SUPREME COURT OF QUEENSLAND

CITATION:	*MBS v DPP (Qld) & Anor* [2012] QCA 326
PARTIES:	**MBS** (appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (first respondent) **DIRECTOR OF MENTAL HEALTH** (second respondent)
FILE NO/S:	Appeal No 4981 of 2012 MHC No 256 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Mental Health Court
ORIGINATING COURT:	Mental Health Court at Brisbane
DELIVERED ON:	27 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2012
JUDGES:	Fraser and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – DIMINISHED RESPONSIBILITY – GENERALLY – where appellant alleged to have killed her twin children by inadequately feeding them – where defence of diminished responsibility raised – where there were divergent expert opinions about whether relevant capacities of the appellant were substantially impaired at the time of the offending – where the Mental Health Court declined to find that there had been a substantial impairment – where appellant contends the evidence in favour of the defence was of greater volume and higher calibre than other evidence – where appellant contends the Mental Health Court overstated and gave undue weight to aspects of the evidence, and failed to take critical evidence into account – where appellant contends the Mental Health Court's approach to determining whether the appellant was of diminished responsibility was flawed – whether the Mental Health Court erred in its approach to the evaluation of the competing evidence

MENTAL HEALTH – DECLARATION OR FINDING OF MENTAL ILLNESS OR INCAPACITY – where the Mental Health Court relied upon the opinion of the assisting psychiatrists when weighing up the evidence against the appellant – whether the assisting psychiatrists went beyond their functions under s 389 of the *Mental Health Act* 2000 (Qld)

Criminal Code 1899 (Qld), s 27, s 304A
Mental Health Act 2000 (Qld), s 267, s 334, s 389
Uniform Civil Procedure Rules 1999 (Qld), r 766

DAR v DPP (Qld) [2008] QCA 309, followed
R v Biess [1967] Qd R 470, cited
R v Lloyd [1967] 1 QB 175, cited
Reid v DPP (Qld) [2008] QCA 123, followed

COUNSEL: S M Ryan with S Robb for the appellant
B G Campbell for the first respondent
No appearance by the second respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the first respondent
No appearance by the second respondent

[1] **FRASER JA:** I have had the advantage of reading Applegarth J's comprehensive reasons. I agree that the appeal should be dismissed for those reasons.

[2] **GOTTERSON JA:** I agree with the order proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J:** The appellant is charged with the murder of her 18 month old twins in June 2008. Counts 3 and 4 on the indictment charge that "on a date unknown between 8 June 2008 and 17 June 2008" the appellant and her de facto partner murdered each child. The period alleged in the indictment is intended to cover the possible dates of the deaths of each child. The prosecution case is that over a period of months the appellant inadequately fed the twins, thereby causing their death. In support of the charges of murder, the prosecution alleges that the appellant was aware that her inadequate feeding would lead to their death (or at least to grievous bodily harm) and, with such an awareness, she continued to inadequately feed them, thus intending the consequences.

[4] The appellant's legal representatives referred the matter of her mental condition at the time of the commission of the alleged offences to the Mental Health Court. The contentious issue before that Court was whether the appellant "was of diminished responsibility when the alleged offence was committed".[1] Section 304A of the *Criminal Code* provides as follows:

> "(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or

[1] *Mental Health Act* 2000 ("the Act"), s 267(1)(b).

> making the omission which causes death in **such a state of abnormality of mind** (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) **as substantially to impair** the person's capacity to understand what the person is doing, or **the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission**, the person is guilty of manslaughter only." (emphasis added)

[5] There was substantial evidence that at the relevant time the applicant suffered an abnormality of mind, namely a major depressive illness. For there to be a finding of diminished responsibility, the Mental Health Court needed to be satisfied that the appellant's abnormality of mind "substantially" impaired one of the capacities referred to in s 304A. The appellant contended before the Mental Health Court that her major depressive illness substantially impaired her capacity to control her actions in omitting to provide adequate nutrition to the twins. She also submitted that it substantially impaired her capacity to know that she ought not to do the acts or make the omissions which led to the deaths of her twins.

[6] The Mental Health Court undertook a detailed evaluation of the circumstances of the offences, police interviews of the appellant on 16 and 18 June 2008, statements from lay witnesses, reports from five psychiatrists and the oral evidence given by those psychiatrists at the hearing on 16 and 17 April 2012. The judge who constituted the Court was assisted by psychiatrists, Dr J M Lawrence and Dr E N McVie.

[7] The Court was satisfied that there was some impairment of the appellant's capacity to control her actions, but was not satisfied that her capacity was substantially impaired. It also was not satisfied that the appellant's capacity to see the wrongness of her actions or appreciate the consequences of her actions was substantially impaired. That capacity was impaired, but the Court found that it "was not at that point on the continuum" that satisfied the Court that it was "substantial". Accordingly, the Court found that the appellant was not of diminished responsibility in relation to the offences of murder.

[8] The appellant's first ground of appeal is that the presiding judge erred in finding that the appellant was not of diminished responsibility. The appellant contends that the finding that the appellant was not of diminished responsibility at the time of the alleged offences of murder was against the weight of the evidence and involved errors in approach. In particular, the appellant contends that:

(a) by "volume" and in "quality", the evidence which supported the defence was, respectively, greater and of higher calibre than the evidence which did not;

(b) her Honour's finding involved overstatement of certain aspects of the evidence and a failure to take into account relevant clinical evidence;

(c) her Honour's finding gave undue weight to certain aspects of the evidence; and her Honour failed to consider pieces of evidence, which were critical to her finding, in the context of other evidence and having regard to the competing clinical opinions about that evidence;

(d) her Honour's approach to the issue of whether the appellant was of diminished responsibility was flawed: it involved a misunderstanding of the critical point in time for "substantial impairment"; a misunderstanding of the capacity to "morally reason"; and a conflation of the concepts of "mental illness" and "abnormality of mind".

[9] The first respondent,[2] the Director of Public Prosecutions, replies that the finding made by the Court was open on the evidence, and that her Honour did not err, as alleged.

The second ground of appeal, added by leave at the hearing of the appeal, is that Dr McVie went outside the functions of an assisting psychiatrist established in s 389 of the *Mental Health Act* 2000 ("the Act") in her advice and recommendations to the Mental Health Court.

The nature of the appeal to this Court

[10] For the reasons given in *DAR v DPP (Qld)*,[3] the right of appeal from the Mental Health Court to this Court created by s 334 of the Act is not an appeal "by way of rehearing". However, as that decision and other decisions explain, r 766 of the *Uniform Civil Procedure Rules* 1999 applies to such an appeal. Accordingly, this Court may draw inferences of fact and may, on special grounds, receive further evidence as to questions of fact. As this Court stated in *DAR v DPP (Qld)*, the appeal to this Court from the Mental Health Court "is an appeal in the sense that such an appeal can succeed only if the [Mental Health Court] can be shown to have fallen into error of fact or law."[4]

[11] The task of this Court is the correction of error:

> "What is error in any given case depends, of course, not only on the evidence, but also on the nature of the findings or conclusions made by the primary judge. The demonstration of error may not be straight-forward where findings or conclusions involve elements of fact, degree, opinion or judgment ...".[5]

While the appeal court has a duty to make up its own mind, it does not deal with the case as if deciding it at first instance. In its examination of the evidence, it accords proper weight to the primary judge's views. One reason is that the primary judge had the advantage of hearing the evidence in its entirety, presented as it unfolded at the hearing. If in the process of considering the facts for itself "a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge."[6]

[12] In a case about whether an impairment was "substantial" one is concerned with a question of degree about which opinions may legitimately differ. A simple preference by the appeal court for a view different from that taken by the primary

---

2 Whom I shall refer to as "the respondent". The second respondent, the Director of Mental Health, did not play an active part in the appeal and abides its outcome.

3 [2008] QCA 309.

4 At [29].

5 *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 435 [24].

6 At 437 [28].

judge may not carry with it the conclusion of error. The appeal court "might conclude either that there could not be said to be only one possible correct determination or that the trial judge had a particular advantage, not shared by the appellate court, in assessing critical matters of nuance and judgment."[7] The appeal court does not proceed as though on a hearing *de novo*. Instead, it must give appropriate weight to the views of the primary judge and set aside his or her finding only if persuaded that the finding is wrong.

Background to the alleged offences

[13] The appellant was aged 30 at the time of the alleged offences. She had experienced an extremely prejudicial childhood. She was fostered as a baby. As a foster child she experienced abuse and trauma. At high school she began dating MJ and left home to live with MJ and his family. When she was in Grade 12 she had a brief relationship with another man and became pregnant. Her first child, T, was born in June 1997. MJ was quite accepting of T, and treated her like his own daughter.

[14] The appellant and MJ remained in a de facto relationship. Over the following years they had three sons. The children were always well fed and cared for. In 2006 the appellant became pregnant again, and gave birth to twins, Z and L, on 27 December 2006. Following the arrival of the twins, the appellant and her de facto husband had six children under their care. By the time of their first birthday, the twins appeared happy and healthy.

[15] Matters deteriorated in early 2008. The relationship between the appellant and MJ changed. They slept in separate rooms. MJ would compete in poker tournaments at a local tavern and drink too much alcohol. He would take the children to school or pre-school, and collect them from after school care.

[16] According to the appellant, in March 2008 she said to MJ that she needed to give the twins up to foster carers, but he would not listen. The appellant spent an increasing amount of time on the computer. The care that she took of herself and her home declined, but the older children were still fed and cared for.

[17] The situation of the twins was quite different. As was later revealed in the appellant's interviews with police, the twins were given nothing but formula from the time they were 15 months old, and in the weeks leading up to their death the appellant sporadically gave them a couple of bottles a day. Towards the end of their lives the appellant knew that they were not getting enough sustenance and that this was not right. They were kept in a room and had not seen sunlight for three months. When asked by police why she did not ask for help, the appellant stated, "When they got too small I was really scared that I was going to be in a lot of trouble."

[18] As Dr van de Hoef observed, it seems that the appellant "successfully prevented every other adult from sighting the twins between April and June 2008." An example of how the appellant prevented others from seeing the twins appears in the evidence of one of the owners of the house that the family rented after October 2007. The owner never saw the twins when she inspected the rental property. They were in their room, with the door shut. Each time the appellant told the owner that the twins were asleep. Not including two house inspections, the owner went there about three to six times. In January 2008 the house was messy but the appellant

---

7 *Poulet Frais Pty Ltd v Silver Fox Company Pty Ltd* (2005) 220 ALR 211 at 220 [46].

said, "We're getting there, we're alright", and seemed happy. The owner did not return to the house until the next house inspection in late May 2008. When she arrived in the early afternoon the owner could hear the twins crying. The appellant explained that they were sick and that she was running late. The owner could hear the twins screaming in the bedroom and said to the appellant, "You go and look after the twins and I'll just do what I have to do." The appellant appeared flustered and nervous. She was poorly dressed. The appellant said to the owner about the twins, "They're alright", and followed her into various rooms. When the owner returned to the vicinity of the bedroom in which the twins were crying she asked, "Can I go in?". The owner also said, "Do you want to go in there?", to which the appellant responded, "No they're alright". According to the owner:

> "To me the children sounded exhausted from crying, by this stage they weren't screaming anymore, they were just sobbing. I thought she should have checked on them, but she didn't seem concerned."

[19] After the inspection and discussion with the appellant, the owner gained the impression that the appellant "wasn't getting on top of things". She thought things had changed from the first house inspection.

Statement by the appellant's biological mother

[20] The appellant's biological mother, SM, gave evidence that until around February 2008 she would visit the appellant regularly and help with the children. She would often spend the night at the appellant's house. By February 2008 the appellant was spending an increasing amount of time on the computer, and she would later prevent SM from seeing what she was doing on the computer.

[21] SM recounted that the appellant prevented her from going into the twins' room. She would often hear the twins crying and try to check on them, but the appellant would stop her from entering the room, telling her that "she would look after them."

[22] The last time SM insisted on seeing the twins was around March or April 2008. She said that L looked fine but Z was not looking well. Z's "face appeared very drawn and he was very clingy". The appellant told her that she was "taking him to the Doctors tomorrow" because "He was eating and drinking but was [losing] weight". SM stated that the following day she phoned to see how Z was and was told:

> "The doctor said that [L] was fine. But he was concerned about [Z] because he was [losing] weight and not growing. The doctor has put him on a special formula and if he didn't put on weight he would send him to a paediatrician at the Mater Hospital."

SM was also told something about Z being put on hormones or steroids to help him grow. There is no evidence that either of the twins was taken to a doctor in the first half of 2008. The appellant told police that when she noticed the twins getting thin in around March or April 2008 she phoned a nurse at a pharmacy for some advice.

[23] SM stated that every time she visited the appellant she was told that the twins were sleeping or had just gone down for a sleep.

Statement by the appellant's foster mother

[24] JH fostered and adopted the appellant. She stated that she had previously held no concerns about the appellant's ability as a mother. The children had always

appeared healthy and well fed. JH stated that after the birth of the twins MJ's drinking had become worse. He would drink and play poker at the pub every night. JH confirmed that the appellant's biological mother, SM, had helped the appellant with the children and regularly stayed with the appellant until early 2008, when the appellant told SM that she did not want her to stay over.

[25] JH said that the older children would usually stay with her every Saturday night and sometimes also Friday night. MJ would usually drop the children to her house and pick them up again.

[26] The last time she saw the twins was around Christmas 2007. At that time she saw the twins in the back of a car, and they appeared healthy and well. JH advised that the appellant used to go shopping with the twins and SM, but this had ceased in recent months.

[27] In about May 2008 the appellant told JH that she had been sleeping on the couch in the lounge room. JH also noted that the appellant had been spending time in chat rooms. MJ expressed his concern to JH about the appellant's computer use and the appellant's eldest daughter, T, said to JH, "Mum's on the computer all of the time now."

[28] T called JH in late May 2008, about three weeks before the twins were found. T was crying, and saying that the twins looked thin and terrible. JH stated that when she went to the house the next day she did not gain access to the twins. She heard the twins crying and the appellant said she was going to give them a bottle. JH said, "Can I see the twins?", to which the appellant responded, "After they have their bottle." JH stayed for about an hour and noticed that the twins stopped crying but did not see them.

[29] The following weekend T again indicated to JH that the twins looked very thin. When JH asked MJ about them he responded to the effect that "they are there and alright."

[30] When she next saw MJ a week later JH asked about the twins again and MJ said that he did not know how they were. Contact after this was limited to MJ dropping the older children to JH's house.

[31] JH collected T from the appellant's house on Saturday, 14 June 2008. The appellant barely let her in the door and said, "Here, take [T]. [T] take these clothes. [MJ] will bring the other kids over later this afternoon." She then shut the door.

The evidence of the twins' siblings

[32] T was interviewed by police on 17 and 21 June 2008, not long after her eleventh birthday. Her evidence for the purpose of court proceedings was pre-recorded pursuant to s 21AK of the *Evidence Act* 1977 in April 2011, when she was aged 13.

[33] T told police in June 2008 of an occasion some weeks earlier when she had "snuck into" the twins' room when the appellant was dropping MJ off at poker. The twins were "really thin" and she called her grandmother because she was scared about what would happen to them. Her grandmother told her that she would come over and talk to her mother. She was later told by her grandmother that when she did so the twins were asleep, that she stayed for a while but then had to leave due to

a commitment. When T got home from school that day her mother told her that she "shouldn't be telling people much cos um um we might be taken away from her".

[34] In the police interviews T described how the twins had not been coming out of their rooms in recent months. She explained:

> "Well they hadn't been coming out of their rooms much because Mum's been so upset with Dad, she it hadn't come to her and um when her computer arrived um she she's been really addicted to it, she hasn't been going off it, and um oh I think that's it."

When the family first moved in things were not so bad, the twins were coming out of their room and people were coming over. But since the appellant got her computer this had changed. She had not been letting most people over. According to T, the appellant had "gotten addicted to this game on it, it's a chat room." The appellant sat there all day and T did not try to talk to her because she thought the appellant would get mad at her. The computer was used exclusively by the appellant and one of the programs that she used was called "Second Life".

[35] T described how the appellant used to go shopping nearly every day, but when she got the computer "she never went shopping, she would actually just sleep, eat and go onto the computer."

[36] When T and her siblings would arrive home after being picked up by their father the appellant would open the door and then go back to the computer, watch TV or take a nap. When asked who would cook dinner, T explained, "most of the time we'd buy something randomly and ah then she'd cook tea."

[37] T was upset at MJ's always going to poker. He would spend all his money at poker and there was no money "for clothes and school and stuff." The family rarely went out to movies and the like. The appellant and MJ were not really talking to each other unless the appellant was "nagging him about cleaning up." On occasions they would argue. T would yell at MJ because he always went to poker and also about not going to the twins. T was often away from school because of headaches or a cold. Sometimes the appellant did not have "enough food to take us to school because dad always spends all the money on poker". She said her mother "got even more depressed" than she already was. By depressed T meant that the appellant had "all these bad feelings like angry, upset and stuff like that." She thought her mother became depressed when her father started going to poker a few times a week, and her mother got upset because he was losing money.

[38] T recalled an occasion when her grandmother told MJ that he should go into the room and check on the twins. But MJ never did that.

[39] T recalled that the twins stopped coming out of their room when her mother got her new computer. Things started to change after that. The only thing that her mother was feeding the twins was formula, and the appellant would go into their room for a matter of minutes. Because she was not allowed in the room, T would not see her mother feeding the twins, or T would be doing other things.

[40] On the night that T went into the twins' room and saw how thin they were she eventually left, shut the door and went far enough away so she could not hear them crying. Soon afterwards when her mother arrived home she did not want to tell her that she had been into the room. The next day, after T's grandmother had visited,

the appellant became upset and said to T that she had no idea what happened. She then went to the computer and "started crying and sulking".

[41] In her evidence in 2011 T confirmed that the appellant tried to deter her and her siblings from going into the room.

[42] The appellant's son, L, was aged nine at the time of the twins' deaths and when he was interviewed by police on 16 and 21 June 2008. He told police how he would "sneak" into the twins' room when their mother was on the computer. He and his siblings understood that they were not allowed into the room, and he did not want to get into trouble for doing so.

[43] L's interviews with police described how his mother would cry and say that she wished she could have a better life. She was upset with "naughty kids" (which in its context and in the light of other evidence described misbehaviour by some of the twins' siblings) and "a mean husband she like wants a better husband". L described how his mother never went anywhere, wanted to lose weight and ate "all this junk food". When his mother was on the computer she would drink rum and coke. L thought that she would drink something like ten cans of pre-mixed rum and cola a day because when he came home there were that many cans on her desk and he would pick up all the cans and put them into a rubbish bin.

[44] L could recall occasions when he saw his father go into the twins' room, and one occasion when he saw him give them a cuddle. His father never made the twins bottles of formula. L's evidence of MJ's failure to feed the twins is confirmed by other evidence.

[45] L had the wherewithal to mix formula with water in a bottle, microwave it for the same time that his mother did and take the bottle into the twins' room and feed them. He would lay in the room with them.

[46] L told police that he had seen the twins on a recent Saturday. He also recounted an apparently recent occasion when they were crying and he went into their room and lay down with them. On this occasion they were alive and he hugged them and they started laughing. It is not entirely clear when this happened.

[47] L explained that his siblings would also sneak into the room to see the twins without anyone else knowing. He told police, "If one of us gone into the room when mum knows she'll umm we'll get in trouble."

The events of 16 June 2008

[48] On Monday, 16 June 2008 the appellant went to the shops. While she was there, T, who was aged 11 at the time, walked past the twins' bedroom and smelled something. She then entered the room and saw that the twins had died. When the appellant returned from the shops, T told her she now knew why the appellant had been crying lately. The appellant waited for MJ to return home and then informed him the twins had died. That evening the appellant telephoned JH and said that she wanted JH to come and get the kids. When JH arrived at the home and asked what had happened, the appellant replied, "They were crying. I gave them a bottle but they kept crying. I walked out." JH asked the appellant, "Didn't you feed them since?" The appellant replied, "No". JH stated that to her knowledge the appellant had not suffered depression after having the children.

The police investigation

[49] When police arrived at the appellant's home they located the decomposing bodies of the twins laying in a cot. The house was in disarray and dirty. When initially interviewed by police the appellant informed them that she had been having significant relationship problems with her partner, he had not been providing any support for the children and he had not seen the twins for several weeks.

[50] The appellant told police she had discovered that the children were dead some time on either Sunday, 8 June 2008, or Monday, 9 June 2008. She was unable to recall when she had previously seen the children alive. The appellant stated that in the two weeks before finding them dead she had the flu and had only been feeding the children with a bottle. She indicated that she changed them only occasionally and rarely took them out of their bedroom. She stated to police that she assumed her partner was attending to the children's needs when she was sick. She believed their deaths occurred because she had not fed them enough.

[51] MJ told police that he had had nothing to do with the twins since December 2007 and had nothing to do with the day-to-day running of the house. He stated that he had not checked on the appellant and whether she was providing appropriate care to the twins.

[52] A post-mortem examination revealed that both children had been severely malnourished.

[53] Subsequent inquiries revealed that no person apart from the appellant and the older children had seen the twins since March 2008.

Police interview on 16 June 2008

[54] The appellant was first interviewed at length by police on the evening of 16 June 2008. She indicated that she was fairly sure she had checked on the twins one afternoon and they were okay and that the following day they were dead. She was uncertain as to the actual time lapse but thought it was only one day. According to the appellant, the twins died on either Sunday 8 or Monday 9 June 2008.

[55] The appellant explained how she came to enter the twins' room that day:

> "… I went in because I thought you're so quiet, the house was quiet and um I'd finally woken up off the lounge and um went in after I'd fixed up the kids up I thought it was funny that there was no crying, so that's why I went in."

[56] She described finding the twins. She said their eyes were open and they were both cold to touch. The appellant could see they were both dead. She described her reaction:

> "And um, yeah I got quite a stunned and that's when I walked out of the room for (unintelligible) to the main bedroom and yeah when I walked in [MJ] said 'What are you doing' and all gruffly and then yeah the kids were all playing up so I went out and then looked after them, cause I didn't know how to tell him… that they were… not alive and then that's when I waited for him to wake up and [I'm] pretty sure that's the same day he went out."

[57] The day after she found them dead the appellant went into the room and moved them into the same cot. She explained, "My reasoning to pick them up was just, I didn't know cause I didn't, didn't want to believe that they were dead, I don't know."

[58] T found the twins a week after they had died. She discovered their bodies when the appellant was at a nearby food store.

[59] The appellant told police that she had used the internet regularly:

> "yeah every now and then regularly… Just use it for websites, you know, check emails, that's about it. I did get onto a program (unintelligible) but then I removed it cos it was taking up too much of my time."

[60] She had used the computer the afternoon the twins were found, checked her internet banking and looked at YouTube before she closed it. She was able to indicate to police her internet provider as well as the package's cost and data allowance.

[61] The appellant confirmed that since December 2007 the twins had spent a lot of time in the bedroom, and in the couple of weeks that she was sick they were never taken out of their room, "Only just for a quick bum change, that was it". She confirmed that she and the twins were basically housebound for several months.

[62] The appellant said that she was not feeding them food regularly and was not feeding them properly. She said, "Um… I think it was once or twice. Um… once or twice a day, that was about it… not properly." The appellant stated that when she fed them she would make up a bottle each and give it to them. The twins would feed themselves and would always finish their bottles. She said the last feed she gave them was on the afternoon before they died and that they had finished their bottles because when she went into the room the bottles were empty. She stated:

> "Well that's what I said, you know like they'd be wake up and they were crying and then I'd hear them up saying something you know that they need to be fed so I you know just thought well I thought I remembered going in and giving them a bottle."

[63] The appellant told police that T would try to mother the twins. The appellant would "tell her you know, just leave them, she wanted to mother them kind of thing but that was about it." When asked what was wrong with that, she replied, "Nothing really just I didn't want her you know going in their room and picking them up kinda thing. It's always just been my way with all of them."

[64] The appellant indicated that the other children were always fed and that "[they're] not starved". She told police that her other children would either take a packed lunch to school or have tuckshop, and that in the evenings they had recently bought a lot of takeaway. She also stated that ordinarily she would cook many of the dinners at night as well.

[65] The appellant said she had bathed the twins two days before they died. She bathed them about every two days and she would normally wipe them over with nappy wipes after she changed their nappies.

Police interview on 18 June 2008

[66] The appellant was interviewed again on 18 June 2008. In that interview the appellant confirmed that her relationship with MJ had deteriorated in the months

leading up to the deaths of the twins. She confirmed that he drank more heavily in that period. He would come home and abuse her after he had been drinking. She stated he was hardly ever around. As a response to this she used the internet a lot more. He was playing poker a lot and on Friday nights he would not come home until 2.00 am, and then sleep most of the weekend.

[67] She stated that during the week he would come home with a six pack of beer, drink it and then go out and play poker. If he was not doing that, he was in the main bedroom. Up until January or February he was interacting with the children but after that he did not do very much at all. She stated that the last time she had brought the twins to him was in February. She asked him to hold L as she was busy with the other children, but this "seemed to be a big drama" for him.

[68] The appellant stated that she told MJ that she was not coping and had said to him, "I think I need to give them away." He responded by saying that was "rubbish". She stated that he never went out of his way to find out why she wanted to give them up. The appellant said she spoke to MJ six or seven times about giving the twins away but he would "just shrug it off."

[69] In late February or early March 2008 the appellant confided in JH that she needed to give up the twins. When asked why she felt that way, she replied, "Because I knew, I was (unintelligible) I just felt that I wasn't doing enough for them. There just wasn't enough time to go around for all of them." She stated that in the months leading up to the deaths of the twins she would go into their room in the mornings and give them a bottle, change them and then put them in the lounge room with her child, N. She stated:

> "as I got more depressed about our situation, no money and things like that I just kind of like, and [N] was running off, you know running away and things. Like, you know be running down the street after him and I'd have to put them back in their room and (unintelligible)".

[70] The appellant told police, "I knew deep down that they needed to go, you know, they needed to get help." When asked what made her think that, she responded "Cause of their weight." When asked what she thought would happen to the twins if she did not give them up, she replied:

> "I didn't know what would happen. I didn't know. I kept telling myself that tomorrow I was going, you know. I was just going to fix them. I was going to do everything right. I was. I just don't know how long? How this just got out of hand how long it went?"

[71] The appellant recounted that up until May the twins seemed alright. She stated that in the previous December they had been crawling and they would stand up in their cot. She stated that neither of the twins ever walked. When asked why they never walked, she replied, "Cause lack of interaction with him." By March they were "just laying, just laying about … They were just rolling. That was just it."

[72] When asked how much interaction she had with the twins in the last few weeks she stated that she would go into the room probably three or four times a day, but not for very long. She stated that they were laying in their cots and would cry until they were given a bottle.

[73] She stated she would bath them at least twice a week "until (unintelligible) they got really sick. And then I stopped." This was approximately two weeks before she found them dead. The appellant realised the children's weight loss was a problem around April. She explained:

> "I just felt like if they had bottles, if they weren't crying, they were out of the way, you know, if I knew that they were okay. Because the other four were just, just everywhere. They, you know, there was just, they. I had them, you know one leaning out the window, one's you know in the lounge room, one was in another place…".

[74] The appellant said she used the computer for about six hours a day. Whilst she used the chat line "Yahoo!", she did not discuss online the difficulties she was experiencing. She chatted with people she did not know personally. When asked why she spent so long on the computer, she responded, "I don't know. … It was just human interaction, I didn't have anything, I didn't have anybody else, I don't know. I'd sit down and ask myself."

[75] She indicated that life became very difficult after Christmas because MJ lost his driver's licence. At that time she was giving the twins a regular diet including meat and vegetables, cut up sandwiches, cereal and fruit. That had ceased about February. When asked why their diet changed to only formula, she stated, "My laziness". She added:

> "Um I, I knew that [formula] was okay. I, I kept telling myself I have to start getting these kids back to normal. I, you know, I knew what I was doing was wrong. You know, I knew they were losing weight and I tried to give them some jar food."

She said they did not like the taste of jar food. She confirmed that the children were getting a lot smaller and "had lost a fair bit of weight." She continued, "Um, um they'd got a lot smaller. Um, 'cause they were nearly. They were a size 0." She indicated that the children started to look skinnier in the face and bottom. They looked "withdrawn" and a bit sunken on the cheeks.

[76] The appellant also discussed in greater detail the fact that she had known the twins were dead for over a week. She discussed the difficulty she had telling MJ the twins were dead. When asked, "What do you think you were going to do if you didn't tell [MJ]?", she responded:

> "Every day I told myself that I was going to ring the police so that my babies had to be buried. I was never gonna hide them but I just didn't want to give them up. I hoped that they would wake up and hope that it was a dream. It never was. I don't know how it got to this point that I could do this to my kids."

[77] She said that she knew the twins died because she did not feed them properly. When asked why she thought that was the cause, she replied:

> "Because that week previous that I found them I don't think I I don't I think I was going in there probably once or twice twice a day I gave them a bottle and went back to sleep on the lounge. [MJ] and I have had this massive we're just arguing all the time when he was home at night time and things like this he just had no money."

[78] The appellant then stated that the last time she saw the two children alive was Saturday, which was a day or two before she found them. She described her son as being lethargic and "really drawn and skinny". The appellant stated that over that weekend she got pretty sick and she did not go and see the twins for two days. She realised she had slept for nearly one whole day and that they had not been fed that day, and that there was probably a gap of two days when she did not give them a bottle. When she woke on the Monday she realised that she had not heard the twins. She said she was pretty sick on the Sunday night and that her memory of that weekend was hazy.

[79] The appellant confirmed that the last time her mother or her adopted mother saw the twins was about March. She told police that when they asked to see the twins she would say they had just gone to sleep. When asked why she would not let them see the children, she confirmed that it was because "they were smaller". She stated that the twins were in fact asleep a lot of the time. The appellant thought MJ was deliberately avoiding contact or any sort of interaction with the twins. She recounted that she had not asked him to take care of the twins when she was sick. She indicated that he had plenty of opportunities to go and look at them, feed them or give them a bottle, and stated that he would have heard them crying but did nothing.

[80] When asked why she did not feed the twins she stated that she put them "out of sight. So I could deal with the other four". When asked, "Was you not feeding these kids a way that you would be free of these children?", she replied that she did not want "that they were dead or anything" and that when she said she wanted to get rid of them she meant that she "[just] wanted someone to take them". She stated that she did not deliberately starve her children: "No. No. No I didn't deliberately do it. I didn't think they would get this bad." She confirmed that it was in March or April that she first observed signs of malnutrition and starvation.

[81] In summary, the appellant told police that she gave the babies nothing but formula from the time they were about 15 months old and that in the weeks leading up to their death she sporadically gave them a couple of bottles a day. She knew they were not getting enough nutrition and that this was not right. When asked why she did not ask for help she stated, "When they got too small I was really scared that I was going to be in a lot of trouble. I tried to fix it." She could not explain what she did to fix things other than talk to MJ about giving the twins up. She told police that she knew that she had to get someone to the twins but did not know what would happen when she did. She also told police that she kept telling herself that the twins would get better.

Psychiatric assessments

[82] Dr Hannah, a psychiatrist in the Prison Mental Health Service, undertook an initial assessment of the appellant on 20 June 2008. The appellant was subsequently admitted to The Park High Secure Inpatient Service on 9 July 2008. At the time of this initial assessment, the appellant described feeling increasingly depressed, hopeless and overwhelmed. She described being aware of tasks needing to be completed but having no motivation to complete them. Her recollection of the previous six months was poor, but she could remember either "yelling, crying or sleeping" and that she felt she was "in a black hole". She reported not feeling right in herself since the twins were born and had noticed a significant deterioration in her mood and function over the six months prior to her arrest.

[83] In the months following her admission to The Park, the appellant was treated by another psychiatrist, Dr Voita. At different times in 2008 and early 2009 the appellant was interviewed by other psychiatrists. It will be necessary to consider in some detail the reports of the five psychiatrists who gave evidence before the Mental Health Court and their oral evidence. Shortly stated, their evidence is to the effect that the appellant was in a state of significant depression during the months leading up to the deaths of the twins. There are some differences in their opinions about the severity of her depression. However, there is no dispute that the appellant was in a state of significant depression during those months. An assessment undertaken by Mr Peros, a psychologist, in January 2009 reached the conclusion that the appellant was of "grossly low average intellect."

[84] Before considering the reports and oral evidence of each of the psychiatrists, it is appropriate to make some general observations about this aspect of the evidence which was evaluated by the Mental Health Court. Some of the psychiatrists had advantages over others. For example, Dr Hannah saw the appellant four days after her arrest. Naturally, the appellant's condition that day, which Dr Hannah assessed as involving psychomotor retardation and depressed mood, would have been affected by the events of the previous few days and other events after the twins died. Her state may not have been the same as it was before the twins died. However, Dr Hannah had the advantage of seeing the appellant before any of the other psychiatrists. Dr Voita saw the appellant on at least 20 occasions in the following months, far more occasions than other psychiatrists who did not treat her and who interviewed her for the purpose of forensic assessments. However, whilst Dr Voita had the advantage of seeing the appellant on many occasions, she was briefed with far less material than Dr Sundin, who was comprehensively briefed by the appellant's legal representatives for the purpose of providing a report. These points are made to illustrate the proposition that each psychiatrist who gave evidence, including the two who saw her as a patient, had certain advantages and disadvantages in reaching the opinions that they did.

[85] The reports addressed a variety of matters including expressing opinions as to unsoundness of mind,[8] diminished responsibility, fitness for trial and future management. All the psychiatrists considered that the appellant was suffering from a mental disease at the time of the commission of the alleged offences because, by at least June 2008, she was experiencing a severe, or at least a moderately severe, major depressive episode. This and other evidence led the Mental Health Court to conclude that at the time of the alleged offences the appellant was suffering from a "mental disease" within the meaning of s 27 of the *Criminal Code*. The Court considered whether the respondent's mental illness was of such intensity that she was of "unsound mind"[9] at the time of the alleged offences and therefore was not criminally responsible for her actions. None of the psychiatrists supported a finding that the appellant was totally deprived of any of the capacities referred to in s 27 of the *Criminal Code*.

[86] The contentious issue was whether the appellant was of "diminished responsibility" when the alleged offences were committed. The psychiatrists, both in their reports and in their oral evidence, expressed their opinions about those matters and also "swore the issue". Having a psychiatrist express an opinion about whether an impairment of one of the capacities referred to in s 304A was substantial may be

---

8 *Criminal Code* s 27, The Act, s 267.

9 The Act, s 267(1)(a) and the definition of "unsound mind" in the Schedule to the Act.

a convenient course. However, the term "substantially impaired" is imprecise and different psychiatrists may have a different conception of what is meant by "substantial" in such a context. In *R v Biess,*[10] Matthews J citing *R v Lloyd*[11] stated that whether there is "substantial" impairment is a question for the jury to resolve and that "substantially" has been explained as being "something between trivial or minimal and total."[12] On any view, the Mental Health Court's determination of whether a capacity has been "substantially impaired" involves a question of fact and degree about which conclusions may reasonably differ. Evidence from psychiatrists about whether an impairment is substantial or not involves the use of an imprecise term.

[87] In those circumstances, the difficult judgment that the Mental Health Court was required to reach is not one which can be undertaken by means of a head count of those psychiatrists who, either in their reports or in their oral evidence, swear the issue of whether an impairment was substantial. First and foremost, this is impermissible since the issue is one for the Court, having the benefit of the psychiatric and other evidence and the advice of the assisting psychiatrists. Moreover, one expert witness' understanding of what constitutes "substantial" may differ from the understanding of another. If so, they may reach different conclusions about the ultimate issue of whether a person's impairment is "substantial" but be in agreement on most or all other matters.

[88] The Mental Health Court was required to consider far more than the conclusions reached by the expert witnesses. It had to consider the reasons for those conclusions and the extent to which the evidence supported or did not support them. The Mental Health Court also had to consider a substantial body of other evidence. Having done so, and with the advice of the two assisting psychiatrists, the judge had to reach a determination which was not straightforward, and which involved a matter of degree. In doing so, the judge had the advantage of hearing the expert witnesses give their evidence. Even without that advantage, the judge who constituted the Court, and the experienced psychiatrists who assisted her Honour, brought to bear substantial experience of issues involving mental health. The determination made by the Mental Health Court, and the advice given by each of the assisting psychiatrists, may be characterised as involving a preference for the opinions of some of the expert witnesses over the opinions of the others. To the extent that this occurred, the Court was not involved in a simple head count, and the decision which it reached cannot be treated as suspect, let alone erroneous, because it reflected the opinion of only two out of the five psychiatrists who gave evidence.

[89] Because the appellant's argument that the Court's finding was against the weight of the evidence relies upon both the "volume" and the "quality" of the evidence which supported the defence and criticisms of some aspects of the evidence which did not, it will be necessary to address in some detail the evidence given by each of the psychiatrists.

[90] As significant as the expert evidence was to deciding whether or not the appellant was of diminished responsibility, it must be recalled that her Honour's determination involved a consideration of a substantial body of other evidence that

---

10 [1967] Qd R 470 at 485.

11 [1967] 1 QB 175; [1966] 2 WLR 13.

12 *R v Biess* (supra) at 485; See also *Re CJS* [2003] QMHC 013 at [14] in which Margaret Wilson J described the term "substantial" as "an imprecise term".

permitted her Honour to reach a conclusion about the severity of the appellant's depression, psychological and personality factors which separately influenced her behaviour and affected her capacities, and the extent to which the appellant's "abnormality of mind" impaired one or more of the relevant capacities.

Dr Voita

[91] Dr Voita prepared a comprehensive psychiatric report dated 2 September 2008 and was the co-author of a discharge summary dated 24 September 2008. Her opinions were based upon a variety of material, including police records of interview with the appellant, lengthy interviews with the appellant on 12 August and 28 August 2008, and collateral information about the appellant's history obtained from her foster mother and her biological mother. At the time she wrote her report dated 2 September 2008 Dr Voita had seen the appellant in her role as her treating psychiatrist on more than 20 occasions.

[92] The information that Dr Voita relied upon included the appellant's self-report that her depression deteriorated after finding the twins deceased. When asked how she was spending her time in the two weeks before the children's death, the appellant told Dr Voita, "Just sleeping, on the computer, looking at You Tube, talking, checking my emails ... then I'd get tired, lie down again, grab [N] and lay down with him, send Karina (UK friend) emails, forward emails that Judy and Des had sent me ... I looked at You Tube, sat on Yahoo chat rooms talking."

[93] In her interview with Dr Voita on 28 August 2008 the appellant admitted that she noticed soon after March 2008 that the twins were losing weight and stated, "I kept thinking I had to do something but I was always terrified that they would be taken away and so would my other children ... I did not on purpose not feed them ... I just started to go into denial and thought that they would get better."

[94] Dr Voita made a primary diagnosis of Borderline Personality Disorder. She also diagnosed a Major Depressive Episode of moderate severity, and expressed the opinion that the depression deteriorated after the appellant found the twins deceased and after her arrest. Dr Voita observed:

> "Prior to finding the twins deceased, in spite of her depression she was still able to care for the other four children, spend time on the internet and had ongoing contact with her foster mother and her biological mother."

Dr Voita commented on the significant marital disharmony arising from MJ's alcohol use and gambling problems. This gave rise to significant resentment and anger towards him. The appellant stated that she had told MJ on a number of occasions that she was not coping and that the twins would be better off in foster care. This apparently did not change his attitude and he dismissed her concerns. Dr Voita's report continued:

> "... I do not believe [the appellant] would have been experiencing such a state of mental disease or natural mental infirmity as to deprive her of the capacity to understand what she was doing, or of the capacity to control her actions, or of the capacity to know that she ought not do the act or make the omission as defined under Section 27 of the Criminal Code. I am of the opinion that the neglect of the children was as a consequence of primitive psychological

> defences such as denial due to a severe personality disorder. I am of the view that the offences were not psychotically driven and that she was aware of the nature of her actions and the possible consequences if she did not care for the children. It is clear that she was aware as early as March 2008 that the children's health was deteriorating but chose not to seek medical help for fear of losing custody of them and the other children. It appears that as time passed and she witnessed their health decline, she kept them out of sight by 'closing the door'. She herself can identify that she was in 'denial'. This unfortunate tragedy unfolded in a setting whereby a number of responsible adults were disengaged from caring for the twins and did not take responsibility for their care.
>
> The fact [the appellant] did not inform any member of her family of the twins' demise until their subsequently (sic) discovery by her 11 year old daughter, further attests to her using denial as a defence mechanism. She exhibited denial and avoidance of the reality of the situation and in effect whereas it might have been possible to intervene at the early stages, as a consequence of her behaviour their demise was certain and beyond retrieval."

[95] In her oral evidence, and after considering additional material and information, Dr Voita confirmed her diagnosis of a Borderline Personality Disorder and a Major Depressive Episode. She acknowledged that the appellant was suffering from depression prior to the twins' deaths and her arrest, but thought that it worsened after her arrest and being in custody. She assessed that the appellant's depression had been much the same in the months prior to the twins' deaths and that the issue was the degree of its severity.

[96] On the assumption that it involved escapism and not particularly complex games, Dr Voita did not think that the appellant's excessive internet use was a feature of depression. She found it difficult to explain that and other behaviour by the appellant on the grounds of depression. Dr Voita said that it was clear that "there were some psychological mechanisms and primitive ... coping mechanisms." Even when other people tried to assist or to intervene, including the appellant's children, the appellant resisted. Excuses were given when adults visited as to why they could not see the twins. Dr Voita said that she could not explain that behaviour as part of a depressive disorder.

[97] As to the extent of the appellant's depression, Dr Voita noted that there was contradictory evidence as to its severity, including reports of other parties who did not describe the appellant as depressed. However, even if the appellant's depression was described as a "severe depressive episode", Dr Voita considered that it did not fully explain the circumstances. Dr Voita noted that the appellant's 11 year old daughter had noticed the deteriorating state of the twins, told her mother about it and said that for a while the appellant starting feeding them more. As Dr Voita observed, it was not just the last week that contributed to the tragedy – it was something that had happened over a period of months. The appellant's depression did not fully explain the situation and Dr Voita identified issues in terms of coping mechanisms and personality function. According to Dr Voita, the appellant "certainly was aware that things were dire but still didn't actually act." Her inaction was not an expression of her depressed state. Instead, "there were psychological

mechanisms that are not necessarily due to the depression" and Dr Voita attributed the element of denial to a "dysfunctional coping mechanism related to her personality disorder rather than relating to the depression."

[98] As to the capacity to make decisions about the welfare of her family and the twins, and the capacity to appreciate the rightness or wrongness of her actions "with a moderate degree of sense and composure", Dr Voita accepted that there was some impairment. It was at least minimal to moderate, but she did not accept that it was substantial. When examined about this conclusion, Dr Voita explained that whilst there was a major depressive disorder other factors influenced her opinion, including the fact that the twins were hidden away and there were attempts to prevent others from seeing or having contact with the children. She accepted the phrase "apparently purposeful isolation of the twins." She accepted that if there was not that purposeful or apparently purposeful isolation of the twins, she would have concluded that there was substantial impairment.

[99] Dr Voita concluded that the way the twins were not looked after and shut in a room was attributable to the personality disorder rather than to depression. One way of explaining the appellant's denial and being terrified that her children would be taken away from her was the fear of loss and abandonment, particularly the loss of her children. This was tied in with stopping people from being able to see the children. According to Dr Voita, the appellant was conscious of the fact that she was not helping the twins and that no-one else was feeding them.

[100] The appellant was said to be able to cope with different situations, and have sufficient capacities to spend a lot of time on the internet. This required a certain amount of concentration. Because she was on the internet she was not undertaking other duties in the home.

[101] Dr Voita accepted that there were inconsistencies in the evidence of witnesses about the appellant's physical and mental state in the few months before the twins died. Some of the information that she reviewed prior to giving her oral evidence suggested that the appellant's depression was more severe than Dr Voita had considered at the time she wrote her report. Still, the appellant was able to deal with some visitors and was able to concentrate on the internet. Whilst her housekeeping had deteriorated she was able to care for her other children to some extent. In order to isolate the twins as she did would require a high level of functioning for someone who was severely depressed. Her isolating the twins could not be explained as the behaviour of someone who was apathetic and not engaged. She actively found excuses to prevent people from seeing the children.

[102] Dr Voita accepted that a reason the children were hidden away was the shame that the appellant felt that she had failed the children.

[103] Dr Voita's attention was directed to a witness statement of a friend who visited the appellant on 12 June 2008 (some days after the twins had died), to whom the appellant reportedly said:

> "It's all been downhill since the twins came along and since we moved into the house. We should never have had the twins and we should just get rid of them."

Dr Voita considered that such a statement was out of keeping with someone who was severely depressed, grieving and distraught over the death of her children.

[104] Dr Voita agreed with Dr Lawrence that the appellant's reported belief that somehow things would get better was "almost magical thinking." However, it was obvious that the twins were so unwell that there was a basis for the appellant thinking that child safety officials would intervene and that this would jeopardise her children remaining with her. This was not an illogical fear of losing the children. Dr Voita accepted that the amount of concentration that was required to use the computer for many hours a day depended on the complexity of the tasks, but she reiterated that escapist activity with the computer was not generally consistent with other patients who she had assessed as having a very severe depressive disorder.

[105] Dr Voita concluded her evidence by remarking on how the appellant managed to keep people out of the room, and that her children were not game to go into the room in the face of the appellant's opposition to them doing so. Depression and apathy may have explained the appellant not looking after herself and not looking after the house, but she "actually had the energy and the motivation to actually keep the children separate". Dr Voita saw that behaviour as consistent with denial and not wanting to be found. It might also be a form of punishment of her partner for his rejection of her. However, it was not consistent with depression. The remarks to the visitor on 12 June 2008 were consistent with an ongoing concealment and a degree of anger and resentment towards her partner.

Dr Hannah

[106] Dr Hannah prepared a report dated 12 March 2012, based upon substantial documentation, her experience as the appellant's treating doctor from 20 June 2008 to 5 July 2010 in her role as visiting psychiatrist for the Prison Mental Health Service and her interviews with the appellant on 18 January and 4 February 2012.

[107] When Dr Hannah first saw and spoke to the appellant on 20 June 2008 she gained the impression that the appellant had been in a psychomotor retarded state for some period. However, this impression was not informed by an assessment of the appellant's posture and behaviour during the police interviews, recordings of which were played to the Mental Health Court. In her report, Dr Hannah expressed the opinion that by April 2008 the appellant was aware that the twins were losing weight but appeared to have been unable to respond to this awareness. She only responded by giving them a bottle if they cried. Dr Hannah observed that as the appellant became more depressed her interactions with the twins would have been less responsive and the twins would have been less able to provide the external stimulation that the appellant was relying upon to meet their needs. This could explain why their neglect was so much worse than that of the other children. In the last few weeks prior to the twins' death the appellant appeared to have stopped most tasks other than continuing to use the internet. Dr Hannah thought that this might be explained by her state of mind in that when she was not distracted by the internet "she was overwhelmed with distress at the enormity of the situation and was aware that something needed to be done but was impaired by her illness and her ability to act on this awareness."

[108] Dr Hannah did not consider that the appellant had a Borderline Personality Disorder since she did not exhibit the pattern of behaviours that are consistent with that diagnosis, namely a "pervasive pattern of instability of interpersonal relationships, self-image and affect". Dr Hannah considered that at the time of the offences, the appellant's Major Depressive Disorder was severe enough to cause:

> "substantial impairment of her capacity to 1) understand that she ought to act ie she knew that she ought provide nutrition for the twins but was impaired in her capacity to understand that continuing not to provide adequate nutrition would at some time result in their deaths and 2) through lack of volition to control her actions.

In her oral evidence Dr Hannah remarked upon the appellant's rapid improvement after going into the High Security Unit.

[109] On the issue of volition, Dr Hannah explained that during the last three months of the twins' lives, the appellant might have recognised that there was a need to feed them but there was an inability to actually perform the task. The appellant's depressive illness was impacting on her capacity to fix the problem and she put off doing so, thinking that she would later get the twins back into a normal routine. This evidence does not specifically address just how difficult, or otherwise, it would have been for the appellant to feed the twins some solids when she was still able to feed herself and her other children solid food. The main focus of Dr Hannah's evidence was the appellant's muddled thinking in that she realised that the twins were gradually deteriorating but continued to give them bottles and, as it were, thought that she would "do something different tomorrow." This was consistent with a case of severe depression. Her use of the internet was a distraction and part of putting off the consequences.

[110] Dr Hannah acknowledged that the appellant's ability to put off other people who would ask to see the twins was related to the shame associated with her knowledge that she was not functioning. Dr Hannah also recognised that there was a variation in the appellant's ability to function and, whilst there were some areas where she was not functioning at all, she was able to go out for fast food and other things. She acknowledged that the appellant's behaviour in keeping the twins away from others was an active process. This included castigating her 11 year old for telling a grandmother that the twins were in a bad way. According to Dr Hannah, the appellant was aware that there was something to hide from people. The appellant was also able to respond to the need to feed her other children, even with takeaway food. Dr Hannah accepted that the appellant had a realisation of what was right and wrong. Her depression affected her capacity to "truly understand that her actions would lead to the twins' death". The appellant was aware that she was not doing enough.

[111] Dr Hannah maintained the opinion that the appellant's volition was impaired by her depression and that there was psychomotor retardation. This was notwithstanding her surprise at seeing the state of the appellant's behaviour when she was interviewed by police. She also acknowledged that the appellant's depression would have increased after discovering the bodies. Dr Hannah elaborated on the point that shame was a factor in hiding the twins away and accepted a proposition put to her by the appellant's counsel that the appellant thought along the lines, "I'm not going to let anyone see them until they're all right again." According to Dr Hannah, it was a "real sense of shame of the idea of allowing somebody else to help" and the appellant's continuing belief that she was going to be able to fix the situation somehow that explained the appellant's behaviour. Dr Hannah agreed with a leading question that the appellant could not conceive of someone helping her. Also, according to Dr Hannah, the appellant expected that there would be

a very punitive response if she allowed anyone, including her foster mother and biological mother, to see the twins' state.

[112] Dr Hannah accepted that the appellant's ability to prevent people from seeing the twins, particularly her two older children, who thought they would be punished if they went anywhere near the twins, did not gel with a case of psychomotor retardation in not feeding the twins. It was also hard to reconcile with the appellant being able to pack lunches for her older children to take to school. Even on the day that T found the children, the appellant was able to go to the shops to obtain food. However, as Dr Hannah observed, responding to the older children's requests for food was different to responding to the twins, whose cries would have been less audible as they became weaker and weaker.

Dr Sundin

[113] Dr Sundin prepared a report dated 23 October 2008, based upon a comprehensive brief and assessments of the appellant on 3 July, 10 July and 10 October 2008. She diagnosed a "Major Depressive Episode, moderate to severe intensity, recurrent, without psychotic features occurring in the context of a woman with a Borderline Personality Disorder." Dr Sundin was of the opinion that the appellant's Major Depressive Disorder was such that it caused "substantial impairment of her capacity to understand the repercussions of what she was doing and by virtue of impairing her volution (sic) to thus impair her capacity to control her actions."

[114] Dr Sundin's assessment of major depression of moderate to severe intensity was based upon evidence of the appellant's depressed mood, impaired appetite, disrupted sleep patterns, impaired concentration and memory, social withdrawal, escape into a fantasy world of a computer avatar and other dreams of escape. The appellant had expressed on a number of occasions to her de facto partner her sense that she was overwhelmed and not coping in the care of the twins, particularly because of the disruptive behaviour of one of her boys. The appellant appeared to be increasingly reliant on the older children to fend for themselves and with the passage of time had less energy and impaired volition for care of the rest of the family. Dr Sundin described a woman who was "flat, listless, withdrawn and overwhelmed." She observed that reports from the appellant's son that she was drinking up to 10 cans of rum and coke at a time suggested that alcohol may have further aggravated the appellant's mood state. The appellant accepted that she was drinking rum and coke but no more than six cans at a time, and then sporadically.

[115] In her oral evidence Dr Sundin embraced Dr Lawrence's view that in the week after the twins' deaths the appellant engaged in "magical thinking" in believing that the twins would somehow revive. Dr Sundin did not consider that in the months before the twins' deaths the appellant had similarly lost touch with reality, but thought that she was substantially impaired in her thinking. On the basis of all of the subsequent interviews the appellant appeared to be aware that "what she was doing was wrong in that she wasn't giving the twins enough food", but she was cognitively impaired in that she did not have an adequate appreciation of the fact that she ought not to be doing the act or making the omission. She was assuaging herself with the thought that a few bottles a day was going to be enough to keep the twins going. The appellant was fearful of eliciting the negative judgment of others. According to Dr Sundin, during this four to six month period of time when the appellant was quite regressed as a consequence of her depression, "primitive personality features

were more to the fore" and that decreased the likelihood that she would reach out for help or anticipate getting a positive response. This was compounded by feelings of shame, inadequacy, hopelessness and helplessness.

[116] Dr Sundin accepted as a reasonable hypothesis that the appellant's doing less housework was a manifestation of increasing psychomotor retardation and that this might reflect a substantial impairment of the appellant's capacity for volition.

Dr Fama

[117] Dr Fama examined the appellant on 15 January 2009 and prepared a report dated 21 January 2009. He reported that the appellant managed to cook dinners for the older children on a somewhat irregular basis. During the two to three months prior to her arrest she cooked dinner about three times a week.

[118] Dr Fama considered that the appellant's inability to seek help from family, friends or professional services stemmed largely from her pervasive depression. Her limited intelligence also narrowed her choices and constrained her decision-making. Dr Fama noted that the appellant told police that in the end she knew that giving the twins only a couple of bottles a day was not right, and that she knew it was wrong. Despite this, Dr Fama supported a defence of diminished responsibility on the basis of depressive illness. This was based upon a substantially impaired capacity both to control her actions and to know that she ought not to make the omission. Dr Fama was of the opinion that the appellant was "too burdened with personal dejection and feelings of inadequacy, at a morbid level, to have the initiative to care properly for her twins. In that respect she had markedly reduced control over her actions." Dr Fama's report concluded that the appellant was "too seriously depressed to bring herself to nurture her twin children properly, or to have an adequate realization that what she was failing to do was wrong."

[119] In his oral evidence Dr Fama remarked that although the appellant had some realisation that the twins were deteriorating in their health, the appellant had what others described as magical thinking, that somehow they would pull through. Later in his evidence Dr Fama accepted that the appellant acknowledged that it was wrong not to feed her children. He also acknowledged the perversity of rejecting offers of help in those circumstances. It would have been just as easy to say yes to an offer of help as to reject it. However, Dr Fama explained that this was consistent with marked depression in which there is negativity and an opposition to accepting offers of help.

Dr van de Hoef

[120] Dr van de Hoef also concluded that the appellant suffered from a major depressive episode that was severe in the three to four months before the twins' death. Her report dated 16 January 2009 comprehensively analysed documentary material, witness statements and collateral information. It was also based upon a lengthy interview with the appellant on 4 December 2008. Dr van de Hoef remarked that although there were some references in witness statements to the older children missing school, living in a dirty, messy house and regularly eating takeaway food, there was no evidence that the other children were in danger from starvation. The small boy was left in the front yard unsupervised. The two eldest children's performance at school apparently deteriorated in 2008. This decline in household care and the care of all of the children was a result of changes in the relationship between the appellant and her de facto husband.

[121] In addition to concluding that the appellant suffered a major depressive episode which was severe in the three to four months before the twins' deaths, Dr van de Hoef thought that she also had a Borderline Personality Disorder, with marked lifelong affective instability. Dr van de Hoef concluded that it is highly likely that if any of the family members had been "allowed" to see the twins between April and June 2008, they would have intervened to save them, and get them to professional help. It appears that they were not so alarmed by the appellant's appearance and behaviour to force the issue. However, "the die had already been cast by April 2008", according to Dr van de Hoef, and the appellant knew it. The condition of at least one of the twins at that stage would have prompted mandatory child safety reporting. Dr van de Hoef concluded that:

> "fear of the discovery of the neglect of the twins (and its consequences) led [the appellant] to keep them behind a closed door for much of the next 3 months, and giving them less and less attention and sustenance. She appeared to be able to suspend belief, and the evidence of her own eyes, of the twins' increasingly desperate plight, in favour of shielding herself from the stress of taking care of them, or relieving her chronic neglect of them."

She retreated into the internet and away from anyone who might have helped her. The imminent breakdown of her relationship with her de facto partner exacerbated her withdrawal and avoidance.

[122] Dr van de Hoef observed that there were indications the appellant knew that the twins were in a bad way and acted repeatedly to shield their emaciation from the view of the world. Dr van de Hoef thought that the appellant's Major Depressive Disorder impaired her capacity to know that she ought not do the act, and perhaps also to control her actions. Although many aspects of her mental state and functioning at the relevant time were significantly impaired, Dr van de Hoef was not persuaded that the appellant's illness substantially impaired any of the relevant capacities.

[123] Dr van de Hoef supplemented these opinions with oral evidence. She remarked that when the appellant's relatives came, all she had to do was let them in and burst into tears and say to them that she could not cope any more. Instead, the appellant showed a certain amount of volition in being able to keep her mother, her foster mother and others away from the twins. Far from the appellant making a "cry for help" as was suggested in some of the questions asked of Dr van de Hoef, attempts to check on the twins were "actively stopped" by the appellant. Reference was made to the fact that the appellant's foster mother and her biological mother "were trying to keep a weather eye on things but were actually stopped, or fobbed off, or told lies about the twins' welfare". Dr van de Hoef's opinion was that by the time the twins were starving, the appellant knew that they were in trouble and that if this came to someone else's attention, she would be in trouble. It was fear of these consequences that led her to stop others from seeing the twins.

[124] According to Dr van de Hoef, the appellant's Borderline Personality Disorder was manifested in the first half of 2008 by denying what was obviously happening and by objectifying the children and using them somehow in her relationship with her husband. Dr van de Hoef noted that the appellant told the older children to stay away from the twins' room and that they were afraid of punishment if they entered

the room. Whereas these children had previously played with the twins, the older children were actively excluded from seeing the twins and monitoring their welfare.

[125] The appellant was conscious of the twins' decline. She deliberately delivered less care to them. Although the older children were not particularly well cared for during that year, they were getting enough food.

[126] According to Dr van de Hoef, although the appellant's depression might explain why she did not seek out assistance, it did not sufficiently explain it. According to Dr van de Hoef there were other factors like shame, guilt and fear of discovery which also operated.

[127] Dr van de Hoef drew a distinction between a significant and a substantial impairment of the relevant capacities. She did not find evidence of a significant psychomotor retardation. Although the house was in a terrible state, this did not mean that the appellant was in a state of psychomotor retardation. As Dr van de Hoef explained, the appellant was spending six hours on the computer each day. A couple of weeks before the arrest she was able to negotiate a telecommunications package with a door-to-door salesman. On the day the bodies were discovered by her 11 year old daughter she was able to go to the shops for something. Although the appellant's depressed state made providing nourishment to her children harder than it otherwise would have been, Dr van de Hoef did not think that it took away her capacity to do so or her capacity to know that she ought not to underfeed and starve her babies.

[128] Dr van de Hoef adhered to the view that the appellant's depression was moderately severe and led to a significant decline in functioning. However, she did not think that the appellant was "clearly apathetic, withdrawn, hopeless and helpless." Otherwise somebody would have intervened. Dr van de Hoef observed that the appellant had "enough nous, enough energy to actively repel people who did want to help ...".

[129] Dr van de Hoef's conclusion was that although the appellant's depression was part of her impaired thinking it was also the appellant's personality structure that directed her reaction to what looked to be the imminent loss of the major relationship in her life.

The concession issue – Dr van de Hoef

[130] The appellant placed particular reliance upon a concession that Dr van de Hoef made as a result of questions by Dr Lawrence shortly after Dr van de Hoef referred to the fact that the appellant had "enough nous, enough energy to actively repel people who did want to help ...". The appellant relies upon the following exchanges between Dr Lawrence and Dr van de Hoef:

> "And people who are as depressed as this lady appears to have been, often resort to – or have trouble with their thinking, don't they; they have trouble with concentration and thinking clearly and logically and rationally about things?-- Yes. Yes, they do.
>
> Do you think by the time that things had progressed as they had, they deteriorated over a period of months as far as we can see, and she'd been – had the added illness, the flu, do you think that by that stage she was thinking logically and clearly as to what she should be doing

with regards to the state of the children?-- I think her thinking was definitely impaired by the depressive illness. I think she sought to conceal the true severity of their state, and the fact that they were dead in the house for a week, and she knew that, and still she, it seems, was hoping that that would somehow go away and resolve itself, when clearly it was never going to, that points to her not thinking clearly. But I think I came to the conclusion that the depression was certainly part of that impairment of thinking, but also it was partly her personality structure directing her reaction to what looked to be the imminent loss of the major relationship in her life. I thought that also played a part. I think one of the other factors that led me to that conclusion rather than to say this was just a terribly depressed woman who wasn't thinking clearly and was impaired – or was deprived of any of the capacities was that she did not present, as I understand it, severely ill when she was assessed after the offence. She got treatment, certainly. She needed treatment, certainly. But she wasn't sent to hospital straight away – which may not have been to do with her mental state; that may have been due to bed availability – but I didn't think the treatment she received indicated that she was severely depressed. I didn't think that her two-month admission in high secure indicated that she was severely depressed, and I think I allowed those considerations to affect my opinion about the deprivation question.

I guess – what about the possibility of magical thinking, getting back to the period leading up to the death of the children and perhaps afterwards-----?-- Yes.

-----because she says that she went in and would shake them at one stage, in the hope that they might wake up?-- That's right.

When they were clearly dead?-- Yes.

And that seems to be characteristic of some of the thinking that was going on -----?-- Yes.

-----in that period?-- Yes.

Which just doesn't seem very sort of clear and logical and -----?-- No.

-----clearly directed?-- No.

I am not suggesting she might – I am not suggesting that she was totally deprived of capacity-----?-- Yes.

-----but I wonder whether you would concede that it might have been substantially impaired in her thinking of knowing what she ought to do or what she ought not to be doing?-- Yes. I think, yes, I would concede that possibility. I think magical thinking is a better description, actually, than what I have been struggling with, it was denial as a psychological defence mechanism. I mean, even young [L] knew at an instant that they were dead. He knew. [T] knew at 11. And for the mother to go in and try and shake a dead baby away, absolutely magical thinking is probably exactly what was operating

> then. And not only in respect of that, but maybe she had magical thinking about how much nutrition they were actually getting, magical thinking about whether they would all be able to be resuscitated once the relationship improved and it never did. There was probably magical thinking operating on many levels in that lady's life in the months that led up to the twins' death, yes.
>
> Yes. Her ability to think that her reason was substantially impaired?-- Yes, I think it might have been, yes. I think it is certainly debatable and I would concede that possibility."

[131] I have set out the whole of the passage relied upon by the appellant since the appellant submits that the concession contained in it brought Dr van de Hoef even closer to, if not aligned with, the opinions of Drs Sundin, Fama and Hannah, such that there was a majority in support of the defence of diminished responsibility. I am unable to accept this submission. Dr van de Hoef was prepared to concede the *possibility* that the appellant was substantially impaired in knowing whether she ought not to do the act, and in her ability to reason. The acknowledgment of these possibilities does not detract from Dr van de Hoef's evidence. Her evidence recognised the possibility of substantial impairment, whilst adhering to the opinion that the appellant was not substantially impaired. She was prepared to concede the possibility that a different view was correct. One would expect such a concession to be made by a professional witness in such a complex matter.

The advice of the Assisting Psychiatrists

Dr McVie

[132] At the conclusion of the evidence Dr McVie and Dr Lawrence gave advice to the Court. Dr McVie noted that the five reporting psychiatrists all agreed that certainly by June 2008 the appellant was in a state of severe, or at least moderately severe, major depressive episode. She briefly summarised their evidence. Dr McVie then noted some peculiarities with the case. She remarked that it seemed odd that the appellant was able to deteriorate to the state of severe psychomotor retardation and major depression that Dr Hannah assessed, and which Dr Hannah considered was present for some weeks prior to her initial assessment on 20 June 2008, when none of the witnesses reported concerns about depression until early June 2008. The appellant was seen in April and May by both of her mothers and other people, and by an old friend who visited in June 2008 after the appellant would have known of the death of her twins. These individuals did not report significant concerns about the appellant's mental state. The evidence was that the house was not particularly tidy, but the friend who visited in June 2008 noted that the appellant's youngest son appeared clean and her conversation with the appellant was appropriate.

[133] Dr McVie noted inconsistencies in witness statements about whether the appellant asked for help, particularly in the early stages of 2008 from her mothers.

[134] According to Dr McVie, it was quite clear that by March 2008 the appellant knew that the twins were in trouble, and was aware that their weight was not progressing. From that time she locked them away from others, instructed the older children that they were not allowed to visit, and made excuses to ensure that other people did not have access to the twins to be able to monitor their condition or to intervene and assist.

[135] Because the psychiatrists who gave evidence based their opinions, in part, upon evidence about the deteriorating condition of the state of the house, the ability of the appellant to cope with the housework and the appellant's use of the internet, it was appropriate for the assisting psychiatrists to touch upon this issue. Dr McVie noted inconsistencies in the witness statements, but there was evidence of the appellant going out less and having less interaction with friends via MSN or by phone. Reference was made to the evidence which reported a marked increase in the appellant's use of the computer by the beginning of 2008, and that the appellant commenced using a program called "Second Life", had created an avatar for herself and was involved in a fantasy world of some description in that program. By March 2008 the appellant was not allowing her biological mother to look at the computer and seemed to hide the computer when she was asked about her use of it.

[136] Dr McVie noted the evidence of Dr Hannah and Dr Sundin that the computer may well have been a distraction in the early phases of the depression and may have contributed to the appellant's decreased ability to do housework and feed the children. The possibility existed that the appellant was unable to focus on the computer and may well have sat there staring at it and not been actively involved.

[137] Dr McVie's advice was that the appellant's computer use was "rather unusual in terms of the genesis of a depressive illness", and that there were reports of the appellant using the computer and paying bills on the internet even after the death of the twins became known to her. Dr McVie made a passing comment that it would have been extremely useful to have access to a forensic evaluation of the appellant's use of the internet, in particular her use of the Second Life program.

[138] Significantly, Dr McVie referred to the fact that the appellant restricted access to the twins, and this was an action that was "active". Her advice to the Court was that such action was not consistent with the type of psychomotor retardation or lack of volition that Dr Hannah was describing. Preventing people from accessing the children was an action that needed "considerable energy to input" and, according to Dr McVie, it was very clear that the older children knew that they would be in trouble if they went against this. Notably, the adults did not actively resist and push to see the children, even after T had reported concerns about the welfare of the twins.

[139] Dr McVie advised the Court about the discussion amongst the psychiatric witnesses as to whether the appellant suffered a Borderline Personality Disorder. She advised the Court that most of the witnesses considered that "borderline personality structure was present, either borderline personality disorder or borderline features perhaps as a function of deterioration of mental state which often brings out underlying personality traits."

[140] Dr McVie's advice was that while there was clearly a major depressive illness present in June 2008, she held concerns about inconsistencies in the collateral material. Some of the statements given in the appellant's retrospective account of her mental state, particularly to Dr Hannah, were inconsistent with some accounts given in this collateral material. Dr McVie expressed concerns about the role of the appellant's use of the computer throughout early 2008. Her advice to the Court was to accept the opinions of Dr van de Hoef and Dr Voita that, although some depression was present, because of psycho-social factors and personality factors,

there may well have been other factors at play which resulted in the appellant's actions in early 2008, and which ultimately led to the deaths of the twins.

Dr Lawrence

[141] Dr Lawrence advised the Court to prefer the opinions of Drs Sundin, Fama and Hannah, as well as what Dr Lawrence believed to be the conceded opinion of Dr van de Hoef, that the appellant was suffering:

> "a major depressive disorder of moderate to severe severity and that as a result of the effects of that major depressive disorder there was a substantial impairment of the appellant's ability to know that she ought not to do the omissions, as Dr Fama put it, and also an impairment of her ability to control the behaviour that followed associated with the cognitions and the thoughts".

[142] Dr Lawrence acknowledged the "considerable unusual, almost unique, features and factors" to be taken into consideration. She referred to ambiguities or inconsistencies in the evidence. Dr Lawrence canvassed, and helpfully summarised, the evidence about the appellant's traumatised and dysfunctional childhood, her relationship with MJ and the course of that relationship. She remarked about how things changed clearly in the early part of 2008, and the appellant's report that she felt overwhelmed by the care of the twins. Reference was made to the deterioration in the appellant's function as a housewife and the deteriorating state of her house and her care for the children. The appellant's withdrawal and irritability, increasing fights with her husband and their ceasing to share the same bed were noted by Dr Lawrence. She remarked that MJ was a very central person to the appellant's functioning and the one stable feature in her life. The picture which emerged was one of Major Depressive Disorder including loss of appetite and a disorganised sleep pattern.

[143] Dr Lawrence expressed the opinion that the appellant's thinking was "so distorted that she was unable to think what she should do to correct the situation or activate the actions that would be necessary to change that." Dr Lawrence adopted Dr Hannah's description of psychomotor retardation and also referred to Dr Sundin's evidence of the difficulties that the appellant had of converting thoughts into action. The appellant's use of the computer was described by Dr Lawrence as something like an escape into a fantasy world. It was an activity that required little concentration or physical activity. It fed into her difficulties about poor self-image.

[144] Dr Lawrence did not agree with Dr Voita's assessment of Borderline Personality Disorder as a primary condition. However, Dr Lawrence advised that the appellant certainly suffered from a prejudicial childhood and had personality vulnerabilities. This included dependence on MJ, but the appellant did not exhibit other factors that are considered to be diagnostic criteria for Borderline Personality Disorder. Major Depressive Disorder was the appropriate primary diagnosis.

[145] Dr Lawrence concluded her advice by recommending the acceptance of the views of Drs Sundin, Fama and Hannah that the appellant's Major Depressive Disorder was severely affecting the appellant's function and that this illness or mental disease had "significantly and indeed substantially, impaired her thinking, her ability to know that she ought not do the things that she did".

[146] Dr Lawrence did not specifically address the clinical evidence about the appellant's capacity to actively prevent other people being able to see the twins for a lengthy period and whether this was inconsistent with the type of psychomotor retardation or lack of volition that Dr Hannah, in particular, described. Implicit in her advice is that it did not. However, her assessment of this conduct and the extent to which it supported or detracted from the opinions given by the professional witnesses was not developed.

The challenge to Dr McVie's advice

[147] It is convenient at this point to address the second ground of appeal, namely that Dr McVie "went outside the functions of an assisting psychiatrist established in s 389 of the *Mental Health Act* 2000 in her advice and recommendations to the Mental Health Court." This ground was not addressed in written submissions, and the respondent was only notified of it the day before the hearing. The appellant's oral submissions focused upon Dr McVie's concern about the appellant's internet use and this was submitted to have overstepped her responsibilities as an assisting psychiatrist. No submission was made about the correctness of *Reid v DPP (Qld)*[13] about the function of an assisting psychiatrist. That decision supports the proposition that s 389 contemplates that the assisting psychiatrist may critique the clinical evidence given by others and evaluate the extent to which the evidence tends to support one or other of the conclusions which the parties seek from the Court. Dr McVie's reference to the appellant's internet use was unremarkable in the light of the evidence, including the evidence of the psychiatrists. The psychiatrists addressed the appellant's internet use. The opinion, which Dr McVie shared, that the appellant's time-consuming use of the internet was unusual in terms of a depressive illness, was one which had been expressed by Dr Voita. The evidence showed that the appellant used the computer at about the time of the twins' death for internet banking and other purposes. This evidence was relevant to the issues before the Court and the psychiatric evidence as to whether the appellant's computer use was consistent or inconsistent with relevant capacities being substantially impaired.

[148] Both in relation to her advice about the appellant's computer use and more generally, Dr McVie was addressing the clinical evidence given by witnesses and the extent to which that evidence supported a conclusion of diminished responsibility. Dr McVie did not go outside the functions of an assisting psychiatrist. I should add that neither did Dr Lawrence, who in giving her advice also remarked upon the appellant's internet use.

The Court's decision

[149] The Court's decision comprehensively discussed the evidence, including the psychiatric evidence and the advice of the assisting psychiatrists. It separately addressed the question of whether the appellant's capacity to control her actions, or make the omissions which led to the death of the twins, was substantially impaired, and the question of whether the appellant's capacity to know she ought not to do the act or make the omissions was substantially impaired. Her Honour accepted that the appellant had decreased functioning at the time of the death of the twins and was at the very least moderately to severely depressed. However, her Honour was not satisfied that the appellant's capacity to control her actions was substantially

---

13 [2008] QCA 123 at [44] – [48].

impaired. She preferred the evidence of Dr Voita and Dr van de Hoef as well as the advice of Dr McVie.

[150] Two related issues of concern to the Mental Health Court were the period of time during which the substantial impairment of the appellant's capacity to control her actions would have needed to exist, and the lack of corroboration for such an impairment. In that regard, the Court stated:

> "... [The appellant's] impairment of her capacity to control her actions in depriving the twins of food must have commenced around January 2008 when she resorted to feeding them only formula and leaving them in their bedroom for long periods. These actions then continued for almost six months despite the twins' physical condition deteriorating in front of her. [The appellant] indicated that she was aware by March or April 2008 that the twins had deteriorated and that there were signs of malnutrition. Accordingly to accept that [the appellant's] capacity was substantially impaired I would necessarily have to accept that the capacity of control was substantially impaired for several months.
>
> Not only would the substantial impairment have had to exist for several months it would have had to have gone unnoticed for this substantial period of time. Accordingly I share the concern that despite the fact that this period of impairment would necessarily have existed for many months there is no corroboration of [the appellant's] impairment or the true level of her impairment throughout that period. There is simply no objective evidence of her actual mental functioning during this time. Apart from the fact that the twins died and the clear evidence of the filthy nature of the house, there is no contemporaneous substantiation of her impaired functioning or the level of impairment to allow me to conclude that she was suffering from a substantial impairment of her capacity to control her actions."

[151] Her Honour noted that the actions under consideration, namely the appellant's omissions in failing to feed the twins properly, were sustained for a long period of time in the face of clear evidence of the twins' deterioration. The appellant acknowledged to police that she was aware for some time that the twins were getting thinner and were deteriorating. The Court referred to the fact that the respondent received messages of concern about the twins' health from her daughter and her mothers in the weeks leading up to the twins' deaths. During the inspection in late May 2008 the owner of the house urged the appellant to go and attend to the twins' needs, but, as the Court noted, the appellant "ignored that suggestion and indicated they were alright."

[152] The Court attached significance to the fact that no-one was so obviously worried about the appellant, and that whilst the owner thought that the appellant looked terrible, she did not make any reference to her mental state at that time and neither did anyone else.

[153] After a detailed consideration of the evidence given by the appellant's daughter in an interview with police, the Court stated that when concerns were raised about the twins, the appellant "was able to not only actively rebut those concerns but was able to do so in a way so as not to raise any suspicion about her own level of

functioning." In addition, a friend who visited the appellant on 12 June 2008, a few days after the twins' death, did not note anything unusual about the appellant's presentation.

[154] The Court also noted that there was clear evidence that the appellant was in fact caring for the other children, at least to some extent, which included cooking for them several days a week and otherwise buying them takeaway food. She was using the internet extensively and on the day the twins' bodies were discovered she had done some internet banking. She also was able to shop that afternoon and buy food for the children.

[155] After canvassing this evidence, the Court expressed its agreement with Dr van de Hoef's assessment that the appellant was not so apathetic that she was unable to function and, indeed, she had enough energy "to actively repel those who did want to help [her]." This included repelling her daughter T who wanted to "mother" the twins, and her son L who would have to "sneak in", since if one of the children had gone into the room they would get into trouble from their mother. In addition to the appellant's actively repelling people who did want to help, there was evidence that the appellant was able to attempt cleaning up the house and taking out garbage before police arrived.

[156] In the light of the evidence, and the differences of opinion between the psychiatrists, the Court was not satisfied that the appellant was indeed psychomotor retarded at the time of her arrest. Such a finding was open on the evidence and was confirmed by a playing of the video recording of her interview on arrest, being material which was not available to Dr Hannah when she wrote her report. The Court observed that the psychiatrists who saw the video did not consider that the appellant was psychomotor retarded to any great extent at the time. And, as the Court observed, if the appellant was indeed psychomotor retarded at the time of her arrest this may have been significantly exacerbated by the discovery, a week earlier, of the twins' bodies and the knowledge that they were dead.

[157] The Court remarked on the fact that whilst the appellant was hospitalised soon after her arrest she recovered quickly, was discharged after two months and returned to custody. There is evidence that the return to custody was somewhat rushed. However, the point made by the Court is a valid one and was relevant to the extent of the appellant's illness.

[158] The Court referred to the substantial body of opinion that personality factors were also involved in the appellant's actions. Her Honour stated that she was "particularly persuaded by Dr Voita who initially had the most contact with [the appellant] and her view that [the appellant's] primary diagnosis is that of borderline personality disorder."

[159] After reviewing the evidence, her Honour concluded that while she was satisfied that there was some not minor impairment of the appellant's capacity of control, she was not satisfied that the appellant's capacity to control her actions was at a level that her capacity was "substantially impaired solely due to factors related to her abnormality of the mind." In its context, this finding should be understood as referring to the possible impairment of the appellant's capacity due to factors that were not related to her diagnosed depression. The Court's finding followed an acceptance of Dr Voita's evidence about personality factors. There was other

psychiatric support for the existence of a Borderline Personality Disorder or at least certain personality traits which came to the fore but which fell short of being sufficient to diagnose a Borderline Personality Disorder. The disorder or traits were not necessarily related to the diagnosed depression. For the reasons that Dr Voita and Dr van de Hoef gave, the appellant's dysfunctional coping mechanisms and her personality factors separately impaired her thinking.

[160] As to the appellant's capacity to know that she ought not do the act or make the omissions, the Court proceeded to consider the evidence relied upon by the appellant, the appellant's submissions and tests that are applied in this context in determining whether that capacity has been substantially impaired. The Court concluded that there was "considerable evidence that [the appellant] knew and understood that she was not feeding the twins enough and she knew at least at a theoretical level what the consequences would be." The Court quoted relevant evidence, including statements given by the appellant that she knew that the twins needed to get help. The Court regarded as significant the fact that after the twins began to lose weight the appellant would not let anyone see them. She knew that if anyone saw them in their neglected state they would raise the alarm and this would lead to their removal. The evidence of T that her mother reprimanded her after she told her grandmother that she was worried about the twins was highly relevant in this regard. The appellant told her daughter that she should not be telling people because the children "might be taken away from her."

[161] Applying well-established legal tests, the Court was not satisfied that the appellant's capacity to see the wrongness of her actions or appreciate the consequences of her actions was substantially impaired. The Court found that as early as March 2008 and certainly by April 2008 the twins' health was deteriorating and the appellant was aware of this. She chose not to seek medical help for fear of losing custody of them and the other children. She kept the twins out of sight by "closing the door." As the Court found, "She also clearly knew it was wrong not to care for them adequately which is why she hid them from sight and prevented access to them."

The contention that the volume and quality of the evidence supported the defence

[162] For the reasons given, the concession made by Dr van de Hoef that it was possible that a relevant capacity was substantially impaired did not align her opinions with those of Drs Sundin, Fama and Hannah. In numerical terms, three expert witnesses supported the defence and two did not. The Court's decision was not dictated by these numbers. As was stated in *DAR v DPP (Qld)*:

> "The law does not require the difficult question: 'Who shall decide when doctors beg to differ?' to be resolved by a head count of the differing doctors."[14]

The appellant's written submissions point to what are said to be other concessions made by Dr van de Hoef in her testimony. Under cross-examination she accepted a proposition that one might "wonder" whether the appellant had a Borderline Personality Disorder, or rather was a person with great vulnerabilities around dependency. This acknowledgment was not an abandonment of the view that the appellant suffered from a Borderline Personality Disorder. However, even if it was interpreted as aligning Dr van de Hoef's evidence with other evidence that the appellant had certain personality traits, this evidence did not alter Dr van de Hoef's

---

[14] Supra at [63].

ultimate opinion on the issue of whether the appellant's impairment was substantial or not.

[163] The appellant's submissions also point to Dr van de Hoef's evidence in which she accepted that the appellant's conduct in actively keeping people away from the twins could have been because of "her shame about herself and the house and how sick she had let them become", and that she may have repelled people because of "her negative view of herself and her fear of being revealed as someone who was helpless and hopeless and could not cope." Dr van de Hoef's acceptance of these propositions does not alter the fact that the issue for the Court did not turn on these points. The appellant may have kept people away because of her fear of what the twins' condition would reveal to others about her ability to cope. The relevant point, however, is not one about the shame of being revealed as someone who could not cope. It was the shame associated with having malnourished her children over a period of weeks and months. The evidence supported the conclusion that the appellant actively kept people away from the twins not simply because of shame about her standard of care for them, but because she knew that she had so malnourished them that if their condition was revealed they and the other children possibly would be taken from her by child protection authorities. In short, the evidence supported the conclusion that the appellant knew that what she was doing to the twins was wrong. She concealed the twins' condition because of this awareness.

[164] The appellant's next submission is that the evidence supporting the defence was of a higher calibre. The appellant submits that Drs Sundin, Fama and Hannah were able to elaborate upon their opinions and provide a basis for them in a way in which Dr Voita could not.

[165] The Court's reasons suggest that her Honour thought that all of the expert witnesses gave evidence of a high quality. Ultimately, the Court expressed a preference for the evidence of Dr van de Hoef and Dr Voita, and explained its reasons for this preference. Both those psychiatrists gave persuasive reasons for their opinions.

[166] The appellant submits that Dr Voita's report was based on inadequate material. However, before Dr Voita gave evidence she considered additional material. Some of the collateral material supported the conclusion that the appellant's depression was more severe than Dr Voita had originally assessed it to be. However, this did not detract from the quality of Dr Voita's evidence which was based upon extensive dealings with the appellant as a patient in 2008 and a consideration of critical evidence including the appellant's police interviews. Dr Voita explained the basis for her concern that the appellant did not seek help and kept others away from the twins. Dr Voita also had concerns about the appellant's ability to have a level of functioning in other areas, including excessive use of the internet. Dr Voita had regard to collateral material that she had obtained, including interviews with the appellant's foster mother and biological mother. She was entitled, in reaching her opinions, to give appropriate weight to this information.

[167] The Court had the advantage of hearing each expert witness give their evidence. Cross-examination of witnesses identified limitations on the material upon which such opinions were based and the extent to which those opinions were supported by the evidence. The appellant's submissions observe that her Honour did not address certain limitations in Dr Voita's evidence in her judgment. By the same token, her

Honour did not address the limitations in the evidence of other expert witnesses who did not have some of the advantages that Dr Voita had in expressing an opinion about the appellant's mental condition. The Court carefully considered the psychiatric and other evidence. The submissions made by the appellant about the quality of the evidence given by the psychiatrists do not persuade me that the Court's assessment of this evidence was wrong.

Alleged overstatement of certain aspects of the evidence

[168] The appellant submits that statements that the appellant "actively stopped" others from checking on the twins or "purposefully isolated" them were not supported factually upon a reasonable analysis of the evidence. The appellant's written submissions quote extensively from the evidence about the respects in which the appellant kept others away from the twins. A consideration of this evidence and other evidence upon which the Court relied justified the two doctors in expressing the views which they did in their oral evidence. The Court was entitled to reach a similar conclusion based upon its consideration of the relevant evidence.

[169] The appellant's submissions make the point that, when regard is had to the evidence as a whole, the appellant "did not need to do much to deter her mothers from checking on the twins." But this is a different point. For whatever reasons, the mothers did not push the issue and the appellant deterred them and others from seeing the twins. The appellant lied to her biological mother when she said that the twins had seen a doctor.

[170] Dr Hannah accepted that the appellant's conduct in keeping the twins hidden from others was an active process. Dr Hannah stated that "there was an active process going on in that [the appellant] was aware that there was something to hide from people." Her Honour did not overstate the relevant evidence. She accurately summarised it.

[171] An associated issue raised by the appellant relates to the appellant not asking for help. The experts gave their opinions about the clinical significance of this and the Court assessed the relevant evidence. Its assessment of these issues did not overstate the evidence.

Whether undue weight was given to certain aspects of the evidence

[172] The appellant submits that the Court gave undue weight to the opinions of lay witnesses about the appellant's mental state and a witness who did not identify the appellant as being depressed without taking into account evidence to the contrary, the limited contact that these witnesses had with the appellant, other limitations on their evidence and the fact that they were not experts.

[173] A fair reading of the Court's reasons does not support the conclusion that it gave undue weight to this evidence. Like the psychiatrists who considered numerous witness statements, the Court was confronted with a substantial body of evidence, some of it conflicting, about how the appellant presented in the weeks and months prior to the death of the twins. The Court had to assess this evidence, including the limited opportunity which some witnesses had to assess the appellant's condition. The appellant's submissions have not provided any compelling reason to conclude that the Court's assessment of this body of evidence was wrong. The conclusions reached by the Court were open to it on the evidence. For example, it was open to

place appropriate weight on the fact that the owner of the property who dealt with the appellant and spoke to her in late May 2008 did not observe the appellant's mental condition to be unusual. The Court was entitled to have regard to the fact that the appellant's daughter did not express concern to her grandmother about the appellant's condition or say that she was worried about her mother. Instead, she complained about her mother spending a lot of time on the computer.

[174] The Court made appropriate reference to the appellant's extensive use of the internet since this was a fact which featured in the evidence of some of the psychiatrists.

[175] The appellant submits that the Court's finding that the appellant "recovered quickly" after two months of hospitalisation overlooked the fact that her discharge was sudden due to operational constraints and inconsistent with prison medical records which showed certain matters in relation to the appellant's mood and sleep and adjustments to her drug treatment between October 2008 and June 2011. This criticism is without merit. The evidence was that the appellant recovered quickly after hospitalisation. The fact that her transfer to prison was rushed does not alter this fact. Her clinical course and adjustments to drug treatment in the following years are unremarkable. Although, as the appellant submits, her relatively quick recovery was not inconsistent with her being seriously disturbed at the relevant time, her relatively quick recovery is also consistent with her depression not being as severe as some of the evidence suggested. The Court was entitled to have regard to the evidence of her relatively quick recovery following hospitalisation.

[176] In summary, the appellant has not shown that the findings made by the Court were against the weight of the evidence.

Alleged errors in approach

The relevant period of time

[177] The appellant submits that the Court misunderstood the critical point in time or period of time during which a substantial impairment needed to be proved. The respondent states that the period alleged in the indictment, namely 8 June 2010 to 17 June 2010, is intended to cover the possible dates of the deaths. It is not the period during which the omissions alleged to have caused death occurred. The omissions are alleged to have occurred over months and this was the relevant period during which to consider an impairment of capacity.

[178] There is no dispute that the Court was entitled to consider evidence of impairment of the relevant capacity over an extended period. Moreover, evidence of impaired capacity before the relevant period might be considered as evidence from which an inference of impairment of capacity during the relevant period might be drawn. Still, the issue was whether there was a substantial impairment at the time of the acts or omissions which caused the deaths. Unlike other homicide cases, the prosecution case was not concerned with a single act that occurred in a moment, such as the pulling of the trigger on a gun, with a death following very shortly afterwards. It relied on malnutrition of the twins over an extended period. As the appellant submits, the cause of death was malnutrition over a period of time. It is possible that the appellant's condition deteriorated over time and that, while she was not substantially impaired in a relevant capacity at some time, she was substantially impaired at the time she did the acts or made the omissions which caused the children to die. So much may be accepted.

[179] The appellant points to the finding by the Court that a substantial impairment would have needed to exist over an extended period of time. This finding was well-founded in the evidence. The evidence is that the condition of the twins deteriorated due to malnutrition, and that the appellant was aware of this for some months prior to their deaths.

[180] The expert evidence in support of the defence of diminished responsibility was that the appellant was substantially impaired in a relevant capacity over an extended period. There was evidence that the appellant was physically ill with the flu shortly before the twins' deaths, and that this may have given her less energy to tend to them and her other duties. However, other evidence, including evidence of the property owner, did not suggest that there was a rapid and marked decline in the appellant's condition at around the time of the twins' deaths. A friend who called upon her a few days after the twins died did not find her in a parlous mental state. On the contrary, she had a conversation with the appellant outside the appellant's home on 12 June 2008. The friend said, "It's been a while since I've seen the twins, they must be pretty big now", to which the appellant reportedly replied, "[Yeah] they're fine." The appellant then went on to talk about having spoken in the last couple of weeks with her partner about splitting up and the arguments that they had been having. The appellant is reported to have said:

> "It's all been downhill since the twins came along and since we moved into the house. We should never have had the twins and we should just get rid of them."

The appellant's capacity to undertake such a conversation a few days after she discovered the twins' deaths does not support the conclusion that she was substantially impaired in a relevant capacity a few days earlier. It was open to the Court on the basis of this and other evidence to conclude that the appellant was not substantially impaired, as alleged, at any relevant time. Even assuming that the evidence supported a finding of a decline in the appellant's functioning over the weeks leading up to the twins' deaths, it was nevertheless open to the Court to not be satisfied that she was substantially impaired at the time she did the acts and made the omissions which caused the twins to die.

"Personality factors" and the alleged conflation of "mental illness" and "abnormality of mind"

[181] The Mental Health Court considered evidence that personality factors were involved in the appellant's actions. It preferred the opinions of Dr Voita and Dr van de Hoef. It also acted on the advice of Dr McVie to accept those opinions, which was to the effect that while depression was present, other psycho-social factors and personality factors resulted in the acts and omissions which led to the deaths of the twins. The Court's conclusion that it was not satisfied that the appellant's capacity to control her actions "was substantially impaired solely due to factors related to her abnormality of mind" should be read in that context.

[182] The appellant submits that the Court's consideration of "personality factors" conflated concepts of "mental illness" and "abnormality of mind", and failed to consider the evidence which "contextualised those factors as one of the contributors to the abnormality of mind – rather than as providing a separate explanation for [the appellant's] behaviour."

[183] Whatever criticisms may be made of the summary contained in Dr Voita's report in not distinguishing between a "state of mental disease" within the meaning of s 27 of the *Criminal Code* and an "abnormality of mind" within the meaning of s 304A, the Court did not confuse or conflate these terms. Also, it did not act on Dr Voita's simple, and arguably inadequate, summary of her opinion about diminished responsibility at the conclusion of her report. It considered the points developed in the body of that report, Dr Voita's oral evidence and other evidence about personality factors and other matters. Although various psychiatrists gave evidence about personality factors, the appellant's pre-existing vulnerabilities and other matters that related to the causes of the appellant's impaired capacity to control her actions and the reasons why she acted as she did, the Court preferred the evidence of Dr Voita and Dr van de Hoef, and the advice of Dr McVie.

[184] The Court did not find, and was not required to find, that "personality factors" contributed to the appellant's depressed state, being the abnormality of mind relied upon by the appellant and found by the Court. It was open to the Court, on the basis of the evidence and advice which it accepted, to conclude that the appellant's neglect of her children was due, in part, to the "primitive psychological defences" and personality factors about which Dr Voita and Dr van de Hoef in particular gave evidence. Those witnesses explained how those matters (whether described as "personality factors" or otherwise) and other factors were responsible for the appellant's state of denial, her actions and her impaired capacity to control those actions. It was open to the Court to conclude that those matters provided an explanation for the appellant's behaviour and were factors that separately impaired her capacity.

Alleged misunderstanding of the capacity to morally reason

[185] The appellant submits that her Honour's findings that the appellant did "appreciate at some level that there could be serious repercussions to the twins as a result of not being fed" and that she "knew it was wrong not to care for them adequately" are not responsive to the "test" for the capacity to know that one ought not to do the act or make the omission. These findings are said to address "wrongness" in the abstract, which is not the test.

[186] This contention is misplaced. It is true that in this area of the law a person's capacity to know that what they are doing is wrong is not decided in the abstract. The question is whether the person was able to appreciate the wrongness of the particular act he or she was doing at the particular time.[15]

[187] The Court did not assess the third capacity stated in s 304A in the abstract. It considered the applicant's capacity to appreciate at the time when she inadequately fed her twins that this was wrong. There was evidence that the appellant knew it was wrong. She knew it was wrong to malnourish the twins and that she would be in trouble if their malnourished condition was revealed. This was the reason that she took steps to hide them from others, including her other children.

[188] The appellant relies on evidence about her "magical thinking", particularly that she somehow thought that things would get better. But any such magical or irrational thinking in that regard did not alter her appreciation that what she was doing or

---

15 *The King v Porter* (1933) 55 CLR 182 at 189 cited with approval in *Stapleton v The Queen* (1952) 86 CLR 358 at 367.

omitting to do was wrong. Instead, any such thinking was a forlorn hope that things would get better and her wrongful conduct would not be exposed.

[189] Finally, the appellant submits that the test for "wrongness" was whether the appellant was able to appreciate, at the relevant time, that her inadequate feeding would "kill or nearly kill" her children. I do not agree, and this submission, like a substantial body of the evidence, relates to a different issue, namely whether the appellant foresaw or was aware that the consequences of her actions might lead to death or grievous bodily harm. That issue, and the issue of the intent required to prove murder, were not ones for the Mental Health Court to determine.

[190] It was sufficient for the Court to find that the appellant appreciated at the time she inadequately fed her twins that this would have serious repercussions for them and that her neglect would get them and her into serious trouble. In other words, she knew that her acts and omissions were wrong according to ordinary standards or "the everyday standards of reasonable people".[16]

Conclusion

[191] In the disastrous situation in which the appellant found herself and in which she placed her twins, the appellant's capacities to control her actions and her capacity to know that she ought not to do the act or make the omissions which caused their deaths were impaired.

[192] It was open to the Mental Health Court to find that her capacities were not substantially impaired. The appellant has not demonstrated that the decision of the Mental Health Court was in error.

[193] I would dismiss the appeal.

---

16 *The King v Porter* (supra) at 190.