IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA619/2018
[2023] NZCA 136

BETWEEN	GABRIEL YAD-ELOHIM Appellant
AND	THE KING Respondent

Hearing:	24 November 2022
Court:	Goddard, Woolford and Fitzgerald JJ
Counsel:	R M Mansfield KC and T J Buckley for Appellant M J Lillico for Respondent
Judgment:	1 May 2023 at 11.00 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence on appeal is allowed to the extent set out at [69] to [78] below.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Woolford J)

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Para no

[1] Gabriel Yad-Elohim was found guilty of murder by a jury in the High Court at Auckland. He was sentenced to life imprisonment with a minimum period of imprisonment of 13 years. He now appeals against conviction on the basis of what he says is a miscarriage of justice. He had pleaded not guilty by reason of insanity. His primary ground of appeal is that there was no real contest at trial between the Crown and defence psychiatrists because of the late discovery of relevant evidence and the consequential significant time pressure on the defence psychiatrist to prepare his report. Counsel submits that had there been more time for the defence psychiatrist to consider the implications of the new evidence, there would have been a real prospect of a different verdict.

[2] There was never any doubt that Mr Yad-Elohim killed the victim — a 69-year-old male whom he had never met. The fatal assault was captured on CCTV footage. The key issue at trial was whether he was insane at the time in terms of s 23 of the Crimes Act 1961.

Defence of insanity

[3] Section 23(2) provides that no person shall be convicted of an offence by reason of an act done when labouring under a disease of the mind to such an extent as to render him incapable:

(a) of understanding the nature and quality of the act; or

(b) of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

[4] Section 23(1) presumes everyone to be sane at the time of doing any act until the contrary is proved. The Crown therefore does not have to disprove insanity. The burden of proving the defence of insanity rests on the defendant on the balance of probabilities.

Factual background

[5] The following is taken largely from the sentencing notes of van Bohemen J.[1]

[6] On 26 September 2017, Mr Yad-Elohim went to the victim's apartment building with Ms Uru, with whom he had a slight acquaintance. He had approached Ms Uru in Karangahape Road, Auckland, to buy drugs and together they had travelled by bus to the victim's address in Western Springs. Ms Uru, who was known to the victim, persuaded Mr Yad-Elohim to hand over $200 and stay on the landing below the victim's apartment while she bought the drugs for him. Mr Yad-Elohim said that Ms Uru had told him that the victim had gang associations. Mr Yad-Elohim remained on the landing awaiting Ms Uru's return, but she did not return. She had climbed over the balcony of the victim's apartment, clambered back to the ground and run away with Mr Yad-Elohim's money. As Ms Uru admitted in evidence that had always been her plan.

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1 *R v Yad-Elohim* [2018] NZHC 2494.

[7] After a while, Mr Yad-Elohim became suspicious and went up to the victim's apartment and knocked on the door. The victim opened the door and Mr Yad-Elohim spoke briefly with him. It appears he denied any knowledge of Ms Uru. Mr Yad-Elohim then grabbed the victim, headbutted him twice, dragged him out of the doorway onto the landing, and punched him in the head. The victim fell to the ground beside the wall, apparently already unconscious. He remained on the floor inert through the assault that followed.

[8] Mr Yad-Elohim assaulted the victim around the head, hitting him repeatedly with his elbow and fists, before kicking and stomping on his head and body for about four minutes. At one point, Mr Yad-Elohim left the landing and walked down the stairwell before returning and kicking the victim around the head, body and legs for a further three minutes. It is estimated that Mr Yad-Elohim inflicted approximately 90 blows on the victim in the course of this sustained assault. The victim died as a result of the blunt force trauma which Mr Yad-Elohim inflicted to his head, face and abdomen.

[9] Mr Yad-Elohim was arrested in Karangahape Road, Auckland, the following day by police officers who recognised him from the CCTV footage of the fatal assault. He was interviewed by police with the assistance of a Japanese interpreter at the Avondale Police Station between 8:17 pm and 10:33 pm on 27 September 2017. He was then charged with murder and appeared first in Court on 28 September 2017. Mr Yad-Elohim was then seen by a psychiatrist, Dr Duggal, on 2 October 2017 and gave an account to Dr Duggal of the assault on the victim. We comment further on this account later in this judgment.[2]

Mr Yad-Elohim's history of mental illness

[10] Mr Yad-Elohim was born in Masan, South Korea, of Korean parents on 22 May 1988. He was named Jung Hoon Song at birth. His mother's name is Sunyoung (Jenny) Kim. His father's name is Yeoung Kyeoung Song.

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[2] See [33] and [48] below.

[11] Soon after his birth, Mr Yad-Elohim lived in Japan with his parents for about 18 months, while his father studied at university. The family then moved back to Korea. His parents separated and Mr Yad-Elohim moved to New Zealand with his mother and siblings in 1999, when he was about 11 years of age.

[12] In 2012, when he was about 24 years of age, he changed his name by deed poll to Gabriel Yad-Elohim, which he understood to mean "the hand of God" in Hebrew. This was said to be consistent with the delusional beliefs that he had around that time. When he was interviewed by police the day after the fatal attack, he said his name was Yuuki Watanabe and he was Japanese.

[13] Mr Yad-Elohim first came to the attention of Mental Health Services in 2009, when he was aged 21. He was admitted to Te Whetu Tawera (TWT), the Auckland City Hospital Adult Psychiatric In-Patient Unit, for a period of 13 weeks between July and October 2009. His admission followed his assessment by police after an assault. He was angry and agitated. He had a delusion that his whole family was raped by his friends because they were jealous of him. The discharge diagnosis was psychosis not otherwise specified, in conjunction with polysubstance abuse.

[14] He was again admitted to TWT for about 11 weeks between December 2014 and February 2015. Then, in October 2015, he was admitted to the Waiatarau Unit, the Waitakere Hospital Adult Psychiatric In-Patient Unit, where he stayed for approximately a month. This admission occurred when police brought him to the Emergency Department because he was behaving bizarrely, staring at walls and talking to himself. The discharge diagnosis was paranoid schizophrenia and anti-social personality disorder.

[15] Mr Yad-Elohim was also admitted to St Vincent's Hospital in Sydney, Australia, for about three weeks from July to August 2016 during a two to three month stay in Australia. In 2017, Mr Yad-Elohim travelled to South Korea where he said he received some psychiatric care in hospital and then on to Canada. From Canada he was apparently deported back to New Zealand because of his possession of drugs, just before his final admission to TWT.

[16] At about 3:00 am on Sunday, 17 September 2017, Mr Yad-Elohim presented at the Emergency Department of the Auckland City Hospital, where he was assessed by an on-call psychiatric registrar. Mr Yad-Elohim was recorded as being in a distressed and agitated state. He was experiencing thoughts and urges to injure Pacific Island, Māori, Asian and African people, and he was hearing voices telling him to steer clear of them. He may have also been hearing the voice of God, but that was not that clear. The Registrar formed the impression that Mr Yad-Elohim was suffering from chronic schizophrenia because he reported psychotic symptoms and denied any sustained drug use. He was, accordingly, admitted under the Mental Health (Compulsory Assessment and Treatment) Act 1992 to TWT at around 5:00 am that morning. He was provided with an anti-psychotic medication, Olanzapine.

[17] Thereafter, over successive days, Mr Yad-Elohim's mental state improved and by Wednesday, 20 September 2017, he was assessed as being symptom free. A urine sample had been taken from him, which tested positive for methamphetamine and cannabis. The diagnosis made was again of a substance related psychotic disorder. On Saturday, 23 September 2017, Mr Yad-Elohim was discharged from TWT to a respite house in Mt Albert, Auckland, with medication which he was instructed to continue to take. Mr Yad-Elohim killed the victim three days later, on 26 September 2017.

Fitness to stand trial

[18] Following his arrest on 27 September 2017, Mr Yad-Elohim was remanded in custody. He was transferred to the Mason Clinic (the Regional Forensics Psychiatric Services Secure Unit) on 14 November 2017 after he stopped taking his anti-psychotic medication and described hearing voices which were causing him distress. Because of his continuing psychotic symptoms, the question of his fitness to stand trial arose.

[19] On 19 April 2018, Lang J held a hearing to assess Mr Yad-Elohim's fitness to stand trial. Counsel for Mr Yad-Elohim conceded that he was then fit to stand trial. Lang J had reports from two psychiatrists who had examined Mr Yad-Elohim at the Mason Clinic, Dr James Cavney and Dr Jeremy Skipworth. Both psychiatrists found that Mr Yad-Elohim's mental state had improved significantly, to the point where

the Court was likely to find him fit to stand trial. Lang J thought it clear that Mr Yad-Elohim understood plea options, the roles of the participants in a criminal trial, and the potential outcomes of the trial process. He also assessed him as able to provide his counsel with instructions as to the manner in which he wished to defend the charge of murder. Lang J therefore found on the balance of probabilities that Mr Yad-Elohim was fit to stand trial.[3]

[20] Defence counsel then instructed Dr Justin Barry-Walsh to assess Mr Yad-Elohim for the purposes of determining whether the defence of insanity or a defence based on lack of intent might be available to him at trial. Notwithstanding Lang J's finding that Mr Yad-Elohim was fit to stand trial, Dr Barry-Walsh reached the view that Mr Yad-Elohim was suffering from a persistent psychotic illness which represented a mental impairment and that he was therefore unfit to stand trial. Counsel brought Dr Barry-Walsh's opinion to the attention of the Court and requested a further hearing to determine afresh Mr Yad-Elohim's fitness to stand trial. In response, Wylie J directed the Registrar to arrange for updated reports to be obtained from Dr Cavney and Dr Skipworth and to allocate a date for a hearing into whether or not Mr Yad-Elohim was still fit to stand trial.

[21] At a hearing on 17 July 2018, two weeks before the trial was due to commence, Wylie J heard from Dr Cavney, Dr Skipworth and Dr Barry-Walsh. Each was cross-examined. Wylie J also heard from counsel. Mr Yad-Elohim was present throughout and had the opportunity to speak with counsel.

[22] Wylie J said that on balance he preferred the evidence of Dr Cavney and Dr Skipworth. He bore in mind that both had seen and observed Mr Yad-Elohim over a period of some months. Both were familiar with his case, with his mental impairment and with his response to the medication he had been receiving. In contrast, Dr Barry-Walsh saw Mr Yad-Elohim on one occasion only for a period of two hours. Dr Barry-Walsh conceded that he would have liked to have spent longer with Mr Yad-Elohim.

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3 *R v Yad-Elohim* [2018] NZHC 726.

[23] Further, Dr Barry-Walsh did not in his report expressly consider the statutory definition of "unfit to stand trial" as set out in s 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Nor in his initial report did he address the factors which have been identified by the Courts as providing useful guidance to health assessors considering the issue of fitness to stand trial. When he was questioned about them, he conceded that there was no concern with many of them. Dr Barry-Walsh also appeared to have envisaged a complex trial taking some weeks. That seemed very unlikely to Wylie J. He thought it was likely to be a relatively straightforward trial with one issue only — insanity. Moreover, Dr Barry-Walsh's opinions were largely speculative and based on answers given by Mr Yad-Elohim on one occasion only.

[24] Wylie J acknowledged that the trial was likely to require careful management. It may well be that the Court would have to take regular breaks, sit shorter days, and give counsel extended time to discuss matters from time-to-time with Mr Yad-Elohim. These were all matters for the trial Judge. If Mr Yad-Elohim elected to give evidence, it was also likely that the trial Judge would have to consider how that evidence could best be given. Nonetheless, Wylie J was satisfied on the balance of probabilities that Mr Yad-Elohim was fit to stand trial.[4]

Evidence emerges prior to and at trial

[25] Affidavits of trial counsel for Mr Yad-Elohim filed on the current appeal (see [58] to [60] below) disclose that there was real difficulty prior to trial locating an expert to give evidence for the defence on the question of insanity. It appears, however, that some weeks prior to trial Dr Cavney contacted trial counsel, raising a concern about whether Mr Yad-Elohim might be able to advance a defence of insanity. Following this, Dr Cavney was instructed on 19 June 2018, to give evidence for the defence at trial.

[26] As already mentioned, Dr Cavney had earlier given evidence at the fitness hearing before Wylie J. In preparing to give evidence on the issue of Mr Yad-Elohim's sanity, Dr Cavney reviewed Mr Yad-Elohim's police interview, and noted that Mr Yad-Elohim had been left alone for a period of 20 minutes while the video camera

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4 *R v Yad-Elohim* [2018] NZHC 1785.

was still recording. During this time, Mr Yad-Elohim spoke in Japanese which had not been translated and transcribed.[5] Dr Cavney brought this to the attention of trial counsel who requested that it be translated and transcribed. The translation and transcript were then made available to all parties shortly before the trial.

[27] Dr Cavney also recalled that when he went to see Mr Yad-Elohim in prison shortly after his arrest, Mr Yad-Elohim had provided him with a police summary of facts on the back of which he had written some comments. This document was referred to throughout trial as the AOJ document after a heading on the document written by Mr Yad-Elohim, which he said meant "Administers of Justice". Dr Cavney had placed the AOJ document on Mr Yad-Elohim's file at the Mason Clinic, but it had not been reviewed by any other report writer. Dr Cavney therefore retrieved the document from Mr Yad-Elohim's file in order to review it as part of his assessment.

[28] After the trial had started, but before the psychiatrists had given evidence, defence counsel was contacted by a Korean lawyer who had noted a report in the New Zealand Herald of the commencement of the trial in which Mr Yad-Elohim had been described as Japanese. The Korean lawyer knew Mr Yad-Elohim was Korean, having met him through the Korean community in Auckland. He was also able to provide counsel with the contact details for Mr Yad-Elohim's mother. As a result of further enquiries, an agreed summary of facts was tendered as evidence, which stated:

> 6.1 The defendant is of Korean ethnicity. Both his mother (Sunyoung Kim) and his father (Yeoung Kyeoung) are Korean; they are both his biological parents.
>
> 6.2 The defendant was born in Masan, South Korea. He lived in Japan for about 18 months between his birth and the age of two years old. He then lived in Korea until he moved to New Zealand in 1999.
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> 6.3 The defendant has never had a step-mother.

[29] The agreed facts were contrary to the account of his personal history which Mr Yad-Elohim had consistently given to health assessors.

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[5] Other experts, including the Crown psychiatrist who gave evidence at Mr Yad-Elohim's trial, Dr Peter Dean, had, however, viewed this part of the video interview.

Psychiatric evidence at trial

[30] The trial commenced on 31 July 2018. The first psychiatrist who gave evidence at trial was the Clinical Director of TWT, William Peter McColl. Dr McColl described Mr Yad-Elohim's presentation to the Emergency Department of Auckland City Hospital, his admission to TWT and treatment there before his release three days before the killing. He did not give an assessment of Mr Yad-Elohim's sanity at the time of the killing.

[31] There were two forensic psychiatrists who did give expert evidence about Mr Yad-Elohim's sanity. As noted above, Dr Cavney was called by the defence. Dr Peter Dean was called by the Crown.

Dr Cavney

[32] Dr Cavney had provided three earlier reports dated 7 November 2017, 1 February 2018 and 16 July 2018, on Mr Yad-Elohim's fitness to stand trial. For the purpose of these reports, he had meetings with Mr Yad-Elohim on 1 November 2017 for two hours, 29 January 2018 for one hour and 12 July 2018 for one and a half hours, totalling four and a half hours. It was on the basis of Dr Cavney's reports together with those of Dr Skipworth that Wylie J found Mr Yad-Elohim fit to stand trial in his decision dated 19 July 2018.

[33] In his second report dated 1 February 2018, Dr Cavney set out Mr Yad-Elohim's account of the killing, which was consistent with the account he gave the police at interview the day after the killing, the account he told the first psychiatrist to assess him, Dr Duggal, and the account he later gave the Crown expert, Dr Dean, on 24 May 2018. Mr Yad-Elohim did not give any account of hearing voices that told him to kill the victim (command hallucinations).

[34] In his third report dated 16 July 2018, Dr Cavney confirmed that Mr Yad-Elohim's account had not changed. Dr Cavney said he enquired as to whether the meaning of Mr Yad-Elohim's adopted name (the hand of God) could have been relevant to the alleged offence. Mr Yad-Elohim said in the past he had thought that God had given him the right to act as his "enforcer" and to punish people on his behalf.

However, he denied that this related to the present charge of murder and said the charge arose from the drug deal he described.

[35] As noted, Dr Cavney had received instructions on 19 June 2018, a month prior to the second hearing on Mr Yad-Elohim's fitness to stand trial and six weeks prior to the commencement of the trial. Dr Cavney said that was a very short timeframe to consider the question of an insanity defence. He therefore relied primarily on his previous reports and reports by Dr Skipworth, Dr Barry-Walsh, Dr Goodwin and Dr Dean.[6] He also viewed CCTV footage of the killing and the police video interview following Mr Yad-Elohim's arrest a day later. He had a discussion with Mr Yad-Elohim's treating psychiatrist, Dr McKinnon. Finally, he spoke again with Mr Yad-Elohim, this time for 15 minutes on 25 July 2018, to clarify some points.

[36] In preparing his report on Mr Yad-Elohim's sanity, Dr Cavney identified a number of matters which he thought were significant in any assessment of sanity.

[37] First, in reviewing the CCTV footage of the killing, Dr Cavney noted that Mr Yad-Elohim appeared to nod his head when on the stairwell prior to the fatal assault, which Dr Cavney interpreted as Mr Yad-Elohim hearing voices. When he spoke to Mr Yad-Elohim, Dr Cavney asked him what happened when he was alone on the landing of the stairwell. He said, "I had a cigarette". Dr Cavney said he thought he [Mr Yad-Elohim] may have "heard something". Mr Yad-Elohim paused and replied, "maybe it was a voice telling me I'm in trouble now … coz the T-girl was ripping me off". Dr Cavney asked who the voice was, and Mr Yad-Elohim said, "it was the usual voice … the same voice that tells me Māori are bad". Dr Cavney asked him who he thought it was. Mr Yad-Elohim replied, "maybe it's got some power to talk about the future". Dr Cavney asked him if the voice told him to go up the stairs. He said, "yes … to get the money". Dr Cavney asked if that was all and Mr Yad-Elohim replied, "it was just a feeling". Dr Cavney later characterised this as a voice on the landing that gave Mr Yad-Elohim a portent of the future.

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[6] Dr Goodwin had provided an earlier report to trial counsel for Mr Yad-Elohim on a possible defence of insanity but had concluded that such a defence was unlikely to be available. See [74] below.

[38] Further, the CCTV footage of the fatal assault was shocking in that it showed a deliberate and sustained attack. Dr Cavney also noted Mr Yad-Elohim throwing two cigarettes on the victim's lifeless body, then walking way before coming back to continue the assault.

[39] Second, in reviewing the police interview of Mr Yad-Elohim recorded on DVD, Dr Cavney thought Mr Yad-Elohim showed a degree of formal thought disorder and the slow processing of information. He was also responding to non-apparent stimuli. Most importantly for the present appeal, at the end of the interview Mr Yad-Elohim had been left alone for a period of 20 minutes while the video camera was still recording. Mr Yad-Elohim appeared to be addressing the victim, saying at one stage, "… I'll put a [white] colour flower on you." Dr Cavney thought that Mr Yad-Elohim was thoroughly psychotic and hallucinating during the interview.

[40] Third, Dr Cavney considered that the comment made in the police interview about a white coloured flower may be a reference to a Japanese anime[7] character. One of the posts on Mr Yad-Elohim's Facebook page also referred to a Japanese anime series. Dr Cavney spoke with Mr Yad-Elohim's treating psychiatrist, Dr McKinnon, who confirmed Mr Yad-Elohim's interest in Japanese anime characters. During the 15 minute consultation on 25 July 2018, Dr Cavney enquired of Mr Yad-Elohim if he identified with anime. Mr Yad-Elohim told Dr Cavney that he used to think he was a ninja when he was younger. He said he thought he was a character called Kurosaki Ichiwo. When asked by Dr Cavney whether he thought that at the time of the alleged offending, he replied, "[y]es and now too as well". Dr Cavney thought this was of real clinical interest and if he was ever to be Mr Yad-Elohim's clinician he "would be absolutely tracking that down and asking questions to feed into a clinical formulation of risk." He did, however, acknowledge at trial that "in a court of law" Mr Yad-Elohim's identification with a Japanese anime character was a hypothesis that had yet to be fully explored and confirmed.

[41] Fourth, Dr Cavney reviewed what Mr Yad-Elohim had written on the AOJ document. It talked of making Earth a better place by annihilating cockroaches, dogs,

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7 Anime — a style of Japanese film and television animation typically aimed at adults as well as children.

pigs, maggots and flies. It also listed the names of four men who may be killers or just prisoners on the same landing. When Dr Cavney asked Mr Yad-Elohim about the AOJ document, he confirmed he meant to get rid of flies, but also lowlifes, which Dr Cavney took to be criminal types of people. Dr Cavney thought the document was "something of a Rosetta Stone" as it almost seemed to combine the strands of crime, violence, God and methamphetamine into one psychotic process. Dr Cavney did, however, acknowledge at trial that it was "more of a clinical interest than legal interest" and said he did not want to go too far with his speculation.

[42] Fifth, Dr Cavney commenced giving evidence at 2:15 pm on Monday, 6 August 2018. During the course of his evidence, he stated that he had only heard that morning that the background given by Mr Yad-Elohim to numerous report writers was probably not true. He commented that no one had "yet truly plumbed the depths of Mr Yad-Elohim's psychosis". Dr Cavney said he was not confident that the Court could rely on any reports by Mr Yad-Elohim.

[43] After reviewing all the previous reports, assessing the CCTV footage of the killing and the police interview, including the recently translated and transcribed portion of the interview, as well as the Japanese anime connection and the AOJ document, Dr Cavney was of the opinion that Mr Yad-Elohim deliberately beat the victim to death, threw a symbolic white flower in the form of the two cigarettes to send him to the afterlife, and then walked away. When he believed the victim said something, he came back to make sure he finished the job. He stated that Mr Yad-Elohim probably understood the nature and quality of the fatal assault, but was incapable of knowing what he did was morally wrong. Dr Cavney thought Mr Yad-Elohim believed he was doing God's work.

Dr Dean

[44] Dr Dean was asked by the Crown in May 2018 to report on Mr Yad-Elohim's sanity. This was a month earlier than Dr Cavney was instructed by the defence. Dr Dean's report is dated 11 June 2018, seven weeks prior to trial and one week before Dr Cavney was instructed. Dr Cavney therefore had Dr Dean's report when preparing his own report.

[45] Like Dr Cavney, Dr Dean had access to a wide range of material. He also interviewed Mr Yad-Elohim at the Mason Clinic on 24 May 2018 for approximately 60 minutes. Dr Dean confirmed that Mr Yad-Elohim now has schizophrenia, whether it was caused by some genetic vulnerability and biology of his brain or whether it was caused by methamphetamine. The common symptoms of schizophrenia are delusions and hallucinations. Voices are commonly heard, thinking is often disorganised, and mood can be disturbed, leading to agitation and depression.

[46] When he was interviewed by Dr Dean, Mr Yad-Elohim told him that the charges he was facing arose after an incident when he went to score some methamphetamine. He acknowledged that there was a fight which led to the death of the victim. He described meeting a sex worker the day before on Karangahape Road. He said this meeting was a random meeting. The following day they had a discussion about obtaining drugs. They then travelled by bus to Western Springs in order to purchase some methamphetamine. Mr Yad-Elohim described having a disagreement with the sex worker outside the victim's home. He was eventually persuaded to give him money in order to purchase drugs. The sex worker went upstairs and entered the flat, but did not return. Mr Yad-Elohim then went up the stairs to knock on the flat door hoping to have his money returned to him. The door was answered by the victim and he asked him where the sex worker was. The response he got was that he had not seen anyone. Mr Yad-Elohim described pulling the victim out of the doorway and stated the victim started punching him and they got into a fight. He recalled headbutting the victim twice and said, "I had no time to think". He then described defending himself without thinking. He said the victim fell to the floor, and he attacked the victim with his elbow and kicked him. Mr Yad-Elohim said that he was feeling angry because the victim had stolen his money and disrespected him. He stated again, "I didn't know what I was thinking". He described having to give the victim $200 worth of punishment, and indeed said that he had only used $100 worth of force and had been soft on the victim. He felt the victim must have been weak because he did not consider his actions to have been particularly aggressive or forceful.

[47] He talked about having heard voices from Satan that had been present for some time, including prior to travelling to Canada and while he was in Canada. However, he was adamant that he did not recall hearing Satan's voice at the time of the killing.

He also described having heard a voice telling him to kill people of African or Korean heritage, but this was not relevant to the victim at all. He did not describe being fearful about gangs or being at risk from the victim. He described his motivation as being focused on retrieving his money or receiving payment by punches. He reiterated he did not intend to kill the victim.

[48] Dr Dean noted that this account was consistent with the account he gave in the police interview on 27 September 2017, the day after the killing and to Dr Duggal, who as noted above was the first psychiatrist who had interviewed Mr Yad-Elohim after his arrest on 2 October 2017.

[49] Dr Dean accepted that Mr Yad-Elohim had a disease of the mind for the purposes of an insanity defence. As to knowledge of the nature and quality of his actions, Dr Dean was of the opinion that Mr Yad-Elohim knew that a violent act had occurred, and that he had perpetrated it. He knew the nature and quality of his actions.

[50] However, in contrast to Dr Cavney's opinion, Dr Dean was of the view that Mr Yad-Elohim understood that his actions were wrong having regard to the commonly accepted standards of right and wrong. Mr Yad-Elohim was not driven by his psychotic illness to kill the victim. He was intent on gaining retribution for being cheated. Dr Dean accepted that Mr Yad-Elohim was psychotic at the time of the offending but put significant weight on the consistency of Mr Yad-Elohim's account of and rationale for the offending, which did not include psychotic delusions instructing or driving his offending.

Grounds of appeal

[51] First, counsel for Mr Yad-Elohim submits that Wylie J was wrong to find that he was fit to stand trial. The personal history provided by Mr Yad-Elohim and relied upon by Wylie J is now known to be fundamentally incorrect. Further, Wylie J placed too much emphasis on preferring one expert's evidence over another rather than considering all the evidence and applying it to what is required to effectively participate in a trial. Finally, Wylie J's view that Mr Yad-Elohim 'should' be able to

understand certain aspects of the trial did not meet the requisite threshold of effective participation as set out in the leading case on fitness.[8]

[52] Secondly, counsel submits that the Judge inadequately directed the jury on the issue of insanity, particularly in a case of such brutal offending. He says the Judge should have clearly directed the jury as to the disposition options available should they return a not guilty verdict. The jury clearly had concerns about Mr Yad-Elohim being released into the community.

[53] Thirdly, Mr Yad-Elohim's primary ground of appeal is that a proper contest at trial was not possible given how matters developed very shortly before or at trial with the late provision of a complete transcript of Mr Yad-Elohim's video interview and confirmation that the personal history he consistently gave assessors was flawed. This triggered possible new queries. There was, however, inadequate time to make those inquiries and hence inadequate time to finalise an opinion. That in turn enabled Crown counsel to cross-examine Dr Cavney in a manner prejudicial to Mr Yad-Elohim.

[54] There were two further grounds of appeal which were not pursued at the hearing, namely, the failure to provide a Korean interpreter and a reference to Mr Yad-Elohim's outstanding District Court charges upon which it was suggested that the jury had not been adequately directed.

Fresh evidence

The evidence

[55] Mr Yad-Elohim has filed the following new material:

(a) an affidavit from his mother, Ms Jenny Kim;

(b) two affidavits from trial counsel, Ms Annabel Cresswell;

(c) an affidavit from a Korean lawyer, Mr Joon Young Yi;

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8 *Nonu v R* [2017] NZCA 170.

(d) an affidavit from the defence psychiatrist, Dr Cavney; and

(e) a report from another psychiatrist, Dr David Chaplow.

[56] Mr Yad-Elohim's mother speaks of her son's birth in Korea in 1988, his short stay in Japan as an infant and subsequent schooling in Korea and then his education in New Zealand after they moved here in 1999. She is of the opinion that Mr Yad-Elohim speaks English best and then Korean. He knows Japanese, but not very well.

[57] Ms Kim then refers to the histories recorded in various psychiatric reports and her son's interview by the police. She confirms he is not of mixed Chinese and Japanese ethnicity as he claimed. She notes that he thinks she is his step-mother, but she is his mother and he does not have a step-mother. He was not raised in Japan, nor is his name Yuuki Watanabe as he claimed to the police.

[58] Trial counsel has also provided two affidavits in which she advises that she ensured a Japanese interpreter assisted Mr Yad-Elohim at trial as he had previously been supported by a Japanese interpreter at his police interview. She met the interpreter for the first time at trial. She did not use an interpreter for pre-trial attendances on Mr Yad-Elohim, but spoke with him in basic English. When the Japanese interpreter first met Mr Yad-Elohim, she told trial counsel that Japanese was not his first language.

[59] Trial counsel says she only knew that Mr Yad-Elohim was Korean part way through the trial when a Korean lawyer contacted her and said he recognised Mr Yad-Elohim from the Korean community in Auckland.

[60] Trial counsel says that she had difficulty finding a psychiatrist who would be able to assess Mr Yad-Elohim as criminally insane. Close to trial, she was at a loss as to what to do as she had no defence to advance. It was then that she was approached by Dr Cavney. Dr Cavney said he was concerned about whether Mr Yad-Elohim may be able to advance a defence of insanity. She thought that this was about three weeks before trial, although Dr Cavney's report says he was instructed on 19 June 2018,

six weeks before trial. Trial counsel therefore sought a report from him and called him as a defence expert at trial.

[61] In his affidavit, the Korean lawyer confirms he first met Mr Yad-Elohim around 2000/2001 through a youth group at a Korean Presbyterian Church. After losing touch, he saw Mr Yad-Elohim again in September 2016, shortly before he travelled to Korea. The Korean lawyer next saw a report of the trial in the New Zealand Herald, which described Mr Yad-Elohim as Japanese. He therefore contacted trial counsel to inform her that Mr Yad-Elohim was, in fact, Korean. He also provided her with contact details for Mr Yad-Elohim's mother.

[62] Dr Cavney confirms, also by way of affidavit, that he was advised by trial counsel of a strict three-to-four-week deadline for providing a report on the availability of an insanity defence for Mr Yad-Elohim. Upon reviewing the evidential material with which he had been provided, Dr Cavney noted time lapses in the CCTV footage of the killing where Mr Yad-Elohim appeared to be responding to non-apparent stimuli. He also noted that Mr Yad-Elohim had been left alone for 15 to 20 minutes while being interviewed by the police during which time he again appeared to be responding to non-apparent stimuli and shouting in Japanese. A translation and transcript of what Mr Yad-Elohim had said was completed at Dr Cavney's request.

[63] While alone, Mr Yad-Elohim had referred to throwing a "haku" flower on the victim, which Dr Cavney translated as white and which could be a reference to a Japanese anime character. Dr Cavney then spoke to Mr Yad-Elohim's treating psychiatrist, Dr McKinnon, who confirmed he had shown a particular interest and knowledge about anime. This information led Dr Cavney to develop a clinical formulation that Mr Yad-Elohim may have been delusional in a belief that he was a Japanese anime character at the time of the killing. However, Dr Cavney says he was under time pressure to complete his report and met Mr Yad-Elohim for only about ten minutes or so to assess him in relation to this new information.

[64] Dr Cavney was also aware of the AOJ document, which he thought may be of some significance.

[65] Dr Cavney says that it should also be noted that information had come to light on approximately day two or three of the trial that Mr Yad-Elohim's mother was living in Auckland and the narrative he gave of his mixed Chinese and Japanese ancestry and early upbringing was incorrect. He summarised his position as follows:

> In summary, my preparation of an evidential report in relation to the issue of whether Mr Yad-Elohim was legally insane, occurred under significant time pressure. This was compounded by the need to clinically formulate what I believed to have been newly discovered and critical clinical evidence not previously addressed in earlier reports. In addition, clinically significant new information continued to emerge in real time during the course of the trial that in my opinion would have important to have both fact checked and discussed with Mr Yad-Elohim in detail, beyond the 10-15 minutes available to me prior to having to submit my final report.

[66] Dr David Chaplow is an experienced and well-respected psychiatrist who was asked after the trial by counsel for Mr Yad-Elohim to advise whether he considered a defence of insanity was available to Mr Yad-Elohim. In doing so, he received 11 psychiatric reports and discharge summaries, and the evidence at trial. He also spoke to Dr Cavney and three other psychiatrists who had assessed Mr Yad-Elohim. In addition, he visited Mr Yad-Elohim in prison and conducted an assessment interview with him of approximately two hours. He concluded that Mr Yad-Elohim would comfortably meet the legal requirements of insanity as defined in s 23 of the Crimes Act.

[67] The Crown has also filed new material in the form of a report from Dr Dean, dated 12 July 2021, commenting on the report of Dr Chaplow.

Approach to fresh evidence

[68] The approach to fresh evidence was restated by the Privy Council in *R v Lundy*.[9] The overriding test is whether it is in the interests of justice to admit the evidence. The evidence must be:[10]

(a) sufficiently fresh (in that it could not with reasonable diligence have been called at trial);

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9 *R v Lundy* [2013] UKPC 28, [2014] 2 NZLR 273.
10 At [116]–[126].

(b) sufficiently credible; and

(c) cogent in the sense that it might reasonably have led to a different verdict.

Fresh evidence — discussion

[69] The affidavit by Mr Yad-Elohim's mother is not fresh. The evidence she gives was known at trial. The statement of agreed facts incorporated a revised personal history. Both experts were questioned about Mr Yad-Elohim's misidentification of himself as Japanese when he was of Korean ethnicity. Dr Cavney and Dr Dean both thought it was a good indication of his delusional thinking. These issues were canvassed at trial. We therefore decline to admit the affidavit of Ms Kim.

[70] As to the two affidavits from trial counsel, they provide useful background information about the conduct of the trial, which is not otherwise available. They are credible and cogent, being relevant to the primary ground of appeal — there was an unequal contest between the Crown and defence psychiatrists. They are admissible on appeal.

[71] The affidavit of the Korean lawyer confirms the affidavit of trial counsel that he contacted her to advise her that Mr Yad-Elohim was Korean, not Japanese, and to give her contact details for his mother. We regard his affidavit to be supplementary to those of trial counsel and hence it is also admissible as it provides critical background information about the conduct of the trial.

[72] The affidavit from Dr Cavney provides useful background information about his instructions, the further information he required, the limited time available to speak to Mr Yad-Elohim, and the somewhat undeveloped theories, which he initially described at trial as speculation. Like trial counsel's affidavits, it is relevant to the primary ground of appeal — the unequal contest between the Crown and defence psychiatrists. It is admissible on appeal.

[73] In his report, Dr Chaplow states that appellate counsel's instructions were:

(a) advise whether he considered a defence of insanity was available;

(b) detail how Mr Yad-Elohim's mental health condition would have impacted on the offending and hence culpability at sentence; and

(c) to discuss the rigidity of the insanity defence.

[74] His report is not fresh. While it comments on the evidence given at trial, Dr Chaplow's subsequent discussions with psychiatrists who had assessed Mr Yad-Elohim, and a more recent assessment by Dr Chaplow of Mr Yad-Elohim, the substance of it could, with reasonable diligence, have been called at trial. Trial counsel had already sought a report from two other psychiatrists before receiving the report from Dr Cavney. The defence did not call either of the two psychiatrists because they did not support a defence of insanity. In a report dated 6 June 2018, Dr Ian Goodwin concluded:

> On balance, therefore, based on my interviews with Mr Yad Elohim and the other materials made available to me, it appears difficult to make an argument that Mr Yad Elohim was incapable of understanding that his acts were morally wrong. The justifications that he has given to date for his attack on the victim have been entirely non-psychotic, and he has repeatedly stated that his intention was to 'beat' the victim but 'not to kill' him.
>
> On balance, therefore, I am of the opinion that it is unlikely that a defence of insanity is available to Mr Yad Elohim.

[75] To similar effect, Dr Barry-Walsh concluded in a report dated 15 July 2018:

> … it is my view, on the basis of the information available to me, that Mr Yad-Elohim would not, on balance have a defence of insanity, noting that this is ultimately a decision for the court to make. I express this opinion with a degree of disquiet, given the evidence of psychosis and some unusual features to the alleged offending.

[76] The report from Dr Chaplow does not refer to significant new evidence, which may warrant its admission. He elaborates on Dr Cavney's trial evidence in support of an insanity finding, but expresses it at times in more certain language. It is a report by another expert in the same field supporting the same finding. As Crown counsel submits, "Dr Chaplow is fresh, his evidence is not."

[77] Counsel for Mr Yad-Elohim acknowledged the difficulty in adducing such evidence on appeal. In the end, counsel submits that Dr Chaplow's report illustrates the strength of the defence case if there had been sufficient time to prepare it. We therefore admit it for that limited purpose.

[78] Because we have admitted Dr Chaplow's report for a limited purpose, we grant leave to the Crown to adduce Dr Dean's response to Dr Chaplow's report. Dr Dean gave evidence before us on the appeal and was extensively cross-examined by counsel for Mr Yad-Elohim.

First ground of appeal

[79] As the first ground of appeal, Mr Yad-Elohim submits that Wylie J was wrong to find that he was fit to stand trial. Section 16(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 provides a right of appeal against a finding that a defendant was fit to stand trial. Section 17 sets out the matters for consideration by an appellate court on appeal under s 16. Section 17(3) requires the appellate court to consider the evidence of two health assessors and confirm or quash the finding relating to the appellant's mental impairment.

[80] In the present case, however, there was no appeal against the finding of fitness, presumably because of the short time between the Judge's finding and the commencement of the trial. In *McKay v R*, the Court of Appeal held that, although ss 16 and 17 do not expressly so state, Parliament must have intended the sections to apply only prior to conviction.[11] After conviction, the appropriate pathway is not ss 16 and 17, but s 229 of the Criminal Procedure Act 2011. The inquiry to be undertaken by the appellate court is, therefore, whether a miscarriage of justice has occurred.

[81] Three reasons are advanced why there has been a miscarriage of justice. The first is that the personal history provided by Mr Yad-Elohim and relied upon by Wylie J is now known to be fundamentally incorrect. Counsel submits that Mr Yad-Elohim's continuing psychotic delusions about his personal history affected his ability to give informed and factual accurate instructions to his trial counsel.

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[11] *McKay v R* [2009] NZCA 378, [2010] 1 NZLR 441 at [101].

However, this is a non sequitur. Mr Yad-Elohim's origins and ethnic background were not directly relevant to an assessment of his fitness to stand trial. The three psychiatrists who provided reports, which included the defence expert Dr Cavney, all interviewed Mr Yad-Elohim to assess his understanding of the trial process. His ability to understand the trial process and participate in the trial are separate issues from that of (in)sanity and are largely established through direct questions about his understanding of the trial process. The fact that Mr Yad-Elohim was born in Korea rather than Japan is of limited relevance to such an assessment.

[82] The second reason advanced is that the Judge was wrong to say he "preferred" the evidence of Dr Cavney and Dr Skipworth to that of Dr Barry-Walsh. Counsel submits that the Judge should have considered all the evidence and applied it when determining what was required to effectively participate in the trial, and whether Mr Yad-Elohim was capable of so doing. The Judge did, however, plainly carry out his own assessment of the issues addressed by the experts in light of their evidence. He was entitled to find the evidence of some experts more helpful on those issues. Dr Cavney and Dr Skipworth had observed Mr Yad-Elohim over some months and Dr Barry-Walsh saw him once over a two hour period. Dr Barry-Walsh did not expressly refer to the statutory definition of "unfit to stand trial" or set out the factors usually considered by the Court. Dr Barry-Walsh assumed there would be a complex trial over many weeks, whereas it was likely to be (and was in fact) a straightforward trial focusing on the single issue of insanity.

[83] The third reason advanced was an argument that Wylie J's statement that Mr Yad-Elohim "should" be able to understand certain aspects of the trial did not apply the requisite threshold of effective participation as set out in the leading case on fitness to plead.[12] However, nothing turns on the Judge's use of the word "should". We agree with Crown counsel that the use of this word simply reflects the fact that Wylie J, as a matter of necessity, was making a prediction about Mr Yad-Elohim's effective participation in his jury trial and that the trial Judge may make further decisions about "appropriate management and assistance." Mr Yad-Elohim was going to receive the

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12 *Nonu v R*, above n 8.

advice and assistance of counsel, but Wylie J left open the possibility that the Court processes may be modified to enable him to participate effectively.

[84] We are not satisfied that there was any miscarriage of justice in the High Court as a result of the three matters raised in support of this ground of appeal.

Second ground of appeal

[85] Second, counsel submits that the Judge's insanity direction should have included an explanation to the jury of the various dispositions available, including detention in a secure psychiatric facility, if they were to find Mr Yad-Elohim not guilty by reason of insanity. Counsel says this direction was needed because of the jury's likely concern that Mr Yad-Elohim not be released back into the community. The jury did not display overt concern about the release of Mr Yad-Elohim back in the community, nor did it ask any questions about this issue. However, counsel submits that it is a reasonable inference to draw because of the reaction of one or two of the jury members to the showing of the CCTV footage, which disclosed a brutal and sustained assault on an elderly and innocent man, who was unknown to Mr Yad-Elohim. Counsel submits that the jury was likely to draw an inference from the CCTV footage that Mr Yad-Elohim was an unpredictable and dangerous individual.

[86] Counsel submits that the jury should, therefore, have been told that if Mr Yad-Elohim was found not guilty by reason of insanity, he would not just be released from custody — he would likely go to a psychiatric facility until it was determined that he was no longer a danger to himself or others. However, the only comment made by the Judge in his summing-up to the jury was that "the defence of insanity, if proved, is a complete defence to the charge — even if it has its own consequences in terms of the Criminal Procedure (Mentally Impaired Persons) Act 2003."

[87] Crown counsel refers to the case of *R v Lorimer* as dealing with this very argument.[13] In that case, the Court held that the penalty to which the defendant may

[13] *R v Lorimer* [1966] NZLR 985 (CA) at 988.

be liable on conviction is not the concern of the jury and is legally irrelevant to any issue they must determine.

[88] This is a principled approach with which we agree. It reflects the importance of the jury following the question trail and any directions given by the Judge. In the present case, the Judge gave the normal direction on prejudice and sympathy in which he directed the jury to be dispassionate in their approach and not allow any personal views to influence their judgement as to issues they had to decide. The Judge also made reference in a general way to a finding of insanity having its own consequence, as noted in [86]. Furthermore, a comprehensive question trail was prepared by the Judge with the agreement of counsel. The jury were directed to follow it precisely which would inevitably lead to the proper verdict, whatever it may be. The question trail contained a note that Mr Yad-Elohim's situation would be considered under the Criminal Procedure (Mentally Impaired Persons) Act if the jury found him not guilty by reason of insanity. In the absence of any indication to the contrary, we can and must proceed on the basis that the jury were true to their oath and followed the Judge's directions. The direction contended for would have risked distracting the jury from basing their findings on evidence, implicitly inviting them to reason backwards from a preferred outcome. That would have been inappropriate.

[89] It follows that there is nothing in the second ground of appeal.

Third and primary ground of appeal

Submissions for Mr Yad-Elohim

[90] Counsel submits that the defence expert, Dr Cavney, was instructed at a very late stage and had inadequate time to review all relevant material or to interview Mr Yad-Elohim ahead of trial. This meant that Dr Cavney had inadequate time to investigate the defence of insanity or to report on his opinion.

[91] Counsel submits that the lack of time to prepare for trial gave rise to a miscarriage of justice. As already mentioned, counsel submitted that Dr Chaplow's evidence demonstrated that the defence would have had a strong case on insanity given more time.

[92] In support of this argument, it was also submitted that as a result of time pressure Dr Cavney was appropriately diffident about some of his views when he gave evidence. Counsel contends that this understandable and appropriate diffidence led the jury to give less weight to Dr Cavney's opinions.

Did Dr Cavney have insufficient time to prepare for the trial?

[93] Dr Cavney had quite extensive knowledge of Mr Yad-Elohim prior to being instructed as a defence expert at trial. He had produced three earlier reports on Mr Yad-Elohim's fitness to stand trial. As noted earlier, he had three meetings with Mr Yad-Elohim totalling four and a half hours for the purposes of preparing those reports. Dr Cavney was also able to meet with Mr Yad-Elohim for a fourth time on 25 July 2018 for 15 minutes. This was two weeks after the third meeting on 12 July 2018 for one and a half hours.

[94] It was Dr Cavney who approached trial counsel some weeks before trial and "said he was concerned about whether Mr Yad-Elohim may be able to advance a defence of insanity." This step taken by Dr Cavney reflects his extensive knowledge of Mr Yad-Elohim prior to being instructed as the defence expert on the issue of insanity, and indicates that he already had some preliminary views on the issue of insanity based on his knowledge of Mr Yad-Elohim.

[95] By contrast, the Crown expert, Dr Dean, saw Mr Yad-Elohim just once for an hour on 24 May 2018. Dr Dean was asked in cross-examination at trial whether it would have been better if he had been able to spend at least a couple of hours with Mr Yad-Elohim. He replied:

> I spent as much time as I felt I was, I needed to at the time I saw him. I felt I'd had sufficient information, I had, he had given me a very reasonable account, it was consistent with everything that I had before, and I think the important thing about an assessment of insanity is all the background's important because it gives you a context, it gives you a psychiatric assessment, it gives you a diagnosis, but the only thing that matters in terms of the mental state is at the point of the offence, at the time it happened, not now, not when he was in Te Whetu, but at the point that the offence occurred because that is the only point that really matters in making the judgment of insanity.

[96] Though they submit that Dr Cavney had inadequate time to investigate the defence of insanity, counsel does not indicate what would have been adequate. In evidence at trial, Dr Cavney expressed concern about Mr Yad-Elohim's underreporting saying, "… we have only just begun to see the tip of an iceberg and I think it is quite a large iceberg." He further said:

> I don't know how long it will take for us to fully understand or formulate as we call it his psychosis in relation to his risk. It is possible we may never be able to do that. It is possible we might have something closer as a result of the information that has come out through this trial in a few months. I honestly don't know but this is an unusual case that after nine months in the Mason Clinic we still don't know. This is unusual.

[97] This appeal is not, however, about plumbing the depths of Mr Yad-Elohim's psychosis or formulating a risk profile. As Dr Dean concisely put it, the only point in time that really matters is the point that the offence occurred. Mr Yad-Elohim gave his account of what happened to many health assessors and had never claimed prior to trial to be acting under direction from any voices or acting out as a Japanese anime character, which is one of the suggestions as to what may have driven him to kill the victim.[14]

[98] We are not persuaded that Dr Cavney had insufficient time to prepare to give evidence, or that the new information that emerged at a late stage was so relevant and so material to the question of insanity that further time was required. However, we proceed to test that view against the evidence given by Dr Chaplow, which was adduced on appeal to demonstrate the strength of the defence case if there had been sufficient time to prepare it.

Would further time have enabled the defence to advance a stronger case on insanity?

[99] In his initial report, Dr Chaplow opined that there was ample evidence Mr Yad-Elohim was suffering from active symptoms of schizophrenia at the time of the offending. This was not in issue: it was accepted by all experts that Mr Yad-Elohim was labouring under a disease of the mind in terms of s 23(2) of the Crimes Act.

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[14] In an assessment interview on 27 April 2021, over two and a half years after the trial, Dr Chaplow reports that Mr Yad-Elohim "described the killing as if he was in a film acting the part of an anime character."

[100] As to the first part of the second limb of the test for insanity, Dr Chaplow noted that:

> All opinions seemed to accept that Mr Yad-Elohim understood the 'nature and quality' of his actions although Dr Cavney raised an interesting point that while Mr [Yad]-Elohim understood the 'nature' of his behaviour, he may not have understood the 'quality', his thinking and perceptions being distorted by psychosis.

[101] As to the second part of the second limb, on whether Mr Yad-Elohim knew his actions were morally wrong, Dr Chaplow noted that most of the psychiatrists (excepting the first two) had examined Mr Yad-Elohim months after the offending. At those times, Mr Yad-Elohim was relatively settled on medication and in a contained safe environment. Dr Chaplow stated:

> This fact makes the determination of what exactly occurred months previously a challenge and highly dependent upon the ability of the defendant to recall events and emotions surrounding those events, and/or any witnesses to fact close to the time of the killing, and the police video recording. The police video recording the initial interview and the recording of the actual killing are important factors here.

[102] Dr Chaplow gave some weight to a report dated 27 October 2019 (over a year after the trial), by Dr Barry-Walsh, addressed to Mr Yad-Elohim's counsel at the time. Dr Chaplow stated:

> This report was made after further reflection, particularly following the police video and Mr [Yad-]Elohim's behaviour when they left the room for a period. Although Dr Barry-Walsh concedes that there appeared to be no nexus between the psychosis and the offending at the times he previously assessed Mr Yad-Elohim, he now reflects on how unwell Mr Yad-Elohim was in the time before and after the offending and therefore, on balance, it is his opinion that Mr Yad-Elohim may have had a defence of 'insanity'.
>
> This change of opinion is significant, given Dr Barry-Walsh's seniority as a forensic psychiatrist, and his reasoning.

[103] It does not appear, however, that Dr Chaplow had before him a subsequent report from Dr Barry-Walsh, dated 2 December 2019, in which he stated:

> In my report of [27] October 2019 I commented *"on balance Mr Yad-Elohim may have a defence of insanity and this is an issue that would need to be determined by the Court."* Whilst this is my view there are significant impediments to an insanity defence. At no time has Mr Yad-Elohim given an account for his actions that has included description of psychotic symptoms directly influencing his behaviour. He has given a relatively rational and

> understandable explanation for his actions based on his failure to purchase drugs and the loss of $200. Given the strength of this competing account, it is my view unlikely that an insanity defence would be successful. Given the consistency of Mr Yad-Elohim's accounts, if he were to now give a more psychotic description of his thinking and actions at the time, that would not alter my opinion because of the lack of credibility such an account would hold.

[104] In his initial report, Dr Chaplow concluded:

> Although there appears to be no direct correlation between the illness and assault/killing, it is only because we can't always access his mind to find the 'nexus'. We simply don't know. Therefore, it is my opinion, on balance, that he was insane at the material time.

[105] Dr Dean referred to this conclusion as speculative and noted that the inability to access someone's mind applies to all psychiatric assessments.

[106] Dr Chaplow had given his initial report before interviewing Mr Yad-Elohim. After doing so, he gave a second addendum report. Dr Chaplow reported his discussions with Mr Yad-Elohim about the killing as follows:

> **The index offence**
>
> We discussed the killing. He stated, *"It was like I was in a film…"* I asked him why he acted as he did. Yad-Elohim stated, *"because he disturbed the spirit and stole money from an innocent person."* He also said that at the time he was arrested (soon after the killing, that he was 'crazy' and was controlled by something).
>
> I enquired why he returned to the scene of the killing after five minutes. He said, *"He talked to me…he said I haven't had enough…your kicks are weak, and I am going to get up and kill you…"* He told me that in his mind, he did not realise that the victim was dead and that he cried when the policeman, informed him of that fact.
>
> We discussed the police interview, after the police officer and translator left the room. He said, *"I was talking to the spirit of Michael Mulholland (the victim). He came to me…"* He didn't recall laughing maniacally.
>
> I enquired about other hallucinations: he said that before the current incarceration and treatment he would hear people speak in foreign languages that his mind could understand.

[107] Dr Chaplow concluded that Mr Yad-Elohim's explanation for the killing along with the CCTV footage gave ample evidence of the nexus between the illness and killing.

[108] Dr Dean responded by noting that Dr Chaplow appeared to rely entirely on Mr Yad-Elohim's account given by interview some considerable time after the offence (more than three and a half years). Dr Chaplow did not refer to the explanations Mr Yad-Elohim gave at the time, despite noting this was the most important information. Dr Dean said that it appeared Dr Chaplow considered that the connection between the presence of psychotic illness and the offending was sufficient to show that Mr Yad-Elohim did not know his actions were morally wrong. But it was clear to both him and Dr Cavney that Mr Yad-Elohim was not acting under instruction (or command hallucinations) when assaulting the victim.

[109] We do not consider that Dr Chaplow's reports could provide any substantial assistance to a fact-finder over and above the material that was presented at trial. Nothing in those reports suggests that the defence could, with more time, have presented a materially stronger argument supporting an insanity defence at trial.

[110] Some 12 reports prepared by six different psychiatrists were available prior to trial. As set out above, Dr Cavney had spent considerable time with Mr Yad-Elohim before trial. At trial, Dr Cavney acknowledged that mental health professionals may never be able to formulate Mr Yad-Elohim's psychosis in relation to his risk. He said that after nine months in the Mason Clinic they still did not know. He said that he honestly did not know whether any more understanding could be obtained "in a few months" as a result of the information that emerged in the course of trial. On the basis of his evidence, there was no reason to think that an adjournment would have materially assisted the defence in presenting its case.

[111] The late information (being the interpretation of two pages of the police interview, the retrieval from file of the AOJ document, and the provision of information about his personal history), did not materially affect the ability of the experts to give evidence about Mr Yad-Elohim's state of mind as relevant at the time of the fatal assault. What really mattered were the consistent accounts he gave close to the time, and subsequently, about his motivations for the assault. The defence was not unfairly disadvantaged in any material respect by not having more time to consider and address the new evidence.

[112] In summary, we are not persuaded that there was any miscarriage of justice as a result of the defence not having a longer period in which to prepare for the trial. This is, in effect, an argument that the trial should have been adjourned either before it began, or when new information emerged about Mr Yad-Elohim's identity and origins. No adjournment was sought by experienced trial counsel at either of those times. Nor do we consider that, with the benefit of hindsight, the failure to seek and obtain an adjournment led to a miscarriage of justice.

Did time pressure affect Dr Cavney's ability to give confident opinion evidence?

[113] Dr Cavney used terms in his evidence-in-chief such as speculation, inference and clinical opinion. This prompted an entirely reasonable question from the jury about the extent to which they should consider speculation and inferences when considering their verdict. The Judge explained that he would address the difference quite carefully in his directions, but the query also led to the following explanation by Dr Cavney:

> A. Yes thank you and I do apologise if I confused the jury on those issues yesterday. In preparing the case, preparing for the case I reviewed a lot of information, on the basis of that information I formed some hypotheses which you could use the synonym as "speculations." In reviewing the information and clarifying some of that with Internet searches and ultimately a brief discussion with Mr Yad-Elohim some of those hypotheses I disregarded, I think where conversations went yesterday was introducing that into the evidence which is speculation. Some of the other hypotheses clarified with information, what Mr Yad-Elohim said, they would shift to what would be "clinical inferences", and are no longer speculative.
>
> Q. So when you say "clinical inferences", are they your clinical opinions –
>
> A. Yes.
>
> Q. – and that's based on your experience and knowledge in the area –
>
> A. Ah, yes and observations –
>
> Q. – as well as –
>
> A. – of the DVDs et cetera.
>
> …

[114] Dr Cavney then gave an example of his speculation. He had noted a list of names written by Mr Yad-Elohim on the AOJ document. He said he had googled their names together with the word "murder" and come up with the names of serial killers, which were similar to the names Mr Yad-Elohim had written. In his evidence-in-chief, Dr Cavney had named the serial killers and the crimes they had committed. He did say, however, that he had asked Mr Yad-Elohim if he knew some of the names of the serial killers and he had said, "[n]o, I didn't know that."

[115] He then acknowledged that the police had ascertained overnight that the names were in fact men who were in custody at the same time as Mr Yad-Elohim. Dr Cavney said this was not of significance for the Court as it was not relevant to the insanity defence, but it was nonetheless clinically interesting.

[116] Although Dr Cavney did say that he was between a rock and a hard place to come in at the eleventh hour and retrospectively try to tease this information out, he did give clear evidence of his opinion on the issues relevant to the insanity defence. He thought, on balance, that Mr Yad-Elohim intended to kill the victim, with the caveat that Mr Yad-Elohim may have been acting out as a Japanese anime character, putting the victim into a death-like state to get away. He did not express any doubt, however, in relation to his opinion that Mr Yad-Elohim believed he was doing God's work and did not know that assaulting the victim was morally wrong, on the basis of what Mr Yad-Elohim had said to him and to another psychiatrist, Dr Skipworth, as well as statements recorded in his police interview.

[117] There is no reason to think that the jury discounted Dr Cavney's evidence unfairly because he was "teasing" the issues out, or because he qualified some of the views he expressed.

Conclusion

[118] We are satisfied that there was no miscarriage of justice in connection with the finding that Mr Yad-Elohim was fit to stand trial.

[119] We are also satisfied that there was no miscarriage of justice as a result of the directions given by the Judge at trial. In particular, it was neither necessary nor

appropriate for the Judge's insanity direction to include an explanation of the various dispositions available, including detention in a secure psychiatric facility, if they were to find Mr Yad-Elohim not guilty by reason of insanity.

[120] Finally, we do not consider that there was any miscarriage of justice as a result of the additional information that became available at or just before trial, and the limited time available for Dr Cavney to prepare to give evidence at trial. There is no reason to think that additional time would have enabled materially different evidence to be given at trial, or might have led to a different verdict.

Result

[121] The application to adduce fresh evidence on appeal is allowed to the extent set out at [69] to [78] above.

[122] The appeal against conviction is dismissed.

Solicitors:
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