that the abnormality of mental functioning substantially impaired the appellant's ability to form a rational judgement and exercise self-control. Dr Joseph made clear that this was a conclusion he reached "on balance". We must therefore consider how we should treat this specific evidence.

(c) *The status to be attached to the view of the psychiatrists*

41. In *R v Brennan* [2014] EWCA Crim 2387, [2015] 1 WLR 2060 the sole defence was the partial defence of diminished responsibility. Only one consultant psychiatrist was called to give evidence. The prosecution had commissioned a psychiatric report but had chosen not to call its author because he agreed with the conclusions of the defence expert. The prosecution did not challenge the doctor called by the defence but tested her opinion by reference to the defendant's planning and lies. The court concluded that diminished responsibility was the only possible outcome on the evidence. It made observations on the course a judge should follow in such circumstances.
42. In *Golds*, the Supreme Court observed at paragraph 49 in relation to *Brennan*:

"Certainly a jury is not bound by the expert. In some cases, pre-planning, especially involving meticulous preparations, may indicate self-control which gives grounds for rejecting an opinion that self-control was substantially impaired. In others, there may be legitimate grounds for asking the jury to disagree about the level of impairment. In yet further cases, it may be perfectly proper to ask the jury to conclude that it was the drink or drugs which led to the killing, whilst the underlying mental condition was in the background. That is not by any means an exhaustive catalogue of questions which a jury may properly be

invited to decide. However, as the Court of Appeal rightly held, if the jury is to be invited to reject the expert opinion, some rational basis for doing so must at least be suggested, and none had been at trial nor was on appeal. It is not open to the Crown in this kind of situation simply to invite the jury to convict of murder without suggesting why the expert evidence ought not to be accepted.”

43. It is important to note the emphasis in the *Golds* judgment not only on the prosecution’s right (if not duty) to assess the medical evidence and to challenge it, where there is a rational basis for so doing, but also on the primacy of the jury in determining the issue. It is clear that a judge should exercise caution before accepting the defence of diminished responsibility and removing the case from the jury (see paragraph 50). The fact that the prosecution calls no evidence to contradict a psychiatrist called by the defence is not in itself sufficient justification for doing so. In the light of the judgment in *Golds*, we see no reason not to follow the broad approach of this court in *R v Khan (Dawood)* [2009] EWCA Crim 1569, [2010] 1 Cr App R 4, to which reference was made in *Brennan*, which we would express as follows: it will be a rare case where a judge will exercise the power to withdraw a charge of murder from the jury when the prosecution do not accept that the evidence gives rise to the defence of diminished responsibility.

44. The Supreme Court concluded in relation to *Brennan* at paragraph 51:

“Where, however, in a diminished responsibility trial the medical evidence supports the plea and is uncontradicted, the judge needs to ensure that the Crown explains the basis on which it is inviting the jury to reject that evidence. He needs to ensure that the basis advanced is one which the jury can properly adopt. If the facts of the case give rise to it, he needs to warn the jury that brutal killings may be the product of disordered minds and that planning, whilst it may be relevant to self-control, may well be consistent with disordered thinking. While he needs to make it clear to the jury that, if there is a proper basis for rejecting the expert evidence, the decision is theirs—that trial is by jury and not by expert—it will also ordinarily be wise to advise the jury against attempting to make themselves amateur psychiatrists, and that if there is undisputed expert evidence the jury will probably wish to accept it, unless there is some identified reason for not doing so.”

45. This case is clearly not one of those rare cases where we should simply follow the views of the psychiatrists, even though they are agreed and are highly persuasive. The prosecution is plainly entitled to put its case that the partial defence did not arise. There were plainly issues in this case which would have been for the Board of the court martial (or the jury if there had been one). If this case was at a trial court, it would be for the jury or the Board to determine whether the abnormality of mind arising from the adjustment disorder in fact substantially impaired the appellant’s ability to form a rational judgement or to

exercise self-control and whether it was a significant contributory factor in causing the appellant to kill the insurgent.

46. We therefore have to consider all the evidence to determine the safety of the conviction. Before turning to that evidence, we must first deal with an important issue that arose after the hearing.

## **5. The dispute over the evidence as to the conditions in Afghanistan**

47. As a result of submissions made by the prosecution after the conclusion of the hearing in relation to the Telemeter Report to which we briefly referred at paragraph 6 above and which had been heavily relied upon in the appeal proceedings, it is necessary to explain in much greater detail than we had intended the background and use of the Telemeter Report. It is regrettable that we have had to do this, as we had thought at the hearing that we had found a means of resolving the two factual disputes then apparent.

### *(a) The Telemeter Report*

48. On 7 March 2014, Admiral Sir Philip Jones, the then Fleet Commander and Deputy Chief of Naval Staff, commissioned Brigadier Huntley, the then Head of the Centre of Defence Leadership, to carry out an internal review of events ancillary to the killing in respect of which the appellant was convicted. He was assisted by a senior occupational psychologist.
49. He submitted an interim report on 30 May 2014 in which he indicated the further lines of inquiry he wished to pursue so that he could understand why the appellant had committed murder, including issues relating to the chain of command. His final report (known as the Telemeter Report), was completed on 11 March 2015. The findings of the Report were accepted by the Fleet Commander, but we have not been provided with the document accepting the conclusion. We would observe that it is a very impressive and well-written report powerfully supporting the conclusions it reached.
50. On 16 September 2015, the Under Secretary of State for Defence, whilst reserving the security classification of the report, agreed to make a copy of the report available to the legal team acting for the appellant, to the CCRC and, if appropriate, to this court.
51. It was relied on heavily by the appellant in his submissions to the CCRC. An extract was agreed with the Ministry of Defence on 13 November 2015 which not only formed an important basis on which Professor Greenberg expressed his opinion, but also Dr Joseph and Dr Orr.
52. Although the report was provided to the court by the CCRC, the hearing of the appeal and in particular the evidence of Professor Greenberg and Dr Joseph proceeded on the basis of the extract agreed with the Ministry of Defence which they had carefully considered against all the other evidence.
53. Although there was no apparent dispute about the extract agreed by the Ministry of Defence, during the course of the hearing of the appeal it became

evident that the area of underlying factual dispute about the conditions under which the appellant served in Afghanistan related to two principal matters: (1) the support given to the appellant by his command in Afghanistan, particularly by Lt Col Murchison and (2) the conditions at CP Omar compared with the conditions at Temporary CP Toki. This CP was about 3 miles from CP Omar, on the evidence of Mr Terrill, a documentary filmmaker embedded with the troops at Temporary CP Toki between May and July 2011.

54. As we will explain at paragraph 101 we ascertained from the psychiatrists that what mattered was the appellant's perception of the support from the command and not the actuality; we proceeded on the basis that it would not be necessary therefore for us to resolve the dispute on the actual position by hearing further evidence. As to the second matter, we saw a film about Toki; it was agreed that we should form our own judgement as to the extent to which it was relevant.

*(b) The complaint by Col Murchison*

55. On 6 July 2015, the procedure adopted in respect of the Report was the subject of complaint by Col Murchison, as he had by then become. It is appropriate to add that, although he was notified in January 2015 that he would be criticised and given the opportunity to respond to the criticism, he apparently did not do so.
56. The nature of Col Murchison's complaint was that the mechanism of an internal review should not have been used; a more formal process should have been used. Detailed criticism was made of the resourcing of the review, the failure to gather evidence properly and the lack of procedural protection afforded to Col Murchison and others affected by the review. It was said that the review strayed beyond its terms of reference and the questions raised in relation to those in the chain of command. The report was said to be derived from a flawed process and "in a number of important respects is incomplete, inaccurate and misleading"; it was said that the author of the report began the process with an already established narrative and tailored the investigation to fit it. Detailed specific criticism was made of the failure to seek further information and interview others.

*(c) The decision on Col Murchison's complaint taken by General Sir Gordon Messenger and an official at the Ministry of Defence*

57. The complaint was considered by General Sir Gordon Messenger, Vice Chief of the Defence Staff, and the Director General of Finance at the Ministry, under the provisions of s.334-339 of the Armed Forces Act 2006.
58. The decision on the complaint was signed on 7 December 2016, the day after the CCRC announced it was making the reference, as we have set out at paragraph 6 above. A copy of the decision was provided to the court. The complaint was stated to have been upheld in respect of its main elements for reasons set out at Annex B.



59. The decision recorded that Col Murchison had suffered a degree of stress and reputational damage and that it was inappropriate to have criticised him. Although the initial terms of reference were appropriate, the focus on the operational judgements of individuals demanded a different methodology. It should not have continued in the format it did.

“The appropriate safeguards required for those liable to criticism were not adequately in place. Potentially affected persons ought to have been given the full right of reply, as they would have been given had this phase of the review been conducted with the protections offered by a Service Review, for example.”

60. The decision added:

“We have written a statement which is to be attached to the [Internal Review] at Annex C. This states that the [Internal Review] went beyond the remit of the original [Terms of Reference] in a manner that was inappropriate and therefore cannot be relied upon. The position will be clear to all future readers of the report.”

61. On 12 December 2016, the appellant’s legal team was asked in accordance with Annex C to attach a covering statement to the report which was done. It was in these terms:

“The Internal Review which led to this report went beyond the remit of its original Terms of Reference: an Internal Review intended to look at culture and ethos.

It was not sufficiently robust to allow conclusions to be drawn as to the appropriateness of individual operational decisions in the chain of command. Specifically personnel criticised in the report were not able to identify the source of the criticism such that they could respond effectively to it, and have their response considered, when judgments about them were made in the drafting of the report.

Therefore, statements containing specific criticisms of individuals within the chain of command cannot be relied upon as the investigative process did not have sufficient veracity for such judgments to be relied upon. The overall recommendations made are unaffected by this and may safely be relied upon.

The report should be read with this statement in mind.”

- (d) *The position taken by the prosecution after the conclusion of the hearing.*

62. At the hearing we treated this statement and the terms of the decision itself as expressing a reservation as to the specific criticism of the actual actions by the

command in Afghanistan, particularly Col Murchison. As we have noted, we considered we could resolve the issue by proceeding on the basis we set out at paragraph 101 below.

63. However, in the submissions made after the hearing the prosecution contended (at paragraph 5) that “the criticism which had since come to light of the Telemeter Report is not limited [to] the allegations concerning the chain of command, but rather its defective consideration of what happened *on the ground* and the operational circumstances in which the killing occurred”. There then followed a detailed submission as to the unreliability of the extracts agreed with the Ministry of Defence in 2015.
64. In the light of this approach, to which the appellant strongly objected, we will first consider the effect of this further submission on our decision as to the safety of the conviction. If it has no material effect, and we conclude that the conviction is unsafe, we will consider the much more difficult question of whether in the circumstances, where the prosecution now dispute much of the evidence on the basis of which the hearing of the appeal proceeded, we should substitute a verdict of manslaughter. It is important to recall that the prosecution had originally urged us in their submissions before and at the hearing, in the event that the conviction was unsafe, to substitute a conviction for manslaughter.

## **6. Our conclusion on the safety of the conviction for murder.**

65. We approach the question of safety on the basis of the psychiatric evidence we have set out and on the basis that a conclusion on the safety of the conviction does not involve us in reaching a definite conclusion on matters relating to the conditions in Afghanistan. We have to proceed on the basis that the extract from the Telemeter Report, even though now disputed in many more respects by the prosecution, contained for present purposes a sufficient evidential basis, together with the other evidence, to support the conclusion that if the defence of diminished responsibility had been before the court martial, there would have been a reasonable doubt as to the safety of the conviction. Our reasons are as follows.
  - (a) *The decision not to plead the defence at the time of the court martial*
66. It was again common ground between the psychiatrists that the appellant was suffering from an adjustment disorder at the time of the court martial.
67. It was the opinion of the psychiatrists that the appellant lacked insight at the time of the trial. He would not have wanted to advance a psychiatric defence because of the matters to which we have referred at paragraph 35. He only knew of PTSD and was not suffering from that. Additional factors were the stigma, perception of weakness and the likely end of his career.
68. We have also carefully considered the diagnosis made by Dr Orr after conviction and prior to sentence to which we have referred at paragraph 4 above. We accept the evidence of all three psychiatrists that Dr Orr had a very limited brief and that he was not applying his mind to the appellant’s mental

state at the time of the killing and whether he had a basis for the partial defence of diminished responsibility.

69. Critical to our conclusion on this issue is that, at the initial hearings before this court in December 2016, the prosecution accepted that there was a reasonable explanation for the failure to call psychiatric evidence at trial and, thus, for failing to advance the partial defence of diminished responsibility. This concession has meant that it is not right to conclude that there was a tactical reason for failing to deploy it. Had it been otherwise, it would not have been appropriate for this court to consider the defence at all: see *R v Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183.

(b) *The prevalence of adjustment disorder*

70. The evidence of Professor Greenberg was that about 20-25% of combat troops deployed to Iraq and Afghanistan at some point suffered from a mental health difficulty; those that had mental health problems were more likely to commit or at least condone morally reprehensible behaviour. In 2012 and 2013, the most common form of mental health diagnosis, about one third of those diagnosed, were adjustment disorders.

71. As this was the first case as far as any of the witnesses were aware in which an adjustment disorder had been associated with the killing of an enemy, a very considerable degree of caution is required. The evidence was that all elite troops (which the Royal Marines are) are trained to withstand stress and to be resilient, particularly when well led. However, as Professor Greenberg stated and we accept, everyone has a breaking point. As he pithily expressed when cross examined by counsel for the prosecution:

“There isn't any such thing as a Rambo-type, Arnold Schwarzenegger soldier who can face all sorts of stressors and appear to be invulnerable. That sort of person only exists in the cinema.”

(c) *Reliance on the appellant's account and his credibility*

72. As we have set out above, the psychiatrists had interviewed the appellant and relied on his evidence in the diagnosis of the adjustment disorder and its severity. The prosecution invited us to disbelieve the appellant and placed particular reliance on the findings of the Board as set out in the sentencing remarks.

73. We were referred to a number of authorities in which this Court has looked at the reasons set out in the sentencing statement in determining the safety of the conviction: *R v Stables* [2010] EWCA Crim 2405 at paragraphs 8-9; *R v Gray* [2012] EWCA Crim 252 at paragraph 3 and *R v Moffat* [2014] EWCA Crim 332, [2014] 2 Cr App R (S) 37.

74. In a case such as the present where the findings set out in the sentencing decision were of such gravity, it would be both just and necessary to consider by further and fuller argument on the nature of a court martial, the way in

which it in fact operates and the true extent of the effect of the decisions to which we have referred. We would observe that in the first decision the issue was briefly considered in an *ex tempore* judgment; in the second, there was no dispute about the point; the third was a sentencing appeal where the issue did not arise.

75. However, it is not necessary for us to consider these decisions. It is clear to us that findings of the Board, particularly in relation to the credibility of the appellant, cannot now be of substantial weight, as the Board had not heard the psychiatric evidence which could have impacted on its judgement. Further, we attach little material significance to the lies in his interview by the military police, not least because we have taken into account his explanation for the lies and, in particular, his recognition at the time that for a number of reasons, not least related to his position in the marines, he would not have wanted to admit that he had behaved disreputably and contrary to proper standards.
76. Nor can we accept the prosecution contention that the psychiatrists were flawed in their reliance on the appellant's evidence and in attaching credibility to his evidence. The psychiatrists followed the approach of assessing the account in the light of all the other objective evidence; it is the same approach which we have followed.

(d) *The approach to safety*

77. The approach to assessing the safety of a conviction in an appeal where there is fresh evidence generally was summarised in *Burridge* [2010] EWCA Crim 2847, [2011] 2 Cr App R (S) 27:

“[99] That brings the court to define the grounds for allowing an appeal on this basis, the principles of which are set out in a number of authorities at the forefront of which is *R v. Pendleton* [2001] UKHL 66; [2002] 1 Cr. App. R. 34; [2002] 1 WLR 72 (per Lord Bingham of Cornhill, at page 83, paras. 18 and 19) which was followed by this court in *R v. Hakala* [2002] EWCA Crim 730 and *R v. Hanratty* [2002] EWCA Crim 1141, [2002] 2 Cr App R 30. This line of cases was cited in *Dial & anor v. State of Trinidad and Tobago* [2005] UKBC 4; [2005] 1 WLR 1660 by Lord Brown of Eaton-under-Heywood who gave the judgment of the majority (the others being Lord Bingham of Cornhill and Lord Carswell) and put the matter in this way:

“[31] In the board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a

difficult one, it may find it helpful to test its view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict': *R v Pendleton* [2002] 1 All ER 524 at [19]. The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford v DPP* [1973] 3 All ER 762, [1974] AC 878 at 906, and affirmed by the House in *R v Pendleton*:

“While the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe]”

*(e) Our conclusion*

78. The prosecution contended that there was no contemporaneous evidence relating to his suffering from an adjustment order; the evidence obtained after conviction was insufficient to show that he had an adjustment disorder or that there was any substantial impairment.
79. We have set out at paragraph 35 the experience of the psychiatrists that assessments can properly and routinely be made at a time significantly after the events to which the assessment relates. It would clearly have been much better if there had been an assessment by the prosecution prior to the court martial, but that did not happen. The Privy Council observed in *Robinson v The State* [2015] UKPC 34 at paragraph 29 when discussing the process for considering the defence of diminished responsibility in England and Wales:

“In England and Wales these decisions are facilitated by the usually ready availability of full medical reports from experienced forensic psychiatrists. It is an important contribution to this process that every person charged with murder is routinely assessed by such a psychiatrist instructed by the prosecution, and early after arrest, either in prison or, in the relatively few cases in which s/he is on bail, as a condition of bail. So long as this careful consideration is given to each case, it is plainly of public benefit for pleas of guilty of manslaughter to be accepted. This avoids trials on non-issues which will be both expensive to the public and distressing to many of those involved, whether as witnesses, or relatives of the deceased, or as defendants and their families.”

This practice was again referred to in *Golds* at paragraph 48. Unfortunately, it is the experience of members of this court that in cases before the ordinary courts, the routine practice of the prosecution in obtaining reports is no longer followed. This appears to be related to the very real delay that obtaining such a report incurs along with the increasing cost involved. In many cases, such a decision may be entirely justifiable, but it is particularly unfortunate in any case involving conduct which is entirely inconsistent with the prior character

and conduct of the defendant. That is even more so in a case such this where, in any event, there is a real responsibility placed upon the armed forces in respect of the mental health and welfare of their troops.

80. Unfortunate though that may have been, the totality of the evidence before us is now clear. If the expert evidence of the psychiatrists and the other evidence which we set out fully at paragraphs 86-106 below had been before the court martial, we are in no doubt but that the defence of diminished responsibility would have had to have been left to the Board and that it could have affected their decision to convict. It matters not for this purpose that the evidence as to conditions in Afghanistan is disputed by the prosecution. That evidence plainly had sufficient force and credibility (even if disputed) together with the psychiatric evidence to form the basis of a case that the defence of diminished responsibility that could be advanced. Such a case, if it had been advanced before the Board could have raised a doubt as to guilt in the minds of the Board. As a result, the verdict is unsafe and the conviction for murder must be quashed.
81. We turn next to consider the much more difficult question as to whether we should substitute a verdict of manslaughter by reason of diminished responsibility instead of remitting the case for a retrial.

### **7. The power to substitute a verdict of manslaughter by reason of diminished responsibility**

82. The power to substitute is contained in s.14 of the Court Martial Appeals Act 1968 which provides:

“(1) This section applies where an appellant has been convicted of an offence and the Court Martial by which he was tried could lawfully have found him guilty of some other offence, and it appears to the Appeal Court on an appeal against conviction that the Court Martial must have been satisfied of facts which proved him guilty of that other offence.

(2) The Appeal Court may, instead of allowing or dismissing the appeal, substitute for the finding of the Court Martial a finding of guilty of the other offence, and may pass on the appellant, in substitution for the sentence passed on him by the Court Martial, such sentence as they think proper, being a sentence warranted by the relevant Service Act for that other offence, but not a sentence of greater severity.”

This mirrors the provisions of s.3 of the Criminal Appeal Act 1968.

83. The power to substitute (under s.3) a conviction for manslaughter on the basis of medical evidence not adduced at trial was recognised in *R v Weekes* [1999] Crim LR 907 and in *R v Campbell* [1997] 1 Cr App R 199. Whether it is appropriate for the court to substitute will depend on the individual circumstances. In neither of these cases, nor any other case involving fresh evidence, was the court troubled by the language of s.3 (1) which appears only

to contemplate this court having power to substitute if the trial court could have found the appellant guilty of some other offence, which it could not have done as the fresh evidence on which this court relied to substitute would, *ex hypothesi*, not be before the trial court. The words of the section must be taken to imply that this court can take into account the fresh evidence.

84. The difficult question for us is whether in the light of all the submissions made before us, and in particular the post-hearing submissions of the prosecution, we should substitute the verdict of manslaughter. At a trial, it is for the defendant to establish the partial defence of diminished responsibility on a balance of probabilities. It is therefore necessary for us on the basis of the evidence to consider whether such a defence would be established on a balance of probabilities. Neither is it determinative that both the appellant (advised by counsel) and the respondent agree that if the conviction for murder is quashed, a conviction for manslaughter by reason of diminished responsibility should be substituted.
85. It is thus necessary for us to analyse the position for ourselves. As it is not in dispute that at the time of the killing the appellant was suffering from an adjustment disorder, it is necessary to focus intensely on the evidence relating to the issue of substantial impairment.

## **8. The evidence relating to substantial impairment**

86. We have set out at paragraph 39 the five headings under which we summarised the approach of the psychiatrists to the evidence. We will use the same headings. We have taken into account, as agreed before us, all the material before the court martial and the material placed before this court. We have accorded the written material, including the statements of witnesses not called, the weight we considered appropriate.

### *(a) The evidence in relation to the appellant's condition prior to his deployment to Afghanistan*

87. The evidence in relation to the appellant prior to his deployment to Afghanistan was that:
- (i) He was very focused in mentoring and supporting those junior to him.
  - (ii) His appraisals showed that he was not a person who would let his emotions get the better of his behaviour.
  - (iii) He had been very good at training others; there was nothing to suggest he became angry.
88. We are satisfied on the evidence that he was an exemplary soldier.
89. The appellant's father had died (after suffering from Parkinson's disease) shortly prior to his deployment to Afghanistan in March 2011.

90. The appellant returned to the UK in July 2011 to scatter his father's ashes which he did on 24 July 2011. It is apparent that this caused him to reignite his grief.

91. We are entirely satisfied that the death of his father shortly before his deployment to Afghanistan and the subsequent return to the UK to scatter his father's ashes placed significant stress on him.

*(b) The circumstances under which the appellant was operating in September 2011*

92. As we have set out at paragraphs 47-64, significant issues were raised about the agreed extract from the Telemeter report in the light of the decision made by General Sir Gordon Messenger and the Ministry of Defence on 7 December 2016 to which we have referred at paragraphs 58 and following above.

93. Although the reliability of the matters set out in the agreed extract from the Telemeter report in this appeal is a matter entirely for our decision (as it would be for the Board in any retrial), in reaching our decision on its reliability we must have regard to the conclusion reached by General Sir Gordon Messenger and the Ministry of Defence on the complaint of Col Murchison and the note placed on the report at the request of the Ministry of Defence. We do so, nonetheless, in circumstances where we have no information, beyond the matters set out in the decision of General Sir Gordon Messenger and the Ministry of Defence, as to the process by which they reached their decision or the evidence they heard, if any, in relation to the Telemeter Report. On its face, the decision, despite the fact it contained substantial criticism of a report that has played a central role in this appeal, seems to have been reached by a review of the report itself, its terms of reference and correspondence. We have taken that fact into account in assessing the weight to be attached to the decision of General Sir Gordon Messenger and the Ministry of Defence on the Telemeter Report.

94. We have, in this context, therefore carefully considered the detailed reasons given by General Sir Gordon Messenger and the Ministry of Defence in Annex B of their decision and its relevance to the matters set out in the agreed extract of the Telemeter Report that is before the court. It is clear in our judgement that the conclusion reached was primarily directed at the investigation of the matters giving rise to the criticism of Col Murchison and others in the chain of command. However the wording of the decision goes significantly beyond that, as it refers to the process of the review resulting in the report having been flawed and there having been insufficient rigour.

95. We must, however, treat wide-ranging statements in context. On a proper reading of the decision of General Sir Gordon Messenger and the Ministry of Defence and the apparent circumstances in which the decision was reached, we have concluded that the broader wording is solely directed at the way in which the investigation and the report related to criticisms of Col Murchison and the chain of command. That is the essence of the statement the Ministry requested be attached to the report. The remarks must therefore be read narrowly. We cannot see any basis on which such a carefully written report as



the Telemeter Report was can be criticised in respect of the conclusions it reached on the conditions under which the appellant operated.

96. That reading is entirely consistent with the position taken in the pre-hearing submissions made by the prosecution about the Telemeter Report. The decision of General Sir Gordon Messenger and the Ministry of Defence dated 7 December 2016 was relied on (see paragraph 144 of the submissions) in respect of the criticism of Col Murchison and others in the chain of command. It did not extend beyond that.
97. We proceeded to hear the evidence on the basis that the criticism of the extracts from the report was limited in that way. It was for that reason we adopted the approach to the issues relating to Col Murchison's evidence set out at paragraph 101 below.
98. In all the circumstances:
  - (i) We reject the criticism of the Telemeter Report made in the post-hearing submissions, other than in relation to the criticism of Col Murchison. It was based on a misreading of the decision of General Sir Gordon Messenger and the Ministry of Defence.
  - (ii) Moreover, it would in all the circumstances have been unfair and unjust to the appellant to permit the prosecution to make such a substantial change in its case after the hearing. Had the wider points on the Telemeter Report been raised during the hearing, the court would have had to consider receiving substantial additional evidence and inquiring more generally into the Telemeter Report and the decision made by General Sir Gordon Messenger and the Ministry of Defence on 7 December 2016, if the court was to consider, as it had been originally invited by both parties, the issue of substitution.
  - (iii) In our judgement it would not be appropriate or fair now to permit these issues to be ventilated, well after the conclusion of the hearing and in terms contrary to those upon which we were asked to consider the position at the hearing.
99. Having rejected the post-hearing submissions of the prosecution on the wider criticism of the Telemeter report and having considered all the evidence we are satisfied that:
  - (i) The appellant had not received the full amount of pre-deployment training; he had to take time out of the training because of his father's death.
  - (ii) He had not been trained in Trauma Risk Management (TRiM), a peer-support process which, according to Professor Greenberg's evidence, should have been operating in Afghanistan and there appears to have been no opportunity to offer him the support of a TRiM trained colleague, save when one of the TRiM trained

marines arrived at CP Omar three days before the killing of the insurgent. It was clear in the opinion of Professor Greenberg (which was not contradicted) that the failure to provide TRiM for the multiple under the command of the appellant until the arrival of this marine was a significant factor.

- (iii) The appellant had previously been deployed as part of larger units where he would have been able to speak freely to others of his rank. He became commander of the multiple at CP Omar when the company under Lt Augustine was split.
- (iv) On 27 May 2011 Lt Augustine and Marine Alexander were killed whilst on patrol; this meant that the appellant lost the support of his junior officer. We accept the evidence of Professor Greenberg that this was of material significance as a stressor.
- (v) There was powerful evidence that members of the multiple under the command of the appellant were always on edge and did not feel safe at night. It was submitted by the prosecution that this was irrelevant; we reject this submission as it is contrary to the psychiatric evidence.
- (vi) The Padre did not visit CP Omar because it was too dangerous. Although we have not heard oral evidence from Col Murchison who, it was said, believed that the Padre had confused CP Omar with another base, we are satisfied that the evidence clearly shows that the Padre was correct in his recollection. It was the evidence of Professor Greenberg that padres carried out an important role in relation to the morale and mental health of troops, providing an opportunity for any marine under stress to speak about it. We accept that evidence as evidence of a further stressor.
- (vii) The multiple was a close knit group; instead of seeking external support, they would have tried to deal with trauma and stress through peer support.
- (viii) CP Omar, though only 2 km away from Shazad as the crow flies, was during summer months under constant external threat and difficult to reach safely. It was isolated. It was without doubt austere. We were shown a film about Temporary CP Toki made by Mr Terrill to whom we have referred at paragraph 53. Whilst we accept that conditions at Temporary CP Toki may have been worse than those in CP Omar, that was only a matter of degree immaterial to the issues in this appeal. The daily dangers faced by HM Armed Forces at CP Omar, were acute. The prosecution relied on a statement by Major Fisher that CP Omar was “relatively quiet”; this does not accord with the other evidence or other parts of his statements where he makes clear that J company had been hardest hit by the insurgents, that they were losing ground to the insurgents and by the end of the tour were combat weary.

- (ix) The multiple at CP Omar was undermanned; the previous multiple had been 25; the multiple under the appellant was 16.
  - (x) The multiple was required to patrol between 5 and 10 hours a day over rough ground in heat that was normally over 50 degrees Celsius when carrying a minimum of 100lbs of equipment. They should not have done morning and evening patrols, but were sometimes required to do this because of the manpower shortage. We cannot accept the submission by the prosecution that the heat, weight of equipment and tiredness set out in the Telemeter Report were irrelevant; the psychiatric evidence before us was to the contrary.
  - (xi) In consequence the men became physically very tired, particularly at times of illness or insurgent activity. The appellant was in particular deprived of sleep. The psychiatric evidence was that this might have led to diminished decision-making capacity.
  - (xii) It was difficult to detect insurgents in the local population whose hearts and minds they were seeking to win over; there was a constant threat of apparently friendly people acting as insurgents.
  - (xiii) Ambushes by insurgents and the threat of IEDs was constant; statistics showed that there was an IED explosion (whether controlled or instigated by the insurgents) on average every 16 hours during the material time.
  - (xiv) The insurgents had inflicted severe casualties and treated dead bodies callously and hung them from trees.
  - (xv) The appellant regarded himself as responsible for the members of his troop, particularly those with children (the appellant had none); he therefore undertook more patrols and risks to himself so that his troop could all get home safely.
  - (xvi) The appellant regarded himself as easily identifiable and targeted by the insurgents. Approximately a month before the killing on 15 September 2011 two grenades were thrown at the appellant by insurgents whilst he was talking to Afghan civilians outside the camp. The grenades fell into a nearby drainage ditch which funnelled the blast upwards, saving his life.
100. There was a significant dispute between Lt Col Lee and Lt Col Murchison as to the level of support provided to CP Omar, the visits made and the adequacy of the command of Lt Col Murchison and Major Fisher. We had statements from each of these as well as Warrant Officer Pooler and Regimental Sergeant Major Moran.
101. It was not necessary for us to resolve that dispute or assess the reliability of the Telemeter Report as regards the command by Lt Col Murchison and Major Fisher in the light of the submissions made by the prosecution about the

Telemeter Report and the evidence of Col Lee. Nor do we need to resolve the significant conflict in the evidence given by Col Lee and Col Murchison to which we have referred. That was because it was common ground amongst the psychiatrists that what was relevant to the mental state of the appellant and his responsibility for the killing was the perception that the appellant had of the support given to him. That perception can be summarised:

- (i) There was a lack of support from the officer commanding J Company and from Col Murchison.
  - (ii) CP Omar was not made physically secure; it could have been easily overrun. It did not seem secure, especially at night.
  - (iii) These matters intensified the feeling of isolation at CP Omar.
102. Professor Greenberg's evidence was that it was key to the mental health of a unit that they felt supported and their safety was given real consideration; the perceived lack of leadership by Col Murchison and Major Fisher and their perceived lack of support were key stressors on the appellant. The appellant's perception of the lack of leadership from those above heightened his sense of responsibility. As we have said it is not necessary for us to determine whether that perception was justified. It was the perception that was relevant.
103. An appraisal of the appellant written by Major Fisher dated 10 September 2011 noted that the appellant had probably reached his ceiling as "he lacked the dynamism to go further in his career". This was in marked contrast to his earlier appraisals. Far from assisting the prosecution, this would therefore appear to confirm that the appellant had changed significantly whilst at CP Omar; it provides support for the conclusion of Professor Greenberg that this may well have resulted from his adjustment disorder.
- (c) *The other evidence in relation to the day on which the insurgent was killed*
104. On 15 September 2011:
- (i) The attack on CP Talaanda had been sustained and long; radio chatter suggested another attack was imminent; the second insurgent had not been accounted for; there was therefore a heightened threat of attack. The evidence of Professor Greenberg was that this affected cognitive functioning and decision making.
  - (ii) The finding of the insurgent with a High Explosive grenade may have increased arousal as a trigger of memory of a recent attack when grenades were thrown at the patrol.
- (d) *The other evidence relating to the mental state of the appellant*
105. The serious nature of the appellant's mental condition was evidenced by:
- (i) The evidence of Warrant Officer Wright, who had been TRiM trained, that the appellant was a "husk of his former self" and in a

flat mood not wanting to discuss Afghanistan when they played golf together during an R&R period in July 2011.

- (ii) The account of the appellant's wife that on return to the UK to scatter his father's ashes in July 2011, he looked at the ground a lot when walking in the country. When asked why, he had told her of having to be alert in looking for IEDs when in Afghanistan.
- (iii) The evidence of members of the multiple, Rea, Whitehead and Hammond, that the appellant did no more than was necessary as a commander; that he withdrew more into himself and isolated himself in the container which served as a control room; and that he became increasingly irritable, particularly with others outside CP Omar.
- (iv) His startled response in a theatre in New York on 6 December 2011 when there was a loud bang.

(e) *The evidence of the appellant*

106. Each of the psychiatrists interviewed the appellant at length. It is not necessary for us to set out any more in relation to his account.

**9. Our conclusion on substitution of a verdict of manslaughter**

107. On the basis of this evidence we turn to assess whether the evidence entitles us on the balance of probabilities to find, on all the evidence before us (including the evidence before the court martial), that a Board (or jury) would conclude on the balance of probabilities that the appellant suffered from an abnormality of mental functioning arising from the adjustment disorder which substantially impaired his ability to form a rational judgement or to exercise self-control and provided an explanation for the killing of the insurgent.

(a) *The exceptional nature of the circumstances in which the appellant was placed*

108. We have had to consider what led the appellant deliberately to kill the insurgent at a time when he was incapacitated. The key issue, as correctly identified by Dr Joseph, was (1) whether it was a cold-blooded execution as the Board of the court martial concluded on the evidence before them or (2) whether it was the result of a substantial impairment of his ability to form a rational judgement or exercise self-control arising from his adjustment disorder.

109. Having considered all the evidence before us, we have concluded:

- (i) The appellant had been an exemplary soldier before his deployment to Afghanistan in March 2011.
- (ii) The appellant suffered from quite exceptional stressors we have set out at paragraphs 99-103 during the time of that deployment which increasingly impacted on him the longer he was in command at CP Omar. In addition to the matters we have set out, it is clear that a

consequence was that he had developed a hatred for the Taliban and a desire for revenge.

- (iii) At the time of the killing, the patrol remained under threat from other insurgents as we have set out at paragraph 104.
  - (iv) Given his prior exemplary conduct, we have concluded that it was the combination of the stressors, the other matters to which we have referred and his adjustment disorder that substantially impaired his ability to form a rational judgement.
110. As we have observed at paragraph 34, a person with such a disorder can appear to act rationally. In this case examples include moving the body out of the sight of the camera, waiting for the helicopter to move away, stating that he was not be shot in the head and other similar comments which we have described.
111. However, that type of planning is quite distinct from the effect of an adjustment disorder which can affect the ability to form a rational judgement about (1) the need to adhere to standards and the moral compass set by HM Armed Forces and (2) putting together the consequences to himself and others of the individual actions he is about to take. In our view, the adjustment disorder had put the appellant in the state of mind to kill, but the fact that he acted with apparent careful thought as to how to set about the killing had to be seen within the overarching framework of the disorder which had substantially impaired his ability to form a rational judgement.
112. We have also considered whether he lost his self-control (within the context of diminished responsibility). There can be little doubt that on 15 September 2011 the appellant was angry and vengeful and had a considerable degree of hatred for the wounded insurgent. On prior deployments, similar emotions had been controlled by him. The appellant's decision to kill was probably impulsive and the adjustment disorder had led to an abnormality of mental functioning that substantially impaired his ability to exercise self-control. In our judgement the adjustment disorder from which he was suffering at the time also impaired his ability to exercise self-control.
113. It follows that the other grounds of appeal will not fall for consideration by this court. We would, however, like to make it clear that, when reviewing the matters the subject of our judgement, we could see no basis for any criticism of the conduct of the court martial by the Judge Advocate General. He left the issues which had been raised by the prosecution and the defence during the hearing of the court martial to the Board in an entirely fair and proper manner.

## **Conclusion**

114. In the circumstances, we therefore substitute a verdict of manslaughter by reason of diminished responsibility.

As agreed, we will fix a date for the hearing of the submissions in relation to sentence.