



Neutral Citation Number: [2011] EWCA Crim 650

Case No: 2010/05650/D5

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
Lord Justice Latham

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2011

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HENRIQUES
and
MR JUSTICE DAVIS

Between :

R

- v -

Kenneth Noye
Reference by the Criminal Cases Review Commission

Miss Clare Montgomery QC and Mr Julian Knowles for the Appellant
Mr Mark Ellison QC and Mr Peter Grieves-Smith for the Respondent

Hearing dates : 9th March 2011

Approved Judgment

The Lord Chief Justice of England and Wales:

1. On 14 April 2000 Kenneth Noye (the appellant) was convicted at the Central Criminal Court before Lord Justice Latham and a jury of the murder of Stephen Cameron on 19th May 1996. He was sentenced to life imprisonment. His appeal against conviction was dismissed on 10th October 2001.
2. On 13th October 2010 the Criminal Cases Review Commission decided to refer the conviction to this court on two grounds:
 - a) New evidence that is capable of significantly undermining the credibility of a prosecution expert, Dr Heath, and the evidence he gave at trial.
 - b) New evidence that there was bruising to Mr Cameron's knuckles and new evidence that he would not necessarily have sustained bruising to his knuckles.

Facts

3. We must put these grounds into their factual context. This is a notorious case. At lunchtime on 19th May 1996 on a roundabout at the M25/A20 interchange near Swanley in Kent Stephen Cameron was a passenger in a red Bedford van being driven by his girlfriend Danielle Cable. He was 21 years old, and she was 17. The appellant was driving on his own in a blue Land Rover Discovery. Just before traffic lights on the interchange the Discovery overtook the Bedford van and stopped in front of it. The appellant got out of his vehicle and walked back towards the Bedford van.
4. A fight took place between the two men. There were numerous witnesses, all of whom saw different parts of the fight from different angles and distances. Unsurprisingly they described the incident which they witnessed in their own different ways. Miss Clare Montgomery QC on behalf of the appellant drew attention in her written submissions, and then orally, to parts of the evidence which supported the appellant's case. We have considered them all, and done so by studying the transcripts of the evidence given at trial. However no fresh material arising from the eye witness evidence has been drawn to our attention, although we have had to consider an issue relating to one witness, Decabral, which was addressed by the Court of Appeal in October 2001.
5. In his summing up, the trial judge underlined the difficulties which faced the jury if they sought to construct a coherent story which would take account of each and every aspect of the evidence of each individual witness. As he put it, he suspected that the jury would not be able to "square some of the circles". He suggested that maybe what the jury should look for was the "shape of the evidence", the shape of the story, rather

than the particular details, and he suggested to the jury they should not get too “tangled up” trying to answer the questions about which witness was where and when. Rather the jury was advised to examine the “mosaic of evidence” to see whether a satisfactory picture of what happened at the central point could be drawn. The central issue was self-defence, and the circumstances in which the appellant stabbed Mr Cameron and inflicted fatal injuries on him.

6. For present purposes, however, when all the evidence has been examined, and all the arguments and submissions about the significance to be attached to the evidence of Dr Heath are addressed, some stark facts are undisputed and indisputable.
7. It was the appellant who first left his vehicle. Looked at from Mr Cameron’s point of view, and it is a view which should not be overlooked, the appellant would almost certainly have appeared to be looking for a confrontation. When the appellant left his vehicle he was, and he knew that he was, armed with a knife. At this stage Mr Cameron would have had no idea that his potential protagonist was carrying a weapon, and when he left the vehicle in which he was a passenger Mr Cameron was and from start to finish of the fight he remained unarmed. Precisely which of these two men struck the first blow is uncertain, but a time came when they briefly disengaged. There were, as Miss Montgomery put it in argument, two phases to the fight. At the end of the first phase, the appellant made his way towards his own vehicle. He went round the front of his vehicle to the passenger side. By then, even on the appellant’s own evidence, he was not being followed by Mr Cameron. Mr Noye did not run away from the scene. He did not seek assistance from any of those in the vicinity. Instead he pulled out his knife and opened it. He then walked to the back of his vehicle (rather than round the front to the driver’s door) where Mr Cameron was standing. The fight resumed. It came to an end when the appellant used the knife to inflict two stabbing wounds to Mr Cameron. These were not accidental stabbings, but as he accepted, deliberate blows while he held the opened knife in his clenched fist. In effect therefore he punched Mr Cameron in the chest with the knife. The second of these blows was the last blow in the fight. The appellant immediately drove away from the scene, taking the knife with him. He fled the country. During the course of extradition proceedings from Spain, he denied that he had had anything to do with Mr Cameron’s death. He did not suggest that he had acted in self-defence until the trial process in this country.
8. In the meantime Mr Cameron had collapsed into the carriageway. No pulse was detected. The efforts to resuscitate him were unsuccessful. He was taken to hospital. He was declared dead at 2.10pm, just about an hour after the altercation between the two men began.

Self-defence

9. The ancient common law principle of self-defence is readily understood. Unembellished by jurisprudential refinements, in general, the use of force is unlawful, but there are exceptions. Anyone who is under attack or in danger of being attacked

is permitted to use violence in self-defence, using no more force to protect himself than reasonably necessary in the situation he believes himself to be. Even the use of a weapon to inflict fatal injury may fall within the ambit of this defence. However, it can only be in the most exceptional cases that this degree of violence would be consistent with the requirement that the force used in self-defence must be reasonably necessary. To kill someone by inflicting fatal injuries must surely be the very last resort.

The appellant's evidence at trial

10. The appellant gave evidence at trial. In 1985, he had fatally stabbed a camouflaged police officer wearing a balaclava at night in the appellant's garden. At his subsequent trial the jury could not exclude the realistic possibility that he had acted in self-defence, and he was acquitted. What could not be in doubt was that he had direct experience of the potential consequences of the use of a knife and the infliction of fatal injuries. He was convicted in 1986 of involvement in handling the proceeds of the gold stolen in the well known Brinks Mat robbery, when he was sentenced to 14 years imprisonment. He explained that he carried a knife for protection against the risk of kidnapping, or criminal activities by others seeking to discover the whereabouts of the as yet undiscovered substantial amount of the Brinks Mat gold. When he used the knife on Mr Cameron he believed himself to be in a situation of extreme danger, confronted by a man attacking him in a furious temper, who was threatening to kill him. He thought that the fight might end with Mr Cameron throwing him over the bridge on to the road beneath, or if Mr Cameron successfully knocked him out, he would remove the knife from him and use it on him, "without a shadow of doubt". This description of how he came to use the knife is said to be crucial to the issues surrounding the accuracy or otherwise of the evidence of Dr Heath, and the weight, if any, to be attached to the evidence of the pathologists.
11. In his evidence in chief, having referred to the fear that the knife would be "definitely" used on him, the appellant testified "I struck out...with the knife". In cross-examination he agreed that he realised that to thrust a knife with a 4 inch blade into somebody's chest could kill. When he was asked whether he had at any time lost his self-control he responded:

"Only when I panicked...then I panicked and then I used the knife".
12. A short passage from the cross-examination is critical to the issues in this appeal:

"Q And it was a deliberate striking out with the knife?
A Yes.
Q So you did strike out with the knife deliberately?
A Yes.

Q It would appear, Mr Noye, that you did it twice, as the result of the wounds found on Stephen Cameron, yes?

A Yes.

Q Can we take it that the second blow was equally deliberate?

A I can't remember honestly doing the second blow but I accept it...there's two..., yes.

Q There is no question of you suggesting in this case to this jury that it was all an accident are you?

A Well, no, it wasn't an accident, I...struck out in panic because I thought if he'd got the knife off of me, he'd use it.

Q Right.

A He was in such a rage that I just.

Q We have reached this point, Mr Noye: that you admit, do you not, deliberately stabbing this man twice? You admit that?

A Yes."

A few questions later he repeated that he had "just panicked." "... it struck me that this was the last resort. It just struck me that if he gets the knife off of me, he will use it on me, and then I just panicked and I used it. I just struck out, but I just can't tell you where I struck out."

13. On the basis of the appellant's evidence there could be no misunderstanding. His use of a knife was not controlled and measured. He was in a panic. According to his case he genuinely believed that he was at serious risk of being killed, either by being thrown over the bridge, or by being disarmed by Mr Cameron who would then use the knife on him. In his panic he deliberately struck out with the knife.
14. This evidence is crucial to any analysis, and indeed any criticism of the evidence given by Dr Heath. Like all the pathologists who gave or have given evidence in this case, he was offering expert evidence as a pathologist. Any criticism has to be considered in the light of the remaining evidence, not least the evidence of the appellant himself. As frequently happens, although an examination of the expert evidence taken in isolation from the rest of the evidence may raise concerns about its quality, its correctness in the individual case may be confirmed, or at any rate lent great weight, by the rest of the evidence.
15. At trial the jury was directed that the "central issue" was self-defence. In reality that was indeed the only question for the jury. The directions of law were impeccable.

The verdict meant that the prosecution had disproved self-defence. Accordingly a conviction for murder was returned.

16. The issue in this appeal remains similarly focussed. The question is whether in the light of the fresh and new evidence the conviction is safe.

Dr Michael Heath

17. At the time when Dr Heath undertook the post mortem examination of the deceased in May 1996, and again when he gave evidence for the Crown at the trial nearly 4 years later, he was an experienced and respected Home Office pathologist. Unfortunately following a number of complaints his reputation has been severely damaged. The findings of the Home Office Tribunal into his work concluded that his conduct or professional performance called into question whether he was fit to remain on the Register of Home Office forensic pathologists. With that Dr Heath resigned. These events are chronicled in detail in *R v Ahmed* [2010] EWCA Crim 2899. In addition a number of successful appeals against conviction when Dr Heath gave crucial but seriously flawed evidence for the prosecution have been allowed. They include *R v Boreman and others* [2006] EWCA Crim 2265 and *R v Laverick* [2007] EWCA Crim 1750. For the purposes of the present appeal it was accepted that the Crown did not dispute that Dr Heath has been discredited since the trial “by virtue of being found to have: given unreliable over- dogmatic evidence as a forensic pathologist in a number of cases; provided on occasions unreasonably deduced conclusions from evidence that did not enable other possibilities to be excluded; and persisting in his conclusions without proper regard to the contrary and reasoned opinions of other pathologists”.
18. We have, of course, given full weight to these concessions but the fact that Dr Heath has given evidence for the Crown does not automatically lead to the conclusion that the conviction is or should be regarded as unsafe. This point was emphasised in *R v O’Leary* [2006] EWCA Crim 3222 (where the Crown conceded that the conviction was unsafe on this ground) where it was said that

“...it does not necessarily follow from these criticisms that every case resulting in a conviction in which Dr Heath gave evidence for the Crown should or will be treated as unsafe. We expect the Crown to do what the Crown has done here, which is to analyse the precise nature and importance of Dr Heath’s evidence to the conviction in the light of the particular circumstances of the individual case and the issues which arose at trial. Even if Dr Heath’s evidence was challenged at trial, it does not follow that the convictions will all be unsafe. Some will remain safe, even if his evidence lent support to the Crown’s case...”
19. We must address a separate submission advanced by Miss Montgomery that, in effect, the concerns which have now been expressed about Dr Heath’s evidence when giving expert evidence as a pathologist render his evidence inadmissible. We disagree. His

evidence was admissible and it remains so. What has happened is that for the reasons summarised earlier in this judgment its value as expert evidence is undermined and inevitably diminished. Even if the prosecution would not now seek to call Dr Heath in support of the Crown's case in the future, in accordance with the principles which govern the Crown's responsibilities for the conduct of prosecutions, the evidence was admissible.

20. In *R v Ahmed* the court concluded that although the information relating to Dr Heath was "deeply concerning...to anyone connected with the administration of criminal justice" there was no reason to doubt the safety of the conviction in the particular case. Once again, therefore, we must emphasise that although cases in which Dr Heath has given evidence for the Crown must be approached with great caution, the final result will depend on a fact specific conclusion based on all the issues in the individual case.

The evidence of the pathologists at trial.

21. The jury heard from Dr Michael Heath and Dr Peter Jerreat, another Home Office Registered consultant forensic pathologist, who were both called by the Crown, and Dr Vesna Djurovic, also a Home Office registered forensic pathologist, called by the defence. They were not in agreement: dealing with it broadly, Dr Jerreat agreed not with Dr Heath, but with Dr Djurovic. On its own that is not an unimportant consideration. The jury was faced with the evidence of three forensic pathologists, and although it is true that Dr Heath conducted the first post mortem, and therefore that the other pathologists had not, the jury was also well aware of the fact that one of the pathologists called by the Crown tended to support not the first pathologist called by the Crown, but the defence pathologist.
22. In a brief reminder of the essential features of the medical evidence Latham LJ referred to the uncontested evidence from Dr Heath and his description of injuries to Mr Cameron's "face and to the hands and arms and the knees", all of which were consistent with one or probably two falls to the ground, and were of therefore no help in deciding what happened in the fight. He went on to suggest that there was "no bruising found to the knuckles, nor indeed was any blood found on them". He then referred to the stab wounds, which as he put it, is where "the controversy begins". They were two in number. One was described as the big wound, the fatal wound, which was at 45° horizontal angled 45° upwards. The depth of penetration of this wound was approximately 16cm. The wound which was causing controversy was the second wound, further over on the left side of the chest again at 45° both angled upwards and inwards, cutting across, according to Dr Heath's evidence, the top of the superior surface of the liver and creating a slice. That was challenged by Dr Jerreat and Dr Djurovic. They were not convinced that the second wound penetrated at the angle described by Dr Heath. They believed that it went in at exactly the same angle and plane as the first wound. If that was so it was a shorter wound whereas if Dr Heath were correct, the depth of the stab was 18cm.

23. The summing up identified what appeared to be “the most significant” dispute between the pathologists. Dr Heath believed that both the wounds were caused by someone driving the knife up to the hilt. That was disputed by Dr Jerreat and Dr Djurovic. Dr Heath’s belief was based on the bruising which he found at the margins of the wound, and the comparison between the two wounds, one of which had one blunt edge and the other of which appeared to have two blunt edges. The relevance of this point was the nature of the force required to deliver the blows. Dr Heath, if he was right, said the force would be “considerable”, that is beyond severe, whereas Dr Jerreat and Dr Djurovic believed that “moderate” force would be required. The issue might also have been relevant in relation to the length of the blade of the knife. If Dr Jerreat and Dr Djurovic were correct, then the length of the blade of the knife may have been longer than had been postulated, because if the knife was not driven to the hilt, the length of the knife itself may be significantly longer than was required to make the necessary incisions. In any event the minimum length of the knife blade was said to be 12cm by Dr Jerreat or 4 inches, according to Dr Djurovic.
24. That provides the context in which we must examine the fresh evidence, reminding ourselves that the evidence of the pathologists should be considered in the light of the appellant’s assertion that when he inflicted the knife injuries on Mr Cameron he was in a desperate situation, in effect facing a genuine threat of imminent death, or at the very least, very serious injuries. On his own account, the use of measured force is difficult to comprehend.

Fresh Evidence

25. The approach of this court to appeals brought on the basis of fresh evidence admitted under section 23 of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, should now be regarded as settled. It was decided by the House of Lords in *Stafford vDPP* [1974] AC 878 that the ultimate responsibility for deciding whether a conviction was safe rested with the court. This principle was re-affirmed in the House of Lords in *R v Pendleton* [2002] 1WLR 72 in a short phrase in the speech of Lord Bingham of Cornhill that “...the principle laid down in *Stafford* was, in the opinion of the House, correct...”.
26. For a while it was thought that *Pendleton* was authority for a different approach, and there was a great deal of emphasis on the observations by Lord Bingham that the Court of Appeal should remind itself that it has

“an imperfect and incomplete understanding of the full process which led the jury to convict. The Court of Appeal can make an assessment of the fresh evidence that it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their provisional view by asking whether the evidence, if given at the trial, might reasonably

have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe”.

27. Any doubts on the issue were resolved by the decision of the Privy Council in *Dial and another v State of Trinidad and Tobago* [2005] 1WLR 1660 where Lord Brown of Eaton-under-Heywood gave a judgment expressing the view of Board that:

“The law is now clearly established and can simply be stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, always assuming that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case...The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury”.
28. It is relevant to underline, first, that Lord Bingham of Cornhill was himself a member of the constitution, and party to the majority judgment given by Lord Brown; that Lord Brown was expressing the view of the Board as a whole; and that although Lord Steyn and Lord Hutton disagreed with the conclusion that the conviction under consideration was safe, neither suggested that the essential principle was in doubt: indeed Lord Hutton expressly repeated it.
29. This approach has been consistently followed in this court (see for example *R v Hakala* [2002] EWCA Crim 730; *R v Hanratty, deceased* [2002] 3 All ER 534; *R v Ishtiaq Ahmed* [2002] EWCA Crim 2781; *R v Harris* [2006] 1Cr App R 5; *R v Dunne and others* [2009] EWCA Crim 1371; *R v Burridge* [2010] EWCA Crim 2874, where the authorities to date are carefully analysed at paragraphs 99-101).
30. The same principle applies to whatever form or type of fresh evidence is admitted under section 23 of the 1968 Act, whether it appears to strengthen or weaken the case for the appellant or weakens or strengthens the Crown’s contention that the conviction is safe.
31. The responsibility therefore rests with this court. In reaching our decision we reflect on how best to examine the fresh evidence and its possible impact on the safety of the conviction, and test our analysis to ensure that we have reached the right conclusion. Miss Montgomery reminded us that we were not making an assessment based on the advantages of seeing and hearing the witnesses: equally, we do not know which parts of the evidence impressed the jury, and which did not. All this is clear enough, and we recognise the difficulties which can face this court when it is assessing the impact of fresh evidence on the safety of a conviction. Miss Montgomery did however go further and drew attention to *Weiss v R* [2005] HCA 81, and *R v Mantenga* [2009] NZSC 18, the first a decision of the High Court of Australia, and the second a decision of the Supreme Court of New Zealand. In both jurisdictions what can be summarised as the “proviso” remained in force, enabling the court to dismiss the appeal notwithstanding that the point raised on behalf of the appellant might be decided in his favour “if it considers that no substantial miscarriage of justice has

actually occurred”. We mean no disrespect to either judgment, but while they underline some of the difficulties which can arise, they do not impinge on or alter the well established principles which apply in this jurisdiction, nor do they lead to any modification of the essential question which we must address, that is, whether, in the light of the fresh evidence, the conviction is unsafe. The principle is clear.

Dr Nathaniel Cary

32. Dr Nathaniel Cary is a Home Office accredited forensic pathologist. He provided a written opinion dated 21 January 2005, and a supplementary written opinion dated 19th October 2009. We were also provided with a note of what he said at a meeting held at the offices of the CCRC on 25th March 2010. Finally he gave oral testimony in court de bene esse. It is clear, from consideration of each of these sources of information about Dr Cary’s views, that his opinion has changed in a number of respects.
33. In his first report Dr Cary made a number of suggestions, underlining that the fact that Dr Heath carried out the first post mortem did not necessarily give him an advantage over the other pathologists. He suggested that the findings at post mortem were consistent with both stab wounds being “inflicted in rapid succession”, and that the track of the first stab wound, as noted by Dr Heath, was such that it would be almost bound to incise the liver, whether or not it punctured the heart. What was described as stab wound two in the photographs either could have been “relatively superficial penetration” or could have penetrated the heart. There were in Dr Cary’s view three possibilities to explain the sequence in which the wounds were inflicted. They were:
- (a) Stab wound 1 incised the liver and punctured the heart with stab wound 2 simply penetrating the abdomen without further damage.
 - (b) Stab wound 1 punctured the heart but stab wound 2 incised the liver.
 - (c) Stab wound 1 incised the liver and stab wound 2 punctured the heart.

At this stage Dr Cary expressed the view that (a) and (c) were possible and plausible. Dr Jerreat and Dr Djurovic had suggested that (a) was the most likely explanation. Neither of them, nor Dr Heath postulated (c). Dr Cary thought that Dr Heath’s opinion, (b), was the “least plausible”.

34. He was inclined to the view that the correct scenario was postulated at (c) and he indicated that there may have been a double penetrating action “with the two penetrations occurring in rapid succession. This could in effect amount to one overall

action...”. This possibility of one overall action by the appellant assumed considerable importance in the subsequent investigations by the CCRC into the safety of the conviction. If the process of wounding had taken place in accordance with possibility (c) then that would also be consistent with a shorter knife blade length as suggested by the appellant in his evidence.

35. Significant further features of this first report included criticism of Dr Heath’s view that the presence of two blunt ends in stab wound two provided an indication of penetration up to the hilt. This was “quite erroneous”. Further, the force used to inflict the injuries was, in Dr Cary’s view, not “considerable” or “severe”. Dr Cary agreed with Dr Jerreat and Dr Djurovic that the force required for the purpose might well have been “moderate”, and Dr Cary said that any suggestion that more than moderate force was required would be “unfair”.
36. Finally, Dr Carey suggested that any bruising to Mr Cameron’s knuckles as a result of punching “may have been limited”.
37. In his second opinion Dr Cary adhered to the proposition of one “overall action”, adding, (although it is open to question whether this opinion really was embraced by the expertise in pathology) that it was “perfectly plausible that the assailant could have the impression of only one penetrating injury having been inflicted”. He also said that the principal force required for this purpose would require “only moderate force”.
38. At the meeting on 25th March 2010 he suggested that it was now “hard to say” whether scenario (a) or (b) or (c) was more likely than any other. He also agreed that “considerable” force (the description employed by Dr Heath) could not be ruled out. His own assessment was that the force needed was “moderate or more”. Both these observations represented significant changes from his earlier opinions.
39. Dr Carey also commented on evidence given by Dr Heath that there had been some rotation or movement of Mr Cameron’s body, consistent with the body rotating away from the assailant as the stab wound was inflicted. There was, he said, no evidence from which to make any such deductions. Nor was it possible to say, on the basis of the injuries alone, whether the assailant was using a knife in his left or right hand, or whether he was standing “full on” or sideways. This group of issues was not thought by the judge to merit mention in his summing up.
40. Dr Cary was asked to summarise what his evidence added to the evidence of Dr Jerreat and Dr Djurovic. He suggested that he was able to point out “all of the flaws in Dr Heath’s evidence”. He had also provided a third possible scenario (that is, (c)) as to the cause of the injuries on the deceased, and the scenario he was postulating produced short track lengths to the injuries and was therefore supportive of the use of a shorter knife.

41. By the time that Dr Cary came to give evidence he effectively shifted away from his “third possible scenario”, He said that “at one stage he favoured scenario (c)” but that he now favoured scenario (a). We need not examine how his reference to notes made by Dr Naseem shortly after the death of Mr Cameron at Westhill Hospital explained this modification, but the further change does to some extent undermine the robustness of his criticism of Dr Heath who had favoured scenario (b). When he gave evidence Dr Cary explained that it was “difficult to see how it would reach the heart without slicing the liver”, which tends to support scenario (a) but not, as far as we can see scenario (c), his first preferred option. As to rotation by Mr Cameron when he was being stabbed, he said that he believed that the appearance of one of the two wounds was indicative of relative movement between the knife and the deceased, without, from the point of view of a pathologist, being indicative of any conclusion beyond the fact of the close proximity of the wounds to each other, suggesting a double stabbing face to face, with very little time between the two stabbing motions. But as to that, he expressly said he was “guarded”.
42. By advancing scenario (c) originally, and then moving to scenario (a) Dr Cary was no longer suggesting that the injuries sustained by Mr Cameron represented “one overall movement”. Yet as the CCRC reference underlines, one of the most significant aspects of Dr Cary’s report in January 2005 was the suggestion that one overall action rather than two separate stabbing movements had taken place. By October 2009 he was suggesting that the wound tracks would “best support” a “double penetrating action” but that this could amount to “one overall action” which could have achieved “double penetration of both the clothing and the body”. It then emerged that what Dr Cary was really driving at was the possibility that in the situation of “a dynamic struggle” it was “perfectly plausible” that the assailant could have the impression of only one penetrating injury having been inflicted as a consequence of a thrusting action towards the victim when in reality a second penetrative injury had occurred. At the meeting in March 2010 Dr Cary confirmed the view repeated by Dr Jerreat to the CCRC that “the two wounds could not have been caused by a single stabbing motion” and that the scenario was consistent with “two thrusts in rapid succession”
43. He also gave evidence about force, underlining that when dealing with fatal stabbing wounds, Dr Heath always took the view that severe force was involved. Dr Cary said that as no bone was penetrated “the only fair assessment is that “at least moderate” force “was involved”. In cross-examination he was later to say that “moderate or more force” was involved. He agreed with the descriptions given by Dr Heath, Dr Jerreat and Dr Djurovic of the force required being consistent with a punch. This he believed was a valid description, although he disagreed with Dr Heath’s evidence that it corresponded to a “fast” punch. In the end our impression was that if Dr Carey believed that the force used on this occasion was “moderate or more”, his real concern was that Dr Heath’s use of the word “severe” might have led the jury to interpret his evidence as suggestive of a deliberate act by the appellant, an approach which was less appropriate to an objective expert than to a forensic supporter. In any event, as we have demonstrated, on the appellant’s own evidence he was indeed acting deliberately when he used the knife against Mr Cameron.

44. Dr Cary gave further evidence in cross-examination, that it was “quite likely” that the blade of the knife would have gone into the hilt for the fatal wound, later saying that it seemed inherently unlikely that it did not go in up to the hilt. However he added that “nothing should be inferred” from this evidence. As to the length of the blade which inflicted the injuries, he would not dispute Dr Jerreat’s minimum of 12cm and Dr Djurovic’s minimum of 4-5 inches. (Dr Heath has not himself given evidence of the length of the blade).
45. The last matter which needs to be addressed was the evidence that there was no bruising on the deceased’s knuckles, when a contemporaneous note made by Dr Naseem indicated at least a bruise. There was ample evidence that Mr Cameron had punched the appellant. The photographs show that he had abrasions on his knuckles. Quite apart from the complexities arising from the apparent rapidity of Mr Cameron’s death following the stabbing wounds and its impact on the proper functioning of his circulation, as well as the fact that he fell to the ground which would, in Dr Carey’s view, have produced at least some of the abrasions on his knuckles, no one suggested that Mr Cameron had not punched the appellant. In our judgment the fact that a note made at the time when the body was examined included a reference to a bruise on the knuckle was, notwithstanding the way the point was summarised in the evidence, of trivial importance.
46. There were a number of problems with Dr Cary’s evidence, not least that on a number of important issues it has changed, and that some of the criticisms directed at Dr Heath’s evidence in this particular case were not as solidly founded as the CCRC had understood from his written opinions, and the meeting in March 2010. Our conclusion is that in reality Dr Cary’s evidence has not added anything significant to the evidence given at trial by Dr Jerreat and Dr Djurovic. Therefore, having heard it we decided that the interests of justice did not require that we should admit it.
47. What we are left with, and would have been left with without Dr Cary’s evidence, is of course the general discrediting of Dr Heath’s credit as an expert pathologist. Miss Montgomery pointed out to us, quite rightly, that we could not know how the jury approached the evidence of Dr Heath, and in particular whether they accepted what we shall describe for present purposes as his overstated opinion because he had carried out the first post mortem on the deceased, or whether they may have preferred to approach the issue on the basis that if a pathologist called by the prosecution was giving evidence consistent with evidence called by the defence pathologist, the most sensible approach to take, given the burden of proof, was to proceed on the basis that the more moderate expressions of opinion should prevail. That however is not the test. In the end, the question is whether the broad discrediting of Dr Heath should lead us to doubt the safety of the verdict returned by the jury at the end of this trial.

Discussion

48. In its reference the CCRC, at paragraph 213, highlighted the decision of this court in *R v Laverick*. In that case Dr Heath and Dr Cary clashed on the question whether a

fatal wound to the victim must have resulted from a deliberate stabbing or may have been accidental. Dr Heath's evidence was crucial to the conviction. It was unequivocal evidence from an expert source which bore directly on the issue to be decided by the jury and firmly excluded the possibility that the death of the deceased might have been the result of an accident. The situation however was remote from the facts of the present appeal where the appellant's evidence at trial was, and therefore it was common ground, that he had indeed deliberately struck at Mr Cameron. To the extent that Dr Heath's evidence supported the conclusion that the wounds sustained by Mr Cameron were deliberately inflicted, he was saying no more than the appellant himself. The decision in *Laverick* does not advance this appeal.

49. The CCRC, at paragraph 214, then directed its attention to a different consideration, concluding that it "must be possible" that Dr Heath's evidence played a significant part in the rejection by the jury of self-defence. This approach was adopted by Miss Montgomery. She suggested that if the jury accepted Dr Heath's evidence, this would have had an impact on their view of the credibility of the evidence of the appellant himself, or the reasonableness of what he did when he stabbed Mr Cameron. Attractively advanced as this submission was, it was, on analysis, almost inviting us to re-try the case. Indeed Miss Montgomery did not shirk from pointing out all the evidence from all the eye witnesses which was consistent with or supportive of the appellant's evidence, or which served to undermine the evidence given by witnesses whose account of the incident was less favourable to it. All that evidence was before the jury. The problem is simple. The real issues in this case had nothing to do with the evidence advanced by the pathologists.

50. That is why Latham LJ observed to the jury in his summing up:

"As far as the pathologists were concerned, it may be that the dispute at the end of the day does not really help you one way or another".

That observation reflected the realities.

51. In the Court of Appeal, Lord Woolf CJ identified that the issue for the jury on the basis of the evidence given at trial by the appellant himself was, "first: was he acting in self-defence or was he the aggressor? Secondly, if he was acting in self-defence (and this perhaps is the most important issue) was the use of the knife a reasonable form of self-defence? To put it another way: did the appellant act disproportionately in taking the knife and inflicting two stab wounds on Cameron which caused his death?"

52. Again in accordance with the realities of the case, and freed from the need for the circumspection required of the trial judge directing the jury, the medical evidence required very brief mention. Lord Woolf CJ explained:

"Medical evidence was called. There was an issue as to the precise amount of force which was necessary to cause the

injuries which Cameron received. There is no doubt that at least moderate force had to be used with the knife to cause the injuries which had occurred”.

53. That is the only observation on the medical evidence before the jury. The reason why the Court of Appeal approached the issue of the medical evidence in this way was, we recognise, in part because the issue of the accuracy of Dr Heath’s evidence was not called into question. However the judgment commented that:

“Even on the appellant’s account we find it not at all surprising that the jury should come to the conclusion that it was unreasonable and quite disproportionate to use a knife in the manner in which it was used in this case. We acknowledge that, before finding the appellant guilty of murder, a jury would be required to take fully into account the inability of a person in the course of a fracas of this nature to make fine distinctions between what are reasonable and what are unreasonable steps to take in self-defence. But to take a knife, open it, and then use it, as the appellant agrees that he did, could in the view of the jury be the clearest case of disproportionate behaviour in a fracas which had blown up as this fracas had.”

Again, towards the end of the judgment, Lord Woolf recalled that:

“There was absolutely no justification for the appellant to take out a knife (whether it was a flick knife or a knife which required two hands to open it), and to use it in this fracas.”

54. Miss Montgomery was undeterred. In essence she submitted that the judgment of the Court of Appeal was wrong. It failed to address the issues which arose in the context of self-defence. We do not agree. The court precisely addressed the issues.
55. As we have emphasised, there was no doubt that Mr Cameron was deliberately stabbed by the appellant. To the extent that it went further than the evidence of the other two pathologists called at trial, and indeed the evidence given by Dr Cary, nothing in Dr Heath’s evidence threw light on the truthfulness, or otherwise, of what the appellant asserted was in his mind which was that he struck out in a panic while in mortal fear. Once it is accepted that he deliberately stabbed Mr Cameron, whether the fatal wound penetrated 10 or 12cm or further, and whether the blade of the knife was 4 or 5 inches long or longer, and whether the knife penetrated to the hilt on one or on both occasions, and the relationship of the body of Mr Cameron and the knife at the time when the blows were inflicted, adds nothing of significance to help answer whether his assertions about his state of mind were true. What he actually did was not in dispute. The Crown’s case was that he had deliberately used the knife and caused the fatal injury, not because he was in a panic or fearful of mortal injury, but because he had involved himself in a fight which he was determined he should not lose, and so he resorted to the use of a fatal weapon. In our judgment, having in accordance with

Miss Montgomery's request read all the eyewitness evidence, this was not self defence. Rather it was a gross over-reaction in the context of a fight with an unarmed man, almost certainly consequent on the fact that the appellant was losing it. To open the knife, and then return to the fight and "punch" Mr Cameron with the open knife held in his fist was a wholly disproportionate response, particularly when the appellant might have tried to run away, or sought refuge among the many people who were in the vicinity, or, if he genuinely thought Mr Cameron might indeed disarm him and then use the knife on him, throw the knife away. Dr Heath's evidence did not impinge on the essential issues in this trial, and the diminution in his standing as an expert witness does not undermine the safety of this conviction.

Decabral.

56. The non-disclosure of material which may have undermined confidence in Decabral's credibility was addressed in the Court of Appeal in 2001. Having considered the issue carefully, the court concluded that the conviction remained safe. Miss Montgomery valiantly sought to revive this argument, in effect on the basis that the reservations about the ability of trial counsel to cross-examine Decabral should be added to the reservations about the evidence of Dr Heath, so that their cumulative effect undermined the safety of the conviction. We do not propose to review the earlier decision of the court in relation to the Decabral evidence. We do however note that at least some of his evidence accurately reflected what the appellant himself was to say in evidence. But there was a complete disconnect between the evidence of Dr Heath, the pathologist, and Decabral, one of the many eye witnesses. There was no cumulative effect. Rather, there were two entirely distinct aspects of the evidence which are subject to legitimate complaint. Neither Dr Heath nor Decabral lent the slightest support to the other, and the fact that there were problems about disclosure in relation to Decabral throws no light whatever on the impact of the concerns raised in relation to Dr Heath.

Miscellaneous

57. A number of further aspects of the trial process were drawn to our attention by the CCRC reference. None of them causes us to doubt the safety of the conviction. We should, however, simply notice that a number of criticisms are directed at the accuracy of some of the factual parts of the summing up and they were not as far as we can see raised in the earlier appeal by another distinguished Queen's Counsel. These had not caused very experienced leading counsel to invite the judge at trial to correct any part of his summing up. They were not, as far as we can see, raised in the earlier appeal. One possible reason is that the transcript was not wholly accurate, another is that, to the extent that the summing up was inaccurate, no one at trial or on the first appeal thought that the errors had any real potential to affect the outcome. Like both Queen's Counsel who previously represented the appellant we are not disturbed by these criticisms, or any of the other aspects of the trial process drawn to our attention.

Conclusion

58. This appeal is dismissed.