



Neutral Citation Number: [2018] EWCA Crim 27

Case No: 20170296B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
Mr Justice Schiemann
T870321

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2018

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MRS JUSTICE NICOLA DAVIES D.B.E.
and
MR JUSTICE PICKEN

Between:

REGINA
- and -
RUSSELL BISHOP

Appellant

Respondent

Brian Altman Q.C. and Alison Morgan for the Crown
Joel Bennathan Q.C. and Nicholas Peacock for the Respondent

Hearing dates: 6-7 December 2017

Approved Judgment

Sir Brian Leveson P:

Introduction

1. As long ago as 10 October 1986, less than 24 hours after they had been identified as missing, the abused bodies of Nicola Fellows and Karen Hadaway (both of whom were 9 years of age) were found in Wild Park, Brighton. A substantial police investigation followed which resulted in the prosecution of Russell Bishop (then aged 20) for their murder: for the sake of simplicity, we shall refer to him throughout this judgment as ‘Bishop’. The trial, conducted before Schiemann J (as he then was) and a jury in the Crown Court at Lewes concluded on 10 December 1987: he was acquitted.
2. This is an application by the Crown Prosecution Service, with the consent of the Director of Public Prosecutions, to quash those acquittals and for a retrial to be ordered under s. 76(1) of the Criminal Justice Act 2003 (the ‘2003 Act’) on the grounds that there is “new and compelling evidence” against Bishop (as required by s. 78) in the form of scientific evidence linking Bishop to the murders of Nicola and Karen and in the form of Bishop’s subsequent convictions, three years after his acquittals in the present case, for attempted murder, kidnapping and indecent assault in relation to a 7-year old girl, and that “in all the circumstances it is in the interests of justice” that an order be made (s. 79).
3. On 12 April 2016, an *ex parte* order was made pursuant to s. 82(1) of the 2003 Act restricting the publication of any matter relating to this application until the proceedings are concluded (including any retrial if one is ordered). Thereafter, on 10 May 2016, Bishop was arrested under s. 87 of the 2003 Act. The next day, he was granted technical bail on the grounds that he was then a serving prisoner, continuing to serve the sentence of imprisonment which he received after the subsequent convictions to which we have referred.
4. Having heard the application (including oral evidence) on 6-7 December 2017, on 12 December, we announced our decision that the provisions of s. 78 and 79 of the 2003 Act were met. Pursuant to s. 77(1) we ordered that Bishop’s acquittal for the murders of Nicola Fellows and Karen Hadaway should be quashed and that he should be retried for both offences of murder: we directed that an indictment be preferred accordingly. Having regard to the complexity of the issues and the public interest, we reserved our reasons for so deciding: it is these reasons that we now provide.

The Facts

5. Although attending different schools, Nicola and Karen had been neighbours, living on Newick Road, in the Moulescoomb area of Brighton; they often played together outside of school hours. Bishop lived at 17 Stephens Road, Hollingdean, Brighton, about 1½ miles away from the girls. He knew Nicola’s father, Barrie Fellows, and was a friend of Douglas (Dougie) Judd, a man who lodged in the Fellows’ family home. In around October 1986, he had called at the Fellows’ address and had previously had some contact with both of the girls.
6. At the time of the murders, Bishop was in relationships with two women; these were his partner, Jennifer Johnson, and his girlfriend, Marion Stevenson, who was only 16 years old. This situation had caused tensions within Bishop’s group of friends and was

a principal reason why neither the Fellows nor the Hadaway families wanted Nicola or Karen to spend time with Bishop or Marion Stevenson.

7. On Thursday 9 October 1986, both Nicola and Karen returned home from school. At approximately 4 pm, Bishop called at the Fellows' family home with Marion Stevenson and Tracey Cox looking for Dougie Judd. Nicola answered the door (perhaps even without opening it) and Bishop was told that Dougie was not at home. As the group left, Nicola then shouted "slag" after Marion Stevenson. The result is that Bishop left without entering the house and, of real importance, without having any physical contact with Nicola on that occasion.
8. At about the same time, Karen went to a shop on Park Road to buy a drink, and shortly thereafter she and Nicola played together outside of their home addresses. The girls' mothers checked on them by looking out of the window and, at around 5 pm, Susan Fellows saw the girls run off together towards Barcombe Road. Nicola was wearing red shoes, pink knickers, a shirt, and a pink jumper. Her clothing was clean on that day. Karen was wearing a green sweatshirt from Coldean School, a T-shirt, a kilt-type skirt, white knickers, and shoes. The green sweatshirt was clean on that day although other clothing had been clean on the Monday of that week.
9. Also around this time, wearing a light blue top, Bishop was seen walking eastwards along the central reservation of Coldean Lane.
10. Nicola and Karen were next seen at 5.15 pm by Roy Dadswell. They were playing in a large tree in Wild Park, near to the main Lewes Road and opposite the shops. Mr Dadswell, a park keeper, spoke to the girls. He told them to be careful not to hurt themselves. By that time, Bishop was also in the vicinity of the park and he, too, spoke to Mr Dadswell, saying that his car had broken down "up Coldean Lane". He then walked off towards the edge of Lewes Road in the direction of the shops.
11. At roughly 5.20 pm Karen's mother, Michelle, went to look for her daughter as it was her tea time and she should have been home. She checked in with Nicola's mother, who relayed what she had said about the girls running off down the road: the two mothers went to look for the girls together. Just after 5.40 pm, they encountered Wayne Measor, a neighbour, who informed them that he had seen Karen playing in Wild Park around 20 minutes earlier. He said that she was at the bottom end of the park near the fish and chip shop and had been talking to a park keeper.
12. Between 6.30 pm and 6.45 pm, Bishop was seen coming out from a path running along the back of the park, out on to the west pavement of Lewes Road, near to the railway bridge.
13. Having failed to find the girls by 7.30 pm, at Michelle Hadaway's request, the police were called. News of their disappearance spread quickly, and a number of individuals assisted in the search for the girls, focusing on Wild Park and the surrounding area. The search continued through the night and into the next day.
14. At around 12.30-12.45 pm on Friday 10 October 1986, a group of people were searching in the area of Moulescoomb Railway Station, in an area of wasteland between the footpath and railway line platform which is on an obvious route from Wild Park to Bishop's home address. At some time during this search, one of the

members of the search party, Phillip Upton, saw a light-coloured object, and another, Peter James, jumped over the fence to pick up the object. It was identified as a blue/grey 'Pinto' sweatshirt (the 'Pinto sweatshirt'). It was notably dry, in contrast to the grass which was very wet. The Pinto sweatshirt was then draped over the fence and left there.

15. Around half an hour later, Bishop joined in the search for the girls with his dog. He approached Michelle Hadaway and asked her if she had an item of Karen's clothing which the dog could use to track her scent.
16. At 3.30 pm, Robert Gander came across the same blue/grey 'Pinto' sweatshirt which had been found and discarded by the earlier search party. He noticed that it smelt of body odour and had some sort of red staining both around the chest area and on its right sleeve. He was aware of the disappearance of Nicola and Karen and, thinking the article may be of some relevance, handed it over to the police at around 4 pm.
17. This was also the approximate time that Kevin Rowland and Matthew Merchant decided to join the search for the girls. They followed various paths within Wild Park, focusing on the overgrown areas. At one point Kevin Rowland found an old kitchen knife, which he held on to as they carried along one of the paths. They headed downhill through dense brambles until they came to a small track. Mr Rowland looked up the path and saw some broken branches, as if someone had gone through them. They decided to follow the track, which veered to the left, bringing one of the two girls into Mr Rowland's sight. He immediately thought that she was dead, and called for Mr Merchant. Neither boy wanted to get too close to the girls, but they were clearly visible from the path.
18. At this point, Bishop was talking to PC Paul Smith, who was on duty near Barcombe Road, Moulescoomb. Bishop asked him "Do you think the kids are around here?". PC Smith answered that he did not know, and Bishop said "I reckon they've either gone north or if they're here they're finished". PC Smith responded "Well, Brighton has some strange people in it" which elicited the comment "Yeah, anyway I'm not searching anymore". When asked why not, Bishop said "No, I mean the old bill wouldn't believe it would they ... If I found the girls and if they were done in I'd get the blame, I'd get nicked". To that, PC Smith said "No, obviously you would have to give a statement, but it doesn't follow". They then walked northwards together.
19. It was then that Mr Merchant ran up to PC Smith and Bishop to inform them that the girls had been found. The officer sent Bishop up ahead as he was faster, telling him to keep himself and the boys away from the girls. The group headed north, into the trees and the undergrowth of the hill, climbing near to the top. Bishop arrived first and attempted to step over Mr Rowland, who was sitting close by, to get to the bodies. Mr Rowland told him not to go near the girls and to sit down, which Bishop did.
20. At this time PC Smith had lost sight of Bishop and was shouting "Where are they?" and "How are they?". He recalled hearing Bishop respond "I'm up here keep coming up" and "they're fucking dead".
21. PC Smith arrived at the scene shortly afterwards and crawled through an opening in the bracken to reach the girls. One was lying on her back with her legs up; she was wearing a pink top and had a bruise to her face. When he was close enough to touch

their bodies, he could see that the blood on her nostrils was frothy. The other girl was lying across her, with her head in her lap. It was almost as if they were sleeping. He checked each girl for a pulse, but could not feel one. The girls were very cold. He noted the time of discovery as 4.21 pm.

22. It is important to underline that at no point did Bishop get a clear view of the two girls as they were discovered; the vegetation obscured the view from the main path.
23. At 4.30 pm, the Scenes of Crime Officers arrived and seized a number of fibres attached to the surrounding vegetation. They were followed by the police surgeon, Dr Isaac, who, between 5.45 and 6.00 pm, conducted a brief examination of the girls, and certified them dead.
24. At 6.30 pm, the pathologist, Dr Iain West, arrived. He noted that Nicola was lying on her back at the opening to the clearing, near to an elder tree. Her left arm lay by her side. Her right arm was flexed across her chest. She appeared to be fully clothed. He saw that by her left hand lay articles of clothing which included a pair of knickers. Karen was lying face down, and at right angles to Nicola. She was towards the furthest end of the clearing. Her right arm was extended over Nicola's body and her hand rested on her own right arm and Nicola's abdomen. Her left arm was extended at right angles to her body. She was not wearing knickers but otherwise appeared to be fully clothed. There were visible bruises around both of the girls' necks.
25. After the bodies had been removed from the scene, at 8.30 pm that evening, a full post-mortem examination could be conducted. Dr West found that Karen was a well-nourished girl who had died as a result of compression of the neck, causing obstruction of the airway and blood supply to the brain. Loss of consciousness could have been rapid but death would not have been instantaneous. He found a small graze on her vaginal opening, which he deemed consistent with a roughened surface causing a small graze in the skin of the area. There was no evidence that she had struggled whilst being attacked.
26. With regards to Nicola, Dr West found the same cause of death; in her case, however, he concluded that it would have taken longer for her to lose consciousness. He found bruising on her vagina which would be consistent with penetration by a blunt object whilst Nicola was still alive, and a tear in her anal margin that would be consistent with penetration of the anus by a blunt object. The absence of bruising would indicate that this assault occurred after death. Nicola also had a bruise on her left cheek, which was consistent with a blow to the face such as a punch. Like Karen, there was nothing to suggest that Nicola had struggled with her attacker.
27. The investigation (which included substantial forensic scientific input) continued. Bishop was spoken to on 10 and 15 October 1986 and, thereafter, arrested and interviewed under caution on 31 October 1986. He was subsequently charged with both murders.

The Trial

28. At Bishop's trial, the case advanced by the prosecution was that Bishop had killed both girls by strangling them at the location at which the bodies were found at some time between 5.20 pm and 6.30 pm on 9 October 1986. The location was such that it

was highly improbable that they were taken there by force; it was likely that they were taken there by someone whom they knew and trusted.

29. The evidence adduced in support of this case first concerned the movements of the children and Bishop over the relevant period. Overlying that evidence was what was alleged to be a considerable body of forensic evidence connecting the Pinto sweatshirt not only to the two girls, so as to lead to the inference that it had been worn by the murderer, but also to Bishop who it was said had been wearing it that night. It was also argued that inferences could be drawn that Bishop had lied when interviewed by the police.
30. The defence case was a denial of the premises upon which the prosecution relied. It was contended, in particular, that the girls were not killed in the window of time alleged (after which Bishop had left the vicinity). Bishop did not give evidence but this submission was supported by witnesses who spoke of seeing the girls alive in and around Wild Park after 6.30 pm. These witnesses were referred to at trial by the adopted names of Black, Brown and White in order to shield, as Joel Bennathan QC, on Bishop's behalf, put it, the witnesses from the communal fury that the murders had aroused. One of those witnesses described seeing the girls eating chips.
31. This eyewitness evidence was supported by the pathological evidence in relation to Nicola's stomach to the effect that it consisted of partially digested food with the appearance of chips. This evidence also affected the assessment of the time of death, with Dr West concluding that, if the evidence of the girls having eaten chips at 6.30 pm was correct, then, the presence of the partially digested food in Nicola's stomach would be consistent with a time of death between 7.00 pm and 8.00 pm (albeit that the bracket of time extended from 5 pm to midnight and could have been as late as 3.00 or 4.00 am the following day). In the circumstances, it is necessary to go into the forensic evidence in some detail.
32. As to the evidence linking the Pinto sweatshirt to the murderer, this relied principally on fibres and ivy hair. As for the first of these, Schiemann J commented in his summing-up to the jury that there was "not very much" by way of evidence concerning the "commonness of fibres" of the various exhibits.
33. That evidence (provided by the scientist, Dr Anthony Peabody) had four strands. First, 11 green polyester fibres found on the Pinto sweatshirt were microscopically indistinguishable from the fibres of the green sweatshirt worn by Karen at the time of her death. Secondly, looking at potential common fibres moving the other way, 11 blue acrylic fibres found on Karen's green sweatshirt, and two blue acrylic fibres found on the tapings taken from her T shirt and skirt, were microscopically indistinguishable from the fibres of the Pinto sweatshirt. Thirdly, there were 4 pink polyester fibres microscopically indistinguishable from the fibres of the pink jumper worn by Nicola. Fourthly and lastly, 9 blue acrylic fibres found on Nicola's pink jumper were microscopically indistinguishable from the fibres of the Pinto sweatshirt.
34. Besides this evidence from Dr Peabody, the prosecution also relied upon the presence of stellate hairs of the type found on ivy leaves across the Pinto sweatshirt and the girls' clothing. In Dr Peabody's opinion, the high number of ivy epidermal hairs found were the result of violent or extensive contact with ivy, and not merely walking through the undergrowth where ivy was present. It was his contention that the ivy

hairs found across all garments came from the same scene. We should also note that one animal hair was found on the vest worn by Nicola.

35. Turning to the evidence linking the Pinto sweatshirt to Bishop, the prosecution relied on evidence from fibres, hair and paint. As to the first two, Dr Peabody noted 4 blue acrylic fibres found on a pair of trousers belonging to Bishop, which had been taken by police from his home on 31 October 1986, as microscopically indistinguishable from the Pinto sweatshirt. In addition, 5 pale green polyester fibres found on the Pinto sweatshirt were microscopically indistinguishable from those of a pale green skirt belonging to Bishop's girlfriend, Marion Stevenson, known to be worn by her on 8 and 9 October 1986.
36. Dr Peabody also received samples of head hairs from Nicola, Karen, and Bishop. The prosecution relied upon his finding that 8 human head hairs, one found on the outside of the Pinto sweatshirt, and 7 found on its inside, had the same microscopic appearance to those from Bishop, suggesting that they could have come from him, together with his finding that three white dog hairs found on the Pinto sweatshirt could have come from Bishop's dog.
37. At trial, Dr Peabody stated that, taken together, his findings would support the view that the Pinto sweatshirt may have been in contact with Bishop's trousers and Marion Stevenson's clothing and provided "strong evidence" to indicate that the Pinto sweatshirt had been in contact with the clothing of Nicola and Karen. However, it was not Dr Peabody's evidence that the fibres found on Bishop's clothing could only have come from the recovered Pinto sweatshirt. Nor could he conclude that the Pinto sweatshirt was definitely worn by the murderer.
38. In addition to this evidence, there was forensic evidence relating to two distinct types of red paint (bright red and maroon) found on the right cuff of the Pinto sweatshirt. Specifically, another scientist, David Burt, compared samples of paint from the Pinto sweatshirt with samples of paintwork from various vehicles and locations, including three vehicles to which Bishop was known to have applied red paint during 1986, namely a Mini (registration no. UMC993M), a Ford Cortina (registration no. XMC 403T), and a Ford Escort (registration no. MGX 681P). His conclusion was that the maroon paint on the cuff of the Pinto sweatshirt matched (in colour, microscopic appearance and chemical composition) paint samples from the Mini, as well as a spray gun used when painting and masking tape linked to Bishop together with the lid of certain car wax found at Bishop's address. Unsurprisingly, Mr Burt accepted, however, that the paint on the Pinto sweatshirt's sleeve could have come from any Mini of that colour and so not necessarily the one painted by Bishop. The same would obviously apply to the bright red paint on the cuff of the Pinto sweatshirt which Mr Burt described as matching paint samples from the Ford Cortina.
39. In addition to this scientific evidence, the prosecution relied on other circumstantial evidence to link the Pinto sweatshirt to Bishop. Thus, it was contended that the location in which the Pinto sweatshirt was found was particularly significant as it was an obvious route from Wild Park to Bishop's house and, indeed, the route which Bishop himself told the police that he had taken on 9 October 1986. Having said that, few witnesses could remember what Bishop was wearing when they saw him that day. Moreover, Jennifer Johnson asserted, with certainty, that Bishop definitely was not wearing the Pinto sweatshirt on the night in question, although it should be borne in

mind that she was cross-examined (as a hostile witness) about a statement which she made on 31 October 1986 and in which she stated, when shown the Pinto sweatshirt by two officers, that she recognised it as “exactly the same” as one which Bishop owned, referring to it having a name motif starting with the letter P on the front and some red compound on one of the sleeves; further, she was not then able to find the sweatshirt in his belongings.

40. On 10 October 1986 and 15 October 1986, police officers spoke to Bishop, not at that stage as a suspect but as a potential witness. As suspicion increased, however, he was arrested and, on 31 October 1986, interviewed under caution. The final limb of the prosecution case rested upon what were alleged to be the inconsistencies in his various accounts and upon what Bishop had to say concerning the girls’ bodies when they were found. As to the first of these matters, the prosecution pointed to Bishop’s inconsistent accounts as to whether he had approached and touched the bodies of the girls following their discovery and as to his movements on 9 October 1986 having spoken to the park keeper at about 5.20 pm: he changed his explanation from buying a local newspaper to buying cannabis from a woman called Angie in Ringmer Road.
41. Further, the prosecution alleged that the descriptions of the bodies given by Bishop to the police in statements and interviews and in conversation with two acquaintances, Michael Evans and Geoffrey Casewell, contained accurate details which Bishop could only have known if he had been closer to the bodies than the evidence indicated that he was at the time that they were discovered. For example, in his second witness statement Bishop described Nicola as having “blood flecked foam” on her lips and also stated that Karen had her head lying on Nicola’s stomach. The prosecution’s position was that Bishop could only have known such details if he had been the girls’ murderer since he had not got close enough to the murder scene by the time that Mr Rowland told him not to go near the girls and to sit down, instructions which Bishop followed.
42. At the end of his summing-up, Schiemann J gave the jury a document of the type which in modern criminal procedure would be described as a ‘route to verdict’. The jury were directed to acquit Bishop if unsure regarding any one of the following three propositions: first, that the girls were dead by 6.30 pm (doubtless because of the way in which the prosecution had cast its case rather than because the time of death was a material averment); secondly, that Bishop wore the Pinto sweatshirt on the night that the girls went missing; and, thirdly, that the Pinto sweatshirt was worn by the murderer.
43. This echoed what Schiemann J had told the jury the previous day towards the beginning of his summing-up, when he described the position to the jury as follows:

“Now what is the basis upon which the Prosecution have brought the case? It really has three parts, does it not? Firstly the Prosecution say the girls were killed between 5.20 and 6.30 by Mr Bishop and those witnesses who claim to have seen the girls between 6.00 and 6.45, around 6.30, are mistaken. That is the way the Prosecution case has been put. Mr Leary [for the prosecution] has not suggested those witnesses may be right and that Mr Bishop might have murdered the girls thereafter. That is the first point. The second point the Prosecution put

before you is the submission that Mr Bishop wore the Pinto that night. You know what I mean by the Pinto, the Pinto sweatshirt. The third proposition the Prosecution put in front of you is that the Pinto sweatshirt was worn by the murderer. So there are those three ways all inter-locking being put forward by the Prosecution.”

44. The judge then went on to summarise the witnesses called on Bishop’s behalf who saw the girls at, or after, 6.30pm, before adding this:

“... but that is not where the Defence case ends, because you recollect the evidence of Mr Peabody, when he came to examine the stomach contents of Nicola, it consisted of an amount of partially digested food with the appearance of chips ... When Dr West was cross examined by Mr Lawrence, he asked this: ‘So what you are saying is if there was evidence that she was eating chips at 6.30pm on Thursday, 9th October, that would be consistent, from the state of the digestion of the stomach, with her death at 8.00 o’clock, one and a half hours afterwards, up to midnight? ... The answer was ‘Oh, before 8.00 o’clock. I mean I said within an hour and a half.’ Question: ‘I see. Any time between 6.30 and midnight?’ Answer: ‘No, I am not saying any time. I am saying the likely time is between 7.00 o’clock and 8.00 o’clock.’ So that would tie in, you may think, Members of the Jury, with people having seen Nicola because there is no evidence that Nicola was eating chips on any other occasion. Do you see? She had got chips in her apparently, or something of the appearance of chips within her. So in any event it is consistent with having been observed eating chips at about 6.30 and it may carry the matter further. That is a matter for you.”

45. The judge concluded this part of his summing-up by telling the jury that “if you are not sure that those girls were killed between 5.20 and 6.30, you, according to the Defence, acquit.”

46. The judge then went on to address the second of the “three parts” of the prosecution case which he had identified for the jury concerning the question of whether Bishop wore the Pinto sweatshirt on 9 October 1986. Having reminded the jury of the factual (rather than expert) evidence which was given on this issue, he summarised that factual evidence as follows:

“Where does that get you in relation to whether Mr Bishop wore the Pinto that night? Nobody claims to have seen him wearing it either on that night or any other night. Well, Members of the Jury, you must consider the matter and if you are not sure that Mr Bishop wore that Pinto that night, you will acquit, will you not?”

47. The judge then addressed the third question which he had described as arising, namely whether the Pinto sweatshirt was worn by whoever murdered Nicola and Karen. It

was in doing this that the judge addressed the expert evidence, specifically that given by Dr Peabody. In fact, the judge addressed that expert evidence not only as regards this third question but also, as he explained to the jury in doing so, as regards the second question.

48. Schiemann J did so by referring to the expert evidence which had been put before the jury during the course of trial. He could hardly do otherwise. Accordingly, he reminded the jury about the evidence concerning the paint found on the Pinto sweatshirt, pointing out that “There is no evidence before you at all that the red paint came from the Cortina XEC 403T” and that “what evidence you have is that it could have come from that car”, before making essentially the same point in relation to the Mini. He went on to refer to Dr Peabody’s expert evidence concerning the hairs that they “could have come from Bishop”. The judge then dealt with the fibres, again making the observation that “there has been no evidence that those fibres must have come from the blue sweatshirt, merely they could have come from the same sort of fibres”.
49. Turning, then, to the third question, namely whether the Pinto sweatshirt was worn by whoever murdered the girls, the judge reminded the jury of certain arguments advanced by Ivan Lawrence QC on Bishop’s behalf. He said this in particular:

“The Defence say Mr Peabody could not say certainly that the fibres were from Nicola’s or Karen’s sweatshirts or indeed that the blue fibres came from the Pinto, and moreover the Prosecution witnesses said that the ivy hairs, although they are all shown on this diagram for exposition purposes as coming from the same scene and that looks bad at first blush, when we hear the evidence we learn that ivy all round the country, and certainly all around Brighton, is exactly the same. There was nothing special about the ivy at this particular scene. If these girls had been swinging on trees and what have you, although there are hairs on all these various garments, they do not all come from a common source. ...”

50. He went on to contrast fibres found “on a garment anybody could buy in Marks and Spencer” with fibres found on more rarefied clothing, before making this (as it turns out, somewhat prophetic) observation:

“Well now, what evidence do we have in relation to the commonness of the fibres on the green sweatshirt, pink sweatshirt and blue sweatshirt? The answer to that question, you may think, is not very much. One does not blame anybody for this. Perhaps more research could have been done but it has not been ... ”.

51. The judge then addressed the statements which Bishop had made to the police, before concluding with the ‘route to verdict’-type questions to which we have made reference. He does not appear to have focused on the cumulative effect of the scientific evidence. In the event, on 10 December 1987, after a relatively short retirement of just over two hours, the jury returned to acquit Bishop of both murders.

Subsequent Convictions

52. Just over two years later, on 4 February 1990, a seven-year old girl ('R') left her home to buy some sweets from a nearby shop in the Whitehawk area of Brighton. She was grabbed, bundled into the boot of a red Ford Cortina and threatened with death if she was not quiet. She was then taken to an area known as Devil's Dyke. There, the car was parked on a path running through the woods. R was forced into the back seat and silenced with a hand over her mouth and nose. She was strangled so that she lost consciousness. She was then stripped and sexually assaulted, sustaining genital injuries which were consistent with the insertion of a blunt hard object into her vaginal opening. Whilst unconscious, her body was hidden in dense undergrowth. Despite her injuries, R regained consciousness and was able to alert some passers-by. They noted that she was bleeding from injuries to her mouth and vagina and that her body was streaked with mud.
53. On 7 February 1990, at an identification parade, R identified Bishop as her attacker and this, combined with other circumstantial evidence, resulted in his prosecution and conviction, on 13 December 1990, of offences of attempted murder, kidnapping and indecent assault. He was sentenced to life imprisonment for attempted murder with concurrent terms of 10 years' imprisonment for the other offences.
54. Notwithstanding the similarities between this attack and the murders of Nicola and Karen, the rule against double jeopardy which then applied prevented any further steps being taken against Bishop in relation to these cases. It is, in any event, not suggested by Mr Bennathan that, even when the law changed as a result of the 2003 Act so as to remove the bar on retrial following acquittal that this further conviction would, in and of itself and without more, have been sufficient to justify the application which we are now considering.

Further Investigations

55. It is quite clear that the police kept the murders of Nicola and Karen under review and that, as science developed, continued to consult with forensic scientists in an effort to discover further evidence which could lead to the identification of the murderer. In particular, as developments in DNA identification led to greater sensitivity in analysis, so further forensic investigations were undertaken. At this stage, we do not address whether what has been discovered is "new and compelling evidence" or whether there has been a failure to act with due diligence such that the "interests of justice" in this case militate against the making of the orders sought.
56. On 20 December 1993, the Pinto sweatshirt was transported to Aldermaston where it was examined by forensic scientists, in particular Roger Mann, who took samples from an area of bloodstaining, together with a sample from an unstained area, and submitted them for DNA testing. It was not possible to obtain any information from these samples. Thereafter, almost nine years later, on 23 July 2002, the Pinto sweatshirt was submitted to the Forensic Science Service (the 'FSS') with instructions that the FSS should examine it in relation to the "reported bloodstain on the cuff area". Brian Altman QC for the prosecution told us that this was prompted by a Parole Board hearing concerning Bishop, but we have no detail about that matter (other than that the hearing was due to take place in 2004) or the thinking which then led to that

decision being made. It is, however, worth adding that the request was 16 months before the 2003 Act was passed.

57. Whatever prompted the instructions to FSS, examinations were conducted by Raymond Chapman, a forensic scientist, looking for traces of DNA on a number of items using Low Copy Number (or 'LCN') DNA analysis work. The items (exhibits from the earlier investigations in 1986/1987) included the Pinto sweatshirt, as well as items of clothing worn by Nicola and Karen such as the green sweatshirt belonging to Karen and the pink jumper belonging to Nicola.
58. The results of these examinations were received in August 2003. They included a DNA result which indicated the presence of DNA from more than two contributors. However, owing to the complex nature of the result and the uncertainties over the exact number of contributors, it was considered to be unsuitable for comparison with the National DNA Database or any reference samples. Specifically, Amanda Douglass observed when reporting on behalf of the FSS:

“However, as I understand the sweatshirt was originally examined a number of years ago, prior to the advent of the currently highly sensitive DNA analysis techniques in use, it is possible that any DNA detected may have been transferred on to it after the item was recovered from the scene.”
59. Two years later, in 2005, when the provisions of the 2003 Act allowing applications such as the present to be made had come into force, further work was then carried out, again, by Mr Chapman. This further work was broader in scope than that which had been carried out in 2002 since it included examination of fibres to see if there had been transfer between exhibits. This included re-examining and verifying previous findings from 1986-1987, and further fibres matches were found as part of that process. Specifically, Mr Chapman considered evidence recovered from the Pinto sweatshirt. Even more specifically, he examined certain tapings which had been taken in the context of the 1987 trial from the front, back and inside of the Pinto sweatshirt, as well as further tapings which were taken by the FSS in 2002 from the front and back of the inside and outside surfaces of the Pinto sweatshirt in order to capture any remaining fibres.
60. We need not, in the circumstances, set out in any detail the results achieved by this further work carried out by Mr Chapman. It is sufficient, instead, that we refer to the fact that Mr Chapman reported in December 2005 that, based on the fibres evidence, there was at least “very strong support” for the view that the Pinto sweatshirt had been in contact with Bishop’s home environment.
61. That same month, on 23 December 2005, Carole Evans, a forensic scientist at the FSS with particular expertise in the analysis of mitochondrial DNA, provided a draft statement on the hairs recovered from the Pinto sweatshirt which was followed up with a report provided by her to the police on 4 January 2006. In that report, she explained that four hairs were tested and compared against reference samples provided by Bishop, and that a mitochondrial DNA sequence was obtained from three of the four hairs which matched Bishop. The match obtained and the observation of the sequence in the population provided, Ms Evans explained, “moderate support” for

the proposition that the three hairs recovered from the Pinto sweatshirt originated from Bishop or a maternal relative of his.

62. The case was then considered by the Crown Prosecution Service whose view was that, notwithstanding these further investigations, there was at that stage insufficient “new and compelling evidence” to support a reinvestigation or an application to quash Bishop’s acquittal. The investigation was not then concluded, it being hoped that advances in DNA techniques would improve the strength of the scientific findings.
63. Thus, a further forensic review of the case began in 2011. This led to LGC Limited in Abingdon (‘LGC’) being engaged to explore all forensic opportunities in the case. Specifically, Roy Green, a senior scientific adviser at LGC, whose qualifications include a BSc in Biological Sciences, was asked in August 2012 to inspect the original forensic laboratory files, to devise a strategy and to undertake examinations of relevant exhibits. To this end, LGC (and Mr Green) received boxes of so-called ‘retained material’ from the Forensic Archive. This included, in particular, tapings made either at the post-mortem examination or during the course of the first forensic examinations between October and December 1986. In 2013, Mr Green informed the police that an almost complete DNA profile matching Bishop had been found on the right cuff of the Pinto sweatshirt.
64. Following this information, in December 2013, police officers met with Mr Green and certain of his colleagues to agree a framework for all future forensic work. This framework encompassed a review of the fibres, paint, hair and DNA evidence, together with work on the continuity and integrity of exhibits. More particularly, in June 2014, it was agreed that all DNA work would be the subject of DNA-17 testing, which was a new technique and was accepted by this stage to be the most sensitive technique available.
65. By mid-2015, preliminary statements were provided by LGC. One of those statements emanates from Rosalyn Hammond, another senior scientific adviser at LGC, whose main focus is on the re-investigation of cases which have previously been examined without yielding sufficient scientific evidence to have resulted in a successful prosecution. She described having conducted a review of the possibility of contamination through inadvertent transfer opportunities, indicating that she was not able to conclude that the DNA profile recovered from the right cuff of the Pinto sweatshirt, which matched Bishop, was more likely to have come from the usual wearer of the garment as opposed to having been deposited through inadvertent transfer opportunities.
66. As a result, it was concluded that no reliance could be placed on the right cuff findings and Mr Green’s work (and that of his colleagues at LGC) continued with a focus elsewhere. So it was that, during what was left of 2015 and into 2016, LGC provided updated statements on the work that had been conducted and the results achieved.
67. The first area which it is appropriate to consider concerned further consideration of the fibres evidence. Specifically, Mr Green was asked to establish whether or not there was any textile fibre evidence to support the assertion that Bishop was involved in the murders of Nicola and Karen. To this end, he reviewed both the work which had been conducted by Dr Peabody in 1986/1987 and the work done by Mr Chapman

in 2002-2005. His review included checking the microscopy, inspecting the analytical results and also re-testing selected fibres using a range of current techniques.

68. On 25 June 2015, Mr Green provided a statement setting out his findings in relation to the fibres evidence. He described:
- i) fibres found by Mr Chapman on tapings made in 1986 of the Pinto sweatshirt as matching the fibres of a sock and two sweaters from Bishop's home address (17 Stephens Road);
 - ii) a single linking blue cotton fibre found by Mr Chapman on tapings made in 1986 from the Pinto sweatshirt as matching fibres on Karen Hadaway's T-shirt;
 - iii) a single linking blue round delustred polyester fibre found by Mr Chapman on a taping from the Pinto sweatshirt in 1986 as matching a fibre found snagged on vegetation at the location of the girls' bodies;
 - iv) fibres found by Mr Chapman in 2005 on tapings made in 1986 from the jumper, skirt and knickers worn by Nicola as matching the fibres of the Pinto sweatshirt and the skirt of Marion Stevenson; and
 - v) fibres found by Mr Chapman in 2005 on tapings taken at the post mortem and in the original examination of the exhibits in 1986 from Nicola's clothing as matching the fibres of the Pinto sweatshirt and the fibres of the green skirt belonging to Marion Stevenson.
69. As Mr Altman acknowledged, none of this entailed Mr Green adding to the number of findings made by Raymond Chapman in 2005. Rather, Mr Green "explained the significance of the textile fibre evidence and its interpretation in a way that has not been set out by an expert previously". In so doing, Mr Green arrived at various conclusions. These were as follows:
- i) The combination of fibres found on the Pinto sweatshirt and on the trousers associated with Bishop provides "extremely strong support" for the assertion that the Pinto sweatshirt bore fibres from Bishop's home address, rather than these being due to chance matches;
 - ii) The two-way transfer of fibres between Karen's clothing and the Pinto sweatshirt "is not readily explained unless the items in question had been in recent contact" and:

"provides at least very strong support for the assertion that the fibres found on the Pinto sweatshirt ... originate from Karen Hadaway's green sweatshirt ... and ... that fibres found on items relating to Karen Hadaway ... originate from the Pinto sweatshirt. "
 - iii) The two-way transfer of fibres between the Pinto sweatshirt and Nicola's clothing and the fibres linking Nicola's clothing to Marion Stevenson's skirt was "highly unlikely to be due to coincidental matches", and the combination of fibres on Nicola's clothing provides

“at least very strong support for the assertion that they originate from the ... Pinto sweatshirt and [Marion Stevenson’s] skirt rather than these being due to chance matches”.

Taken together, Mr Green considered that the fibre evidence from the girls’ clothing provides “at least very strong support” for the assertion that the fibres arrived as a result of recent primary contact of the Pinto sweatshirt rather than having been deposited via indirect routes.

70. The second area of forensic analysis (and that which provides the most significant discoveries made by Mr Green) relate to DNA. Repeating the background, it was his report in 2013 that an almost complete DNA profile matching Bishop had been found on the right cuff of the Pinto sweatshirt that led to the agreement of a framework for all future forensic work. In reaching that assessment, LGC had used a DNA profiling technique known as SGM Plus, a technique which had been in existence since 1999 and which was the standard technique used in laboratories in this country. Specifically, the area selected by LGC was doubled-over fabric, which would protect and retain any DNA that might have worked itself in between the layers of fabric during wear. The cuff was cut open and a mini-tape was taken. This mini-tape was submitted for SGM Plus profiling tests, and it was those tests that led Mr Green to estimate that the STR profile that was obtained was in excess of a billion times more likely if the DNA came from Bishop than any other unrelated person.
71. Although on the face of it of very real significance, Mr Green indicated that the strength of this finding would have to be considered in the context of investigations into the continuity and integrity of the item, before the sample was obtained by LGC. It was not possible to say how the DNA had come to be deposited or when this occurred.
72. It was in the light of this conclusion that Ms Hammond was asked to assess whether there were any issues identified in relation to the continuity, integrity, storage and handling of items, from the time they were recovered up to the recovery of the evidence. Her ultimate conclusion was that there was a realistic possibility that the result obtained in relation to the right cuff could have arisen through the inadvertent transfer of DNA to the Pinto sweatshirt during handling or storage. However, even before she reported and so as she was carrying out her review, it was agreed between the police and LGC that further tests would be carried out in relation to what is described as “wearer DNA” on the Pinto sweatshirt since it seems that there were real concerns on the part of the police and LGC that Ms Hammond would likely reach the conclusion which she did.
73. More specifically, it was agreed that tapings from the Pinto sweatshirt would be examined for DNA. The thinking was that, as these tapings had been taken in 1986 during the initial examination of the Pinto sweatshirt carried out at Aldermaston and as they had subsequently been stored in the FSS retention system, there were likely to be fewer issues regarding continuity and the possibility of adventitious transfer of DNA.
74. Initially, it was agreed between Mr Green and the police that the focus would be on the inside of the Pinto sweatshirt given that it was “wearer DNA” which was being

sought. However, that focus was not exclusive. Specifically, in carrying out extensive testing of tapings taken from the inside of the Pinto sweatshirt, Mr Green took samples of possible skin flakes and excised in total about half of the area of each tape in two separate samples.

75. In addition, when Ms Hammond first reported her findings to the police in July 2015, a discussion ensued over whether the tapes from the outside of the Pinto sweatshirt should also be examined. It was decided, albeit not immediately, that this should happen. Thus, on 2 August 2016 the police asked Mr Green to undertake such (external) examinations. He did so, reporting in September 2016.
76. It was not only Mr Green's findings as regards the outside of the Pinto sweatshirt which were significant. So, too, were his findings in relation to certain tests which he had previously carried out involving certain tapings taken from Karen's left forearm. Both these examinations entailed the use by LGC of new DNA-testing mechanisms, specifically DNA-17 short tandem repeat ('STR') chemistry which was introduced into UK laboratories starting in 2014 and are now the standard DNA profiling test in use at LGC.
77. DNA-17 targets sixteen regions of DNA and the sex indicator region. The standard DNA-17 test at LGC uses 30 cycles of amplification, as compared with 28 cycles for SM Plus. The DNA-17 test is also more sensitive than SGM Plus, meaning that profiles can be obtained from even smaller amounts of DNA as well as degraded and compromised samples which might not have given a result using SGM Plus.
78. The results concerning the outside of the Pinto sweatshirt, specifically tapings from there which had been taken by Dr Peabody, were reconsidered by LGC. On the tapings from the outside front of the Pinto sweatshirt, possible skin flakes were found. These were submitted for DNA-17 STR profiling. That profiling indicated the presence of DNA from at least two people, including Bishop. Mr Green estimated that it was in excess of one billion times more likely that the DNA originated from Bishop and an unknown person as opposed to two known people unrelated to Bishop. Mr Green's conclusion, therefore, was that LGC's findings provide "extremely strong support" for the assertion that the DNA present in the sample contains DNA from Bishop.
79. As to the tapings taken from Karen's left forearm during the post-mortem examination performed by Dr West, the taping which was examined was placed on a clear acetate sheet, measuring approximately 15cm x 10cm, with a strip of sellotape wrapped around it. The tape was examined for any possible skin flakes, which were found and then excised and combined for DNA analysis. Mr Green noted that, although the material appeared to be skin flakes, it could have been some other form of DNA such as dried bodily fluid.
80. The result of the DNA-17 STR analysis carried out in relation to this taping indicated a mixture of DNA from at least two people. The results, Mr Green explained in his report dated 25 June 2015, were at least 58,000 times more likely if the DNA was from Bishop and Karen, rather than if it contained DNA from Karen and somebody other than Bishop. Mr Green concluded that this result provided "very strong support" for the assertion that part of the profile originated from Bishop rather than somebody else. In addition, using a further DNA-profiling technique known as Y-STR which is

specific to male DNA and comparing the (admittedly incomplete) results obtained against a reference database, Mr Green estimated that the probability of a male unrelated to Bishop having the same profile as being approximately 1 in 2,900.

81. Accordingly, Mr Green concluded that this provided “strong support” for the assertion that the profile contained DNA from Bishop rather than from an unrelated male. Furthermore, viewing the DNA-17 STR and the Y-STR profiling results concerning Karen’s left forearm in conjunction with each other, in Mr Green’s view, they provided “extremely strong support” for the assertion that, in addition to DNA from Karen, the sample contained DNA from Bishop rather than from another male unrelated to him.
82. It is primarily on this scientific evidence that the prosecution bases the present application. In addition, however, reliance is also placed on work carried out by LGC (and Mr Green) in relation to two other areas. The first concerns the hairs found on the Pinto sweatshirt tapings.
83. This work, done in 2015, followed an earlier attempt in 2005 by Carole Evans at the FSS to conduct mitochondrial DNA testing on four hairs recovered from the Pinto Sweatshirt. Those four hairs were tested and compared against reference samples provided by Bishop, and a mitochondrial DNA sequence was obtained from three of the four hairs (3, 5 and 7) which matched Bishop, so providing “moderate support” for the proposition that those three hairs originated from Bishop or a maternal relative of his. Ms Evans explained in a report dated 4 January 2006, however, that “it was not possible to perform duplicate tests on each hair as the amount of mtDNA present was very low”.
84. Mr Green’s examination entailed his looking at nine hairs which had been retained on the original slides and comparing them against reference samples from Bishop as well as from the girls. Mr Green found that five of these hairs were similar in colour and microscopic appearance to Bishop’s sample, that two others were similar in colour to Bishop’s sample but were finer in diameter, and that one was similar in colour and microscopic appearance to a pubic hair sample from Bishop. Mr Green also submitted hair samples to a Dr Amarjit Chahal in Canada in order that further mitochondrial DNA testing could be performed since scientific developments since 2005 enabled mitochondrial profiling to be carried out on as little as 2mm of hair.
85. The result was that the mitochondrial DNA profile obtained from the pubic hair matched Bishop. This is in circumstances where it is estimated that one in 95 individuals in the Western Eurasian population might be expected to have this mitochondrial DNA profile.
86. Taken together with what Ms Evans had found, this meant that four hairs recovered from the Pinto sweatshirt matched Bishop: three hairs (3, 5 and 7) from Ms Evans’ examination in 2005, and one pubic hair identified by Mr Green in 2015. Mr Green’s conclusion, in the circumstances, was that the hair evidence, considered collectively, provided “moderate support” for the assertion that the hairs with a mitochondrial DNA profile matching Bishop found on the Pinto sweatshirt came from Bishop rather than someone who was not maternally related to him.

87. The second additional area of forensic analysis relied upon by the prosecution concerns paint. This took the form of a review carried out by Dr Louissa Marsh, another forensic scientist at LGC whose particular expertise is the forensic examination of paint, glass and other materials.
88. Dr Marsh was instructed to conduct a review of all of the paint evidence. Dr Marsh, in particular, focused on two areas. The first was the fragments of paint which were found on tapings taken from Karen's clothing during her post-mortem and original examinations in 1986. The second was the fragments of paint which were found on tapings taken from Nicola's clothing during her post-mortem and original examinations in 1986, as well as a flake of paint which was found on a taping taken at the time of the post-mortem from Nicola's neck. Both matched the maroon paint found on the Pinto sweatshirt.
89. Dr Marsh examined the Pinto sweatshirt microscopically and took samples for examination. In so doing, she considered also the findings which Mr Burt had made, comparing those findings against the evidence she was presented with on her own examination. Dr Marsh reached the conclusion that the Pinto sweatshirt was only partially examined by Mr Burt and not microscopically examined during the initial investigation.
90. Dr Marsh concluded, in summary, based on her findings, that there was "strong support" for the propositions that:
- i) Nicola and Karen had come into recent contact with the Pinto sweatshirt;
 - ii) the maroon paint on various areas of the Pinto sweatshirt originated from the same source of liquid paint as the maroon paint on the Mini;
 - iii) the bright red paint on the Pinto sweatshirt originated from the same source of liquid paint as the top coat of paint on the outhouses at 19 and 21 Stephen's Road.
- She, furthermore, considered that her findings provided "very strong support" for the proposition that Nicola and Karen had come into recent contact with the Pinto sweatshirt.
91. Collecting the scientific evidence together, Mr Green was also asked to make what was described as an "overarching statement", which summarises and evaluates the main scientific evidence, against the backdrop of the complex history of some of the items. As he explained when describing the purpose of this statement, he was asked, in particular, to evaluate the scientific evidence to determine whether or not the evidence supports the assertion that Bishop had worn the Pinto sweatshirt, whether or not it had been in his home, and whether he and/or the Pinto sweatshirt had recently come into contact with Nicola and Karen.
92. In the course of a statement of some 21 pages, Mr Green dealt with the evidence in broadly the way which we have sought to set it out, before stating his conclusions. He advanced the following four propositions:

- i) The presence of matching fibres, paint, and hairs together with the DNA and mitochondrial DNA results provide “extremely strong” support for the assertion that the Pinto sweatshirt had been worn by Bishop.
- ii) The fibre findings provides “extremely strong” support for the assertion that the Pinto sweatshirt had been in Bishop’s home and that it had not been worn extensively since it was last there.
- iii) The combination of the fibre and the paint findings provides “extremely strong” support for the assertion that there was recent contact between the Pinto sweatshirt and Nicola, and the sweatshirt and Karen.
- iv) The combination of advanced statistical analysis of the DNA results and the results of Y-STR tests provide “extremely strong” support for the assertion that the DNA mixture detected on Karen’s left forearm taping included DNA from Bishop.

93. Mr Green summarised his opinion in this way:

“... when all the findings to date are considered together this is what I might expect if Russell BISHOP, whilst wearing the Pinto sweatshirt, had close contact with Karen HADAWAY and Nicola FELLOWES at or around the time of their deaths.”

The Legal Framework

94. In view of previous authorities dealing with the power to quash an acquittal and order a retrial under s. 76 of the 2003 Act, the relevant legal provisions and associated authorities can be summarised relatively briefly. It is, however, helpful to set out the statutory provisions so that they can conveniently be referenced in our analysis of the issues which arise in this case and the arguments advanced.

95. Applications to Court of Appeal are governed by s. 76 in these terms:

“(1) A prosecutor may apply to the Court of Appeal for an order -

(a) quashing a person’s acquittal in proceedings within section 75(1), and

(b) ordering him to be retried for the qualifying offence.

(2) A prosecutor may apply to the Court of Appeal, in the case of a person acquitted elsewhere than in the United Kingdom, for –

(a) a determination whether the acquittal is a bar to the person being tried in England and Wales for the qualifying offence, and

(b) if it is, an order that the acquittal is not to be a bar.

(3) A prosecutor may make an application under subsection (1) or (2) only with the written consent of the Director of Public Prosecutions.

(4) The Director of Public Prosecutions may give his consent only if satisfied that –

(a) there is evidence as respects which the requirements of section 78 appear to be met,

(b) it is in the public interest for the application to proceed, and ...

(5) Not more than one application may be made under subsection (1) or (2) in relation to an acquittal.”

96. At this stage, it is important to highlight s. 76(5) which permits one application only. This provision is particularly relevant to uses of “due diligence or expedition” given the advancing nature of forensic science and the importance for the Crown of maximising the prospects of the single application being successful.

97. The requirement of new and compelling evidence is set out in s. 78 in these terms:

“(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

(3) Evidence is compelling if –

(a) it is reliable,

(b) it is substantial, and

(c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.”

98. In the context of s. 78, both Mr Altman and Mr Bennathan referred to *R v Dobson* [2011] 1 WLR 3230, [2011] EWCA Crim 1256, in which this Court quashed an

acquittal of one of the people found not guilty of the murder of Stephen Lawrence. Lord Judge CJ explained the provisions in this way:

“7. Thus ‘compelling evidence’ for the purposes of section 78 is defined in the section itself. It does not mean that the evidence must be irresistible, or that absolute proof of guilt is required. In other words, the court should not and is certainly not required to usurp the function of the jury, or, if a new trial is ordered, to indicate to the jury what the verdict should be. Our attention has been drawn to the observations of Hughes LJ, in *R v G(G) and B(S)* [2009] EWCA Crim 1207 where the proposed new evidence, of a co-accused who had been convicted at the original trial, did not satisfy the test of reliability. At para 5 of the abbreviated judgment, Hughes LJ observed that it is ‘only where there is compelling new evidence of guilt, of the kind which cannot realistically be disputed, that the exceptional step of quashing an acquittal will be justified’. The purpose of this observation, as para 9 makes clear, was to highlight that the quashing of an acquittal is an exceptional step, which indeed it is, and can only be ordered if the statutory requirement in relation to the ‘reliability’ of the new evidence is clearly established.

8. However, the legislative structure does not suggest that availability of a realistic defence argument which may serve to undermine the reliability or probative value of the new evidence must, of itself, preclude an order quashing the acquittal. It must, of course, be carefully analysed, and given its proper weight. If the argument, or indeed any defence evidence, leads the court to conclude that the new evidence is not, after all, as reliable or substantial as it was thought to be, or that it no longer appears to be highly probative of guilt, then the court cannot be satisfied that the statutory test has been met. That is a fact-specific decision. In the end, there are three defined elements: provided the new evidence is reliable, substantial, and appears to be highly probative, for the purposes of section 78 it is compelling: otherwise it is not.”

99. The significance of *Dobson* (among other authorities) was underlined in *R v MH* [2015] EWCA Crim 585 when dealing with the “interests of justice” test set out in s. 79 of the 2003 Act. Thus, as visualised by Lord Judge CJ in *Dobson*, Mr Bennathan recognised that the Court of Appeal analysed the evidence which was suggested by the prosecution to be “new and compelling” in order to decide whether the conclusion reached by the prosecution was right this: see (at [51]) the discussion of the possibilities of contamination.

100. Coming on to s. 79 (“Interests of justice”), this is in these terms:

“(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order under section 77.

(2) That question is to be determined having regard in particular to –

(a) whether existing circumstances make a fair trial unlikely;

(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;

(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.

(3) In subsection (2) references to an officer or prosecutor include references to a person charged with corresponding duties under the law in force elsewhere than in England and Wales.

(4) Where the earlier prosecution was conducted by a person other than a prosecutor, subsection (2)(c) applies in relation to that person as well as in relation to a prosecutor.”

101. This provision was considered in *MH* in some detail and by reference to a number of the relevant authorities. Giving the judgment of the court, I said:

“47. As to the interest of justice requirements, s. 79(2) does not confine the court to the factors set out, although regard must be had to them ‘in particular’. Thus, following *R v W*, we accept that although those undertaking the forensic work are not officers or prosecutors within the statutory language of s. 79(2)(c)-(d), their due diligence and expedition may be taken into account. In our view the test for due diligence and expedition is an objective one: what would a reasonably competent police officer, prosecutor or forensic scientist have done facing the particular circumstances of the case.

48. In that regard, inaction, indifference or sloppiness are, of course, highly material and there can be no suggestion that the legislation permits an investigation to be undertaken in a half-hearted manner on the basis that if it fails, more can then be done and permission will be given to set aside the general rule preventing double jeopardy to allow a new trial. On the other hand, that is not to say that human error by a police officer or a scientist is necessarily determinative against an application: all the circumstances must be considered with particular reference to those set out in s. 79(2) of the 2003 Act.”

102. We obviously have regard to these considerations in the present case. Mr Bennathan submitted, however, that the factors enumerated in ss. 79(2)(a) and (b) must amount to an absolute bar to the quashing of an acquittal given both the common law and the unqualified right to a fair trial under Article 6 of the European Convention on Human Rights.
103. In our view, there is no substance in Mr Bennathan's submission as far as it concerns s. 79(2)(b) when viewed in isolation. Although relevant to the issue of fair trial, lapse of time, in and of itself and without more, could never amount to an absolute bar or some sort of 'trump card'. If that were the position, s. 79(2) would not have been framed in the way that it has been.
104. That conclusion is reinforced by the observations of this court in *R v Dunlop* [2006] EWCA Crim 1354, [2007] 1 Cr App R 8 in which Lord Phillips CJ observed:
- “28. Mr Owen submitted that the cumulative effect of the 17 year delay between any retrial and the original offence, the seven year delay between any retrial and the alleged confessions and the nine month delay between the coming into force of Pt 10 of the 2003 Act and the application for a retrial was such that it would not be in the interests of justice for Dunlop to be retried. The basis for this submission was that these periods of delay, of themselves, made it unfair to retry Dunlop, not that the effects of delay on the retrial would render any verdict unreliable.
29. Mr Owen accepted that delays of as long as 17 years between offence and prosecution have been not uncommon in the case of historic sexual offences. He submitted, however, that the period between acquittal and retrial was so unique in character that it was qualitatively different from either the period between charge and disposal at trial or the period between the offence and the first trial. We are unable to accept this submission. So far as the quality of delay is concerned, we can see little difference between the delay in charging a sex offender, who may have been lulled into a sense of false security by the absence of any charge over many years, and the delay in retrying a defendant who has been lulled into a sense of false security by the existence of a rule against double jeopardy. If a case of unfairness lies in relation to the retrial of the latter, we do not consider that it can be founded on any special quality of the delay between acquittal and retrial. We do not see that the other periods of delay on which Mr Owen relies add anything to his case. In particular, we do not consider that the delay of nine months in making the application for a retrial was unreasonable.”
105. Thus, although relevant to the possibility of there being a fair trial, without more, delay does not necessarily mean that an application under s. 76 should be refused but that the argument as to whether existing circumstances make a fair trial unlikely is more compelling. Although not described in s. 79 as a factor which has any greater

significance than the other factors listed in s. 79(2), in practical terms, it is obviously of critical importance since if the consequence of an acquittal being quashed and a retrial ordered, could lead to a successful application for a stay on the grounds of abuse of process, then, it makes no sense to have acceded to an application under s. 76 of the 2003 Act in the first place.

106. Put differently, unless a retrial can be fair, it ought not to be ordered. That must be the position even if none of the other s. 79(2) factors is applicable since it is difficult (if not impossible) to conceive that the Court of Appeal would ever, in practice, order a retrial which it concluded would be unfair; thus, the considerations relevant to abuse of process are properly considered at this stage. The same does not so obviously apply to the other factors.
107. At one stage during the course of his oral submissions, Mr Bennathan inclined to suggest that the reference in s. 79(2)(b) to “that question” tied “the length of time” issue back to section 79(2)(a), so enabling it to be argued by a defendant facing an application under s. 76 of the 2003 Act that lapse of time, in and of itself, justifies a refusal of the application on fairness grounds. When it was pointed out that the words “that question” are a reference not to s. 79(2)(a) but to the “question” described in the opening words of s. 79(2), and so the matter addressed in s. 79(1) (namely the broader “interests of justice” question there identified), he did not pursue the argument.
108. Mr Bennathan then went on to submit that ss. 79(2) (c) and (d) should be given an enhanced status rather than simply being matters to be addressed in a consideration of the overall “interests of justice”. His argument was premised on the basis that these provisions will only ever come into play when the Court has decided there is “new and compelling” evidence that an accused person was wrongly acquitted of a serious crime, and so at a stage when the prosecution will always be able to pray in aid a broad “interests of justice” argument.
109. In this regard, Mr Bennathan highlighted how, in framing s. 79(2) as it has done, the legislature has chosen to use the same language as that contained in s. 23(2) of the Criminal Appeal Act 1968 by using the same language that the court must have “regard in particular to” the relevant features. In the former context, Mr Bennathan relied upon the observation of Lord Judge CJ in *R v Erskine* [2009] EWCA Crim 1425, [2009] 2 Cr App R 29 (at [39]) that the considerations listed “are neither exhaustive nor conclusive, but they require specific attention”. Mr Bennathan also prayed in aid the Chief Justice’s comment in *Dobson* (at [10]) that:

“if the new evidence relied on by the prosecution would have been revealed for use at the first trial by a competent investigative and/or prosecutorial process, then the interests of justice may, on this ground alone, lead to the application being refused”.
110. It was Mr Bennathan’s submission that, were it the case that lack of due diligence or expedition would only prevent an application being allowed where that delay had led to prejudice, there would have been no need for these particular provisions at all because, in any event, there could be no fair trial. In our judgment, however, this represents far too technical an approach to the construction of the legislation: s. 79(2) contains a list of non-exhaustive factors which the court must consider and there is no

question of priority or hierarchy. Neither do ss. 79(2)(c) or (d) have any enhanced status: they are factors to be taken into account as a matter of fairness between the parties. Indeed, it is not difficult to visualise the possibility that, as the definition of “new and compelling” evidence would include evidence that was available and known about at the time of the first trial, unless due diligence and expedition had to be demonstrated, it would be far too easy for the prosecution to seek a ‘second bite of the cherry’ in circumstances which would be entirely inimical with the interests of justice. Furthermore, it seems to us that Lord Judge CJ’s comment in *Dobson* (set out above) that “the interests of justice may, on this ground alone, lead to the application being refused” (our emphasis) somewhat undermines the submission which Mr Bennathan made. The word “may” is permissive, not mandatory.

111. Otherwise, and uncontroversially, at least as we understood it, Mr Bennathan submitted that failings by those conducting forensic examinations are relevant to the decision whether or not to overturn an acquittal since, although such roles would not, as a matter of strict construction, come within the ambit of s. 79, any failings on their part might go to the broader “interests of justice” test. This is the approach which was adopted by the Court of Appeal in *R v Weston* [2010] EWCA Crim 1576 where Thomas LJ (as he then was) said at [55]:

“At the material time scientists who conducted forensic examinations had moved from police forces into the Forensic Science Service. Therefore clearly Mr Mann and Ms Miller were not officers within the meaning of the sub-section. However, it seems to us that as Parliament has left to the court the determination of what is in the interests of justice, we should have regard to the question as to whether they had acted with due diligence. Although Mr Mann and Ms Miller were not employed under a contract of service with the police, the FSS provided under a contract of services an essential part of the original investigation.”

112. In addition to judgments dealing with applications such as the present, we were referred also to certain other authorities. Thus, Mr Bennathan submitted that it is permissible and relevant for an accused to adduce evidence about the likelihood of other identifiable suspects having committed the offence charged. Whilst the question for any jury will remain whether they are sure that the defendant committed the crime, material that points to other culprits may raise doubts on that question: see *R v Greenwood* [2005] EWCA Crim 1388, [2005] 1 Cr App R 7. He argued that such evidence is far less likely now to be available or to be as cogent as it would have been. If it is otherwise appropriate to order a re-trial, however, given the disclosure of the contemporaneous investigation (and anything that has since emerged), this argument is no different from overarching arguments which arise following delay and (where a fair trial is otherwise possible) dealt with by appropriate judicial direction.
113. Mr Bennathan also highlighted the unsurprising fact (given the lapse of time) that the prosecution are now represented by different counsel to the counsel who appeared at the 1987 trial and who so firmly tied the prosecution to the murders occurring prior to 6.30 pm on 9 October 1986. He drew attention to the authorities which stress the need for those advancing appeals which entail criticism of trial counsel to make proper, rigorous and focused inquiries of the original representatives, relying, in

particular, on what Lord Thomas CJ said in *R v Grant-Murray* [2017] EWCA Crim 1228 (at [131]):

“For the avoidance of doubt, new advocates instructed in a case, whether or not they believe the grounds involve criticism of the trial representatives, must make all proper and diligent enquires of previous counsel, advocates and solicitors, so that they have all the information properly to understand what took place prior to and during the trial. This will also be necessary in every case involving an application to call fresh evidence. They must then expressly certify in the grounds of application for leave to appeal submitted to the court on form NG that that has been done. The court will not entertain an application without such a certification.”

114. Lord Thomas CJ went on (at [133]):

“We would emphasise that it is a wholly inadequate compliance with this duty to send the lawyers instructed at the trial the grounds of appeal and to ask for comments. Inevitably the application will be made sometime after the trial and those representing the applicant at the trial must have identified for them the issues that relate to the conduct of the trial which are relevant to the appeal. Specific questions must be formulated and specifically put. Some questions will simply be for information that is not apparent from the papers. In other cases there will be implicit criticism; in such a case there can be no shying away from putting fairly and squarely the implicit criticism of those then acting for the applicant at the trial so that the appellate court has all the information before it when it commences the consideration of the application. The fact that a trial lawyer might have retired or left the profession to take up office or for some other reason does not excuse the newly instructed advocate from pursuing such inquiries with that person.”

115. It was Mr Bennathan’s submission that, whilst *Murray-Grant* is a case which was concerned with appeals by defendants, there is no reason why, in the context of applications under s. 76 of the 2003 Act, the prosecution ought not to be under a similar obligation. We agree with Mr Altman, however, that there is a distinction between prosecution applications under s. 76, where the focus is on the prosecution’s ability to establish the existence of “new and compelling” and cases where, in support of his or her appeal, a convicted defendant alleges suggested failings on the part of trial counsel. Whereas in the case of the former the issue is whether the prosecution has satisfied the statutory criteria, which does not depend on whether trial counsel was somehow at fault, that is not the position in the case of the latter, hence the need in the latter (but not the former) case to have the input of trial counsel to provide an explanation for the suggested failing. Given this distinction, we cannot accept that the prosecution decision at the first trial can bind any new prosecution to put the case in the same way.

116. We might add in this context that unused material (if any there be) justifying the time at which death was said to have occurred will doubtless still be available and the forensic decision at the first trial to identify the time of death as before 6.30 pm could doubtless be deployed by the defence, if thought helpful, at any new trial.

New and Compelling Evidence

117. Turning to the issues which arise in this case, we consider separately the two aspects of the application (the scientific evidence linking Bishop to the murders of Nicola and Karen and Bishop's subsequent convictions for attempted murder, kidnapping and indecent assault).
118. As for the scientific evidence relied upon by the prosecution as being "new and compelling", Mr Altman relied upon the recent forensic evidence set out above of a physical connection between Bishop and the two girls; of the clear link (and the inference) that the person wearing the Pinto sweatshirt was the murderer; and of fact that the Pinto sweatshirt was worn by Bishop.
119. More specifically, Mr Altman submitted that the DNA profile matching Bishop found on taping from Karen's left forearm provides a very strong basis for linking Bishop to the crime scene and, obviously, to one of the girls. This, he submitted, is plainly "new" since it was not adduced at the first trial, and nor could it have been given that DNA testing of that sophistication was not then possible.
120. Besides this, Mr Altman pointed to other scientific evidence which, he submitted, is not only "new" but also "compelling" evidence because it demonstrates that the person wearing the Pinto sweatshirt was the girls' murderer. In this context, Mr Altman referred to the following evidence:
- i) the new fibres evidence linking Karen's clothing with the Pinto sweatshirt and Marion Stevenson's skirt – evidence which Mr Green has described as providing "very strong" support linking the Pinto sweatshirt to Nicola and Karen;
 - ii) the new fibres evidence linking Nicola's clothing with the Pinto sweatshirt and Marion Stevenson's skirt - evidence which again Mr Green has described as providing "very strong" support linking the Pinto sweatshirt to Nicola and Karen;
 - iii) the new findings of paint fragments on Karen's clothing, which match the maroon red paint found on the Pinto sweatshirt - findings which provide "very strong" support for recent contact between the Pinto sweatshirt and Karen; and
 - iv) the new findings of paint fragments on Nicola's clothing and a flake of paint from tapings from the front of the neck, which match the maroon red paint found on the Pinto sweatshirt - findings which similarly provide "very strong" support for recent contact between the Pinto sweatshirt and Nicola.
121. Mr Altman, furthermore, pointed to the evidence showing that the Pinto sweatshirt was worn by Bishop, submitting that this was likewise both "new" and "compelling" given that:

- i) the DNA profile matching Bishop found on the Pinto sweatshirt is described by Mr Green as providing an “extremely strong” basis for attributing the Pinto sweatshirt to Bishop;
 - ii) the fibres evidence linking the Pinto sweatshirt to items seized from 17 Stephens Road provide, according to Mr Green, an “extremely strong” basis for attributing the Pinto sweatshirt to Bishop; and four hairs recovered on the Pinto sweatshirt which match Bishop, so providing additional support to the linkage between the Pinto sweatshirt and Bishop.
122. Mr Altman submitted also (correctly as we see it, and without any apparent demur from Mr Bennathan) that it is appropriate, in considering the new scientific evidence in the context of an application such as the present, to take into account the evidence which was available at the time of the trial, not only by way of context but in addition in making an overall assessment as to the strength of the evidence, old and new, taken together, as matters now stand. In this respect, Mr Altman made reference to:
- i) the original fibres findings made by Dr Peabody;
 - ii) the original paint findings made by Mr Burt, supplemented and clarified by the work conducted by Dr Marsh;
 - iii) the original ivy findings made by Dr Peabody showing a high number of ivy epidermal hairs on the Pinto sweatshirt, and a similarity between these hairs and ivy epidermal hairs recovered from the girls’ clothing;
 - iv) the other circumstantial evidence implicating Bishop, including his conduct at the time of the murders, the sightings of Bishop in the vicinity of Wild Park at the relevant time, the description of the position and appearance of the bodies given by Bishop in circumstances where he was stopped from entering the crime scene when the girls’ bodies were discovered;
 - v) the fact that the Pinto sweatshirt was found in a location on Bishop’s route from Wild Park back to his home address, along with the evidence of identification of the sweatshirt by Jennifer Johnson (albeit that she later withdrew this statement); and
 - vi) the contradictions in the accounts which Bishop provided to others and to the police.
123. Mr Bennathan submitted that the “new and compelling” test is not met in the present case. His position was that, as he put it, there were defence answers to what may otherwise seem to be ‘new and compelling evidence’. In this context, focusing on the requirement for the evidence to be compelling, he referred to the possibility of contamination in respect of the fibres, DNA and paint evidence now sought to be relied upon by the prosecution.
124. Mr Bennathan highlighted a number of features which he submitted demonstrated this proposition. Examples included the fact that, even before the offences were committed, there were numerous connections between Bishop and the girls, specifically one of his close friends lived as a lodger in one of their homes, Bishop

had called at one of the girls' homes on the day of the murders, both his girlfriends knew and had some contact with the families of the two girls, and both girls had been in his car in the past.

125. Secondly, Mr Bennathan made the point that the integrity of the original tapings depended in part on the care and professionalism of the pathologist, Dr West, who is no longer alive and who, Mr Bennathan suggested, was the subject of some criticism at trial. Thirdly, Mr Bennathan cast doubt on the storage of key exhibits (including the Pinto sweatshirt) which, he suggested, entailed now-unidentifiable people having opened exhibit bags, the exhibits being "dumped in disgust after the 'not guilty' trial verdict" (as it was described in an internal police email sent on 26 November 2014) and Bishop's property from the later prosecution in 1990 being discovered stored in the same location as exhibits from the trial at which he was acquitted in 1987.
126. Mr Bennathan explored some of these matters with Ms Hammond during the course of the hearing before us. Ms Hammond agreed with him, for example, that, based on what the Scenes of Crime Officer, Edward Redman, had to say in his statement dated 4 December 1986 as well as on DC Douglas Penry's evidence in a statement made on 15 October 1986, Mr Redman received not only the Pinto sweatshirt but also various items of clothing taken from Bishop's home. Ms Hammond agreed that, in the circumstances, it was right to say that there were potential sources of DNA from Bishop's home being dealt with by the same officer on the same day in the same police station as the Pinto sweatshirt.
127. Mr Bennathan also explored with Ms Hammond the fact that the Continuity Record in respect of the Pinto sweatshirt describes it as having been handed at 9.10 am by Mr Redman to DI Christopher Bentham in a brown paper bag which was itself in a brown paper bag. DI Bentham then removed the Pinto sweatshirt, supported it on card and placed it inside a clear polythene bag which he sealed. It was then, it appears, photographed and labelled as exhibit "DE/1" before being handed to DC Barry Evans. DC Evans is then recorded as at "about" 10.00 am going to Bishop's home address in order to show the Pinto sweatshirt to Jennifer Johnson "to see if she could identify" it which, then at least, she did. The record goes on to state that it "then appears" that SOCO Redman gave it to DS Swan so that it could be shown to Bishop in interview, apparently between about 3.30/3.38 pm and 3.55 pm. Thereafter, although it is not altogether clear how he received the Pinto sweatshirt back, Mr Redman handed it to PC Lee so that it could be sent to Aldermaston (and so Dr Peabody). Mr Bennathan suggested to Ms Hammond that, if the Pinto sweatshirt had been repackaged after it came back from Bishop's home address where it was shown to Jennifer Johnson, or if this had happened after it was shown to Bishop during his interview, then, this would be of considerable interest. Ms Hammond agreed with this.
128. Mr Bennathan, then, took Ms Hammond to certain passages in Dr Peabody's evidence at the trial when he was being asked in cross-examination about the condition which the Pinto sweatshirt was in when he received it. It was suggested to Ms Hammond by Mr Bennathan that Dr Peabody's evidence entailed his doubting that the Pinto sweatshirt was in the same plastic bag as appeared in the photograph taken before it was handed to DC Evans earlier in the day. Ms Hammond's answer was that, at least as she understood what Dr Peabody was doing in answer to the questions which he was asked was commenting on the condition of the Pinto sweatshirt itself rather than

the bag which it was received in. Ms Hammond explained that, if there had been repackaging, she would have expected the notes to have made reference to it.

129. Mr Bennathan additionally put to Ms Hammond the possibility that tapings could have become contaminated, specifically the taping taken from Karen's left forearm the edges of which had lifted. Ms Hammond accepted that it was possible that this could have happened "very early on in its life". So, too, did Ms Hammond acknowledge that the DNA result obtained in respect of that particular taping could have been produced from a single particle or from several particles. In addition, Mr Bennathan explored with Ms Hammond the possibility that the plastic bag containing this particular taping could have been left unsealed between examinations. Ms Hammond's response to this was to make the point that it would have been kept "in a storage area in the laboratory". Furthermore, she explained that, at the time, although precautions would not have been taken for DNA purposes in view of the fact that DNA was not then a consideration, laboratories were nonetheless "taking precautions to avoid contamination with fibres and fibres were certainly identified as a particular evidence type in this case" so as to mean that "the same precautions would be taken in relation to fibres".
130. We have taken all of these matters into account in reaching our conclusion as to whether the scientific evidence now sought to be relied upon by the prosecution (and which is the subject of the present application) meets the requirement that it is not only "new" but also "compelling". We consider it perfectly clear that it does. It is reliable and substantial, notwithstanding the objections which have been raised to it by Mr Bennathan. It is also highly probative, especially when considered together and, the more so, when considered in the context of other evidence which was before the jury at the trial which took place in 1987 and, for that matter, the evidence concerning Bishop's subsequent convictions. It follows that the new scientific evidence is "compelling" within the meaning of section 78(3) of the 2003 Act. In that regard, we underline the observations of Lord Judge CJ in *Dobson* (at [8]) that:
- "the legislative structure does not suggest that availability of a realistic defence argument which may serve to undermine the reliability or probative value of the new evidence must, of itself, preclude an order quashing the acquittal".
131. There is, in short, no necessity that the new scientific evidence should be conclusive or unanswerable. We have considered the points which Mr Bennathan has made, both in submission and when cross-examining Ms Hammond. Our conclusion is that none of those matters undermines the conclusion which we have arrived at. They are all matters which it would be open to Mr Bennathan to explore at a retrial.
132. To take an example, the original tapings still exist. The majority of the taping which was carried out was done at the girls' post-mortems. The Pinto sweatshirt was taped later, first on 31 October 1986 and then at some point before 11 December 1986. In other words, the adhesive back of a sellotape-like material was applied to the surface of Karen's left forearm and then stuck on to an acrylic sheet; the same was done to the surface of the sweatshirt. This means, as Mr Altman put it, that "all necessary findings are locked in place". It follows that, whatever points Mr Bennathan can make concerning subsequent storage of exhibits in this case, in particular in the wake of

Bishop's acquittals in 1987, they are points which are not as far-reaching as is sometimes the position in other cases.

133. What view the jury at any retrial ultimately takes of the new scientific evidence would be a matter for that jury after that evidence has been tested in court. Nothing which we say at this stage should affect the jury's own (subsequent) assessment. All that matters, for present purposes, is that we consider that, in respect of the new scientific evidence, the statutory test contained in s. 78(1) of the 2003 Act is more than amply met in this case.
134. We turn to the second limb of the application, namely Bishop's subsequent convictions for attempted murder, kidnapping and indecent assault. These convictions (and the facts which form the basis for them) obviously constitute "new and compelling evidence" and Mr Altman submitted that it was at least highly (if not overwhelmingly) arguable that they were committed in circumstances which were strikingly similar to those alleged to have led to the death of Nicola and Karen.
135. Mr Altman relied on the following features of similarity:
 - i) Like Nicola and Karen, R was a pre-pubescent girl, who was targeted after school time, when she out in the Brighton area, shortly before dusk.
 - ii) As in the cases of Nicola and Karen, R was strangled to the point where she became unconscious, only then to be sexually assaulted including through penetration using a blunt object. R was then left (like Nicola and Karen) in a densely wooded and concealed area, although fortunately for her (unlike Nicola and Karen) R survived.
 - iii) Both sets of offences involved incriminating items of clothing being discarded nearby and were followed by attempts by the perpetrator to clean himself, his clothing or his car.
136. These are similarities the significance of which is clear. We are quite satisfied that the fact that Bishop was convicted as he was in 1990 amounts to "new and compelling evidence", which is likely to be admitted pursuant to ss. 101(1)(d) and 103 of the 2003 Act on the grounds that he had a propensity to commit offences of the kind with which he is then charged. Whether the evidence is, in fact, admitted and what the jury make of it would be a matter for any retrial. We are, however, satisfied that it meets the statutory test which is the present (and only) focus given the nature of the application which we are considering.
137. It is important to underline that we have not, at this stage, taken account of the evidence obtained by the prosecution from Dr Nathaniel Cary, a consultant forensic pathologist, in which the opinion is expressed that the two cases "are consistent with having been carried out by the same perpetrator with a defined modus operandi involving the abduction, asphyxiation and sexual assault of female children". In the light of our decision in relation to the underlying facts, we have not had to address whether that conclusion constitutes admissible expert evidence. Similarly, we have not had to consider whether, on its own, the subsequent convictions would be sufficient to justify an application under s. 76 of the 2003 Act because, in this case, there is so much more.

138. Finally, we note that Mr Bennathan made no attempt, whether in his skeleton argument or during the course of his oral submissions, to dispute that there were the similarities which we have set out between the murders of Nicola and Karen and Bishop's subsequent convictions. Indeed, Mr Bennathan made no submissions concerning the convictions at all. It seems to us that Mr Bennathan's silence on these matters (which we do not criticise) was wholly understandable since, in truth, there was nothing which he could really have said to rebut the propositions that the subsequent convictions did not constitute "new and compelling evidence" within the meaning of section of s. 78(1) of the 2003 Act. It is evidence which is not only obviously "new" but equally obviously "compelling" in that it is clearly "reliable" as a matter of record, as well as being "substantial" and "highly probative" within the meaning of s. 78(3). Having said that, we would not encourage an application based solely on a subsequent conviction: each case would obviously fall to be considered on its own facts.

The Likelihood of a Fair Trial

139. Mr Bennathan made submissions concerning s. 79(2)(a) of the 2003 Act, to the effect that the existing circumstances made a fair trial unlikely. Although not described in s. 79 as a factor which has any more enhanced significance than the other factors listed in s. 79(2), in practical terms (even if not as a matter of statutory construction), it is obviously of critical importance. This is because if an application to stay a prosecution on the grounds of abuse of process (based on the inability for there to be a fair trial) were to succeed, it makes no sense to have granted an application under s. 76 of the 2003 Act in the first place. In view of this, when advancing his submissions in relation to s. 79(2)(a), Mr Bennathan sensibly and realistically recognised that, if his argument was rejected at this stage, a later application for a stay would be precluded unless, of course, it was based on events which came about or emerged after the present hearing.
140. Mr Bennathan made three central submissions in support of his contention that, in all likelihood, it would not now be possible to have a fair trial. First, he submitted that a retrial would not be able to assess the weight of Bishop's alibi. Secondly, he suggested that it would not be possible fully to inform a new jury about possible alternative suspects. Thirdly, he argued that the issue of contamination of the forensic material could not be properly considered after a delay of in excess of thirty years. As we shall explain, we are not persuaded by any of these objections.
141. As to the first point, Mr Bennathan highlighted the approach of the prosecution and the judge at the trial in 1987 which led to the direction that the jury should acquit Bishop unless sure that Nicola and Karen were killed before about 6.30 pm on 9 October 1986. Mr Bennathan explained that the three witnesses called by the defence (known by the pseudonyms of Black, Brown and White to protect their identities) were able to give evidence refuting the prosecution case that the deaths occurred before 6.30 pm. He described, in particular, evidence given that the girls had been seen at or after that time near the local chip shop eating chips (potentially corroborated by the post mortem evidence).
142. Mr Bennathan had no difficulty advancing the proposition that this evidence, which survives in the form of statements made by the witnesses to the police and in the transcripts of their testimony at trial, combined with consequent powerful effect. He

submitted that, in such circumstances, it would be unfair to allow the prosecution now to change its approach and advance a case which does not hinge on establishing that the murders took place before 6.30 pm. Mr Bennathan suggested that it would be absurd to proceed on the basis that prosecution counsel at the trial in 1987 did not appreciate the difficulty which fixing on that time created for the case being advanced with the result which that approach created for their case. He went on to submit that, in such circumstances, it would be unfair to allow a retrial to proceed with the prosecution advancing their case against Bishop on a different basis; the validity of this proposition was underlined by the fact, as Mr Altman conceded, that no attempt has been made to ask trial counsel why the prosecution case was advanced in that way.

143. Mr Bennathan complained, in this context, that at a retrial the defence could never “recreate the full picture that led to that stance at trial by the prosecution”. He pointed out, in particular, that, although the defence are aware that there were two witnesses who spoke of seeing Bishop leave the area of Wild Park at about 6.30 pm, beyond that, Bishop is unable to recall, if ever he knew it, the fuller reasoning behind the prosecution’s trial tactics.
144. We consider, however, that none of this advances the argument. It is not for the defence to speculate why the prosecution decided in 1987 to put the case forward in the way in which they did. It is for the defence simply to meet the case as it is put: we reject the proposition that a defendant in Bishop’s position can, in effect, compel the prosecution to advance the same case against him in the same way as was advanced before. That is not to say that the prosecution approach in 1987 is irrelevant. At any trial, Mr Bennathan will be in a position forensically to undermine the case then advanced by reference to the way in which experienced counsel had put the case at the trial conducted just over a year after the murders, relying on the same evidence from Black, Brown and White (whose police statements and transcripts are available). Thus, the jury will be required to focus on whether the change of approach is justified when assessing the evidence in the case.
145. Mr Bennathan prayed in aid a specific example in support of his submissions in this regard. This concerns a door-to-door insurance agent whom Bishop apparently recalls calling at his home after he had arrived back from Wild Park on 9 October 1986. Mr Bennathan suggested that there is support for this recollection in the witness statement of Barrie Fellows, Nicola’s father, who described Bishop telling him this. As Mr Altman pointed out, however, the evidence in the prosecution’s possession concerning this issue was made available to Bishop’s defence team in advance of the 1987 trial. Despite this, no case was put forward based on such evidence, although, if now considered relevant, that evidence can be deployed in a new trial.
146. Turning to the second of Mr Bennathan’s submissions concerning alternative suspects, the only point which was made is that, unless and until Bishop and those advising him are fully informed about such other suspects, they are not in a position to take proper tactical decisions and make focused and credible applications to adduce bad character material in respect of any third party. In this context, Mr Bennathan relied on *Greenwood* in support of the submission that it is permissible and relevant for an accused to adduce evidence about the likelihood of other identifiable suspects having committed the offence charged. There are, however, two short answers to this. First, this is not a point which has anything to do with the new evidence now sought

to be relied upon by the prosecution. Secondly, the defence will have available to them such information as the police assembled either then or during the course of any subsequent investigations: indeed, that Mr Bennathan was apprised of this material was evidenced by his reference to a schedule of unused material describing inquiries being made into a particular individual.

147. It was in the context of this last submission that Mr Bennathan advanced a further argument to the effect that it would be too difficult now (in 2018) for the defence to investigate alternative offenders simply because of the passage of time since 1986/7. Mr Bennathan contrasted a case such as the present with an historic sex offence case, in which, he suggested, either the offence was committed or it was not, but there is generally no doubt as to the identity of the offender. For our part, although many such cases involve a challenge to the event rather than the identity of the offender, we do not accept that this is so in all such cases and, in any event, it is clear from what Mr Bennathan was able to advance that the police did not close their eyes to other suspects and the material that has been amassed is available. Difficulties rebutting what gave rise to contemporaneous suspicions on the part of the police will have to be met by the Crown if and when they are raised by the defence at a new trial.
148. In any event, as Mr Altman argued, the courts are well used to dealing with cases of antiquity, controlling the admissibility of evidence to protect a defendant against unfairness. We are clear that appropriate safeguards can be put in place in a case such as the present which will ensure that a retrial is fair. Accordingly, in the same way as the authorities dealing with stay applications indicate that no stay should be granted where the court is satisfied that a fair trial can be held, taking into account the trial judge's residual powers, so we consider that in the present case it would be wrong in principle to accede to a submission that passage of time, without more, would lead to unfairness.
149. This leaves the third of Mr Bennathan's arguments concerned with possible contamination of exhibits, specifically his suggestion that it would be too difficult a task (he described it as a "hopeless task") to attempt to reconstruct what might have happened to exhibits so long after the first trial. As we have identified, however, when dealing with Mr Bennathan's submissions as to whether the new scientific evidence is "compelling" or not, we are not persuaded that there would be anything like the difficulties which Mr Bennathan suggested. The fact that Mr Bennathan was able to explore with Ms Hammond the matters which he did, in not inconsiderable detail, strengthens us in this assessment.
150. Finally, we do not accept that Mr Bennathan was right when he suggested that, at a retrial, the defence would find it difficult from a tactical perspective to make criticisms of exhibits, particularly bearing in mind that Bishop's subsequent convictions will be before the jury. We see no reason why that should be the case. Moreover, any concern could, in our view, be overcome were the trial judge to direct the jury appropriately, not only as regards the burden and standard of proof but specifically on this issue, making it clear that Bishop (like any defendant) is entitled to raise points concerning the integrity of exhibits.
151. In conclusion in relation to s. 79(2)(a), therefore, we reject the proposition that the existing circumstances make a fair trial unlikely: on the contrary, notwithstanding the very substantial lapse of time since the murders, we see no reason why, with

appropriate judicial control of the evidence and directions to the jury, a fair trial could not be achieved.

Due Diligence or Expedition

152. We need next to consider the issue of “due diligence or expedition” under ss. 79(2)(c) and (d) of the 2003 Act, which issue arises only in relation to the scientific evidence. Mr Bennathan does not suggest that it was incumbent on the prosecution, if acting with due diligence or expedition, to launch the one application that can be advanced to quash an acquittal (see s. 76(5) of the 2003 Act) based only on the subsequent convictions. He was right not to do so. Whether or not such an application could ever be justified following the change of the law in 2005, there would have been inherent risks in such an approach.
153. Turning, then, to due diligence or expedition in relation to the new scientific evidence, we adopt the approach described in *MH* at [47] and so proceed on the basis that, whether or not forensic scientists fall within the category of “officer or prosecutor” for the purposes of ss. 79(2)(c) and (d), consideration of the interests of justice necessarily includes in this case a consideration of the diligence and expedition of the forensic scientists who advised the police and prosecution on the approach to be adopted from a scientific perspective.
154. It does not follow, however, that, in looking at what was or was not done by the forensic scientists, it is appropriate to adopt too stringent or exacting an approach. This is not an area in which there is any counsel of perfection to be applied. The question, therefore, is whether what was regarded as appropriate to be done by the forensic scientists at any particular stage was, indeed, appropriate from a professional viewpoint; it is not whether, theoretically, something could have been done at an earlier stage. If there was complete inaction (or indifference) when there ought, on any view, to have been action or interest, that would be relevant. Sloppiness or lack of care would equally be relevant. These are the sorts of considerations which matter in the context of ss. 79(2)(c) and (d), as was made clear in *MH* at [48] and as further explained at [56] as follows:

“The effect of Mr Mousley's approach is that if, as a matter of fact, a test could be done or an examination undertaken and it is not, then any evidence that subsequently accrues from its completion will be the consequence of lack of due diligence and/or expedition. We do not agree. Both the police and the CPS rely on forensic scientists, first, to advise on the most fruitful lines of enquiry (including the taking of samples) and, second, to undertake such examinations as are professionally considered appropriate and which flow from the samples taken or enquiries undertaken. There is no evidential basis for a submission that the advice was misconceived, wrong, or even unduly cautious, let alone that it was advice which no reasonable forensic scientist could have given; neither is there any evidence to suggest that the police failed to exercise due diligence by relying upon it. Furthermore, it cannot be suggested that the police were only prepared to put limited resources into the investigation or that it is as a result of cost

that this testing was not undertaken: in fact, it is clear from all the evidence that the police did approach the forensic investigation without regard to cost although they did properly have regard to what is, in effect, a cost benefit analysis.”

155. There are two aspects to the submissions which Mr Bennathan made concerning due diligence or expedition. The first concerns s. 79(2)(c), and so “whether it is likely that the new evidence would have been adduced in the earlier proceedings” (namely Bishop’s 1987 trial) “but for a failure ... to act with due diligence or expedition”. Mr Bennathan’s focus in this respect was on the evidence concerning fibres which was given by Dr Peabody at the trial, as well as on Mr Burt’s paint evidence. The second aspect concerns s. 79(2)(d) and relates to events post-trial, specifically since 2005 when the prosecution have had the ability to make an application under s. 76 of the 2003 Act. In that respect, Mr Bennathan’s submission was that “virtually all the material” now relied upon by the prosecution in support of the present application could have been assembled at or very shortly after April 2005, when s. 76 came into force.
156. We reject both these submissions. First, it is beyond argument that, by the time of the 1987 trial, there had not been the advances in forensic techniques which have subsequently meant that the prosecution are now in a position to put before the Court the DNA evidence and hair evidence which we have described. As Ms Hammond explained, whilst Dr Peabody would have used techniques to try to detect blood and semen as appropriate on the items submitted, his examinations involved looking at items of clothing for visible stains and using screening tests thereafter. There were no analytical tests available to determine the possible donor of DNA.
157. This is, indeed, implicitly acknowledged by the fact that Mr Bennathan’s submission under s. 79(2)(c) was concerned only with the new fibre evidence and paint evidence and did not extend to include the new DNA evidence and the hair evidence. As Mr Altman pointed out, even if the new fibre evidence and paint evidence were to be left out of account for present purposes (on the basis that, since evidence of this nature was adduced at trial, the new evidence ought to have formed part of what was put before the jury), that still leaves “new and compelling” evidence in the shape of the DNA evidence to which we have referred relating to the taping taken from Karen’s left forearm and the further DNA evidence linking Bishop to the Pinto sweatshirt.
158. This is evidence which, on any view, could not have been adduced in 1987 at Bishop’s trial, irrespective of whether it ought to have prompted an earlier application under s. 76 of the 2003 Act. It is also evidence which, it ought not to be overlooked, is accompanied by other evidence which was not available at the time of the 1987 trial and which is now sought to be relied upon by the prosecution, namely the hair evidence matching the Pinto sweatshirt to Bishop and his subsequent convictions for attempted murder, kidnapping and indecent assault.
159. It follows that in relation to this evidence (as opposed to the fibre evidence and paint evidence) there can be no question that it would ever have been adduced at the 1987 trial. It follows, in turn, that there can be no question of this evidence not being adduced because of any “failure ... to act with due diligence or expedition”. There is, in the circumstances, simply no need to inquire into the “due diligence or expedition” issue at all.

160. Even focusing on the fibre evidence and the paint evidence, however, we are unconvinced by the points which Mr Bennathan made. Specifically, Mr Bennathan referred to the fact that Mr Green has himself noted failures on the part of Dr Peabody to make findings which have been made by Mr Green. This, despite the fact, Mr Bennathan pointed out, that it is apparently common ground that the techniques for the recovery of fibres from items using tapes, removal of fibres and subsequent microscopic comparison with reference samples are “largely unchanged” now compared with how they were in 1987.
161. Mr Altman sought to meet this point by referring to the fact that, in her report, Ms Hammond explained that, whilst Dr Peabody’s approach was “entirely consistent with the general approach at that time”, the approach which Mr Green had used when evaluating the fibres evidence was not an approach which was used in 1987 since “[at] that time statisticians were only starting to formulate ideas about the application of a Bayesian approach to evidence evaluation”. After explaining this, Ms Hammond then made the observation that
- “To this extent the full formalized evaluation of all of the fibres evidence could be considered to be new as it could not have been adduced at the trial.”
162. Although we are not entirely persuaded that this is an answer to Mr Bennathan’s point and although also we were somewhat doubtful about Ms Hammond’s associated suggestion (repeated when she gave oral evidence before us) that Dr Peabody may not have been assisted when giving his evidence by the manner in which he was asked questions by counsel (specifically that he was not encouraged to summarise his opinions), we nonetheless consider that there is no real justification for a conclusion on our part that there had been a lack of “due diligence or expedition” in relation to the evidence concerning fibres which Dr Peabody gave. Ms Hammond’s view is that there is no basis for criticism, and we tend to agree. The fact that Dr Peabody, now a retired priest, has previously described being “pinned against a wall” by a police officer after he had left the courtroom, such was the unhappiness with how he had presented his evidence at trial, does not seem to us to warrant a different conclusion.
163. As to the paint evidence given by Mr Burt at trial, Mr Bennathan’s submission centred on Dr Marsh’s reference to the “cursory nature” of Mr Burt’s examinations. Mr Bennathan relied, in particular, on the fact that Dr Marsh had found similar paint traces on both the Pinto sweatshirt and the tapings taken from the clothing of both girls and the neck of Nicola Fellows, Mr Burt had not done so. Indeed, as Mr Bennathan pointed out, Ms Hammond has herself described examination of the tapes and clothing items from the girls for transferred paint as having not been undertaken by Mr Burt.
164. Although we consider that there may be some force in the points which Mr Bennathan made concerning Mr Burt’s work, it seems to us that there is merit in what Ms Hammond had to say when setting out her views on the matter, both in writing and when she was asked in examination-in-chief when giving evidence before us. In relation to the “cursory nature” of the examinations carried out by Mr Burt, she highlighted how Mr Burt’s notes stated “not examined in detail” and suggested that the explanation for this is that “he was taking account of the examinations already

undertaken and, by reference to the notes somebody had previously taken, he didn't need to repeat examinations that had already been done by Dr Peabody”.

165. As to Mr Burt not looking at tapings for flecks of paint, Ms Hammond explained in her report that:

“Tapings were generally considered as unsuitable for paint examinations, as the solvents required to remove paint from the adhesive could disrupt the paint fragments and affect the subsequent analysis. The problem does not exist with modern preparation techniques which do not involve the use of solvents.”

166. In her oral evidence, Ms Hammond put the point as follows when asked by Mr Altman what she had to say about Mr Bennathan's submission:

“That tapes were not the method used to recover paint and, in my view, there is no expectation that Mr Burt would ever have considered or contemplated examining the tapes which had been taken by Dr Peabody, as those tapes had been taken for recovery principally of hairs and fibres; furthermore, that the examination techniques required to remove paint flakes from tapes would have rendered such an examination unviable. Furthermore, within the strategy and the submissions to the police, there was no indication that there was a request for Mr Burt to examine the victim's items for the transfer of paint.”

167. In view of this evidence, we find ourselves unable to conclude that there was in this respect a lack of due diligence or expedition as suggested by Mr Bennathan. It follows that we do not agree with Mr Bennathan's further submission that, in making the present application, the prosecution is engaged in a form of 'expert witness shopping' in that the evidence now relied upon could and should have been adduced at Bishop's previous trial.

168. Secondly, coming on to deal with the suggestion that the prosecution should have made the present application earlier (after April 2005), Mr Bennathan submitted that this case involves “numerous instances” of failures to act with due diligence or expedition. It was in this specific context that Mr Bennathan suggested that “virtually all the material upon which the Prosecution now place reliance could have been assembled at or very shortly after April 2005”.

169. Specifically, Mr Bennathan described there as being “very little extra evidence provided by the work of Dr Louissa Marsh that could not have been obtained by a less cursory examination at the time of the Respondent's trial”. In so doing, he observed that Ms Hammond had not indicated when the more discerning paint analysis techniques not involving the use of solvents came into existence. In circumstances, however, where Ms Hammond's expert evidence is the only such evidence before us, and in circumstances also where Ms Hammond was not cross-examined on this particular point, we are reluctant simply to assume that Mr Bennathan's proposition has been made good.

170. More important, however, the prosecution's application can hardly be said to hinge on the paint evidence or on the fibres evidence or on the hair evidence or (with the probable exception of the DNA evidence) on any other single piece of scientific evidence. As Mr Altman submitted, the evaluative approaches and overarching conclusions relied upon in support of the application depend on consideration of the overall scientific picture.
171. That overall scientific picture was, quite obviously, not available in 2005, if only because the DNA evidence matching Bishop to the taping taken from Karen's left forearm was, on any view, not available until relatively recently given that the DNA-17 and Y-STR techniques are of recent invention.
172. Furthermore, whilst the ultimate decision is for us to make, we can hardly lose sight of the detailed work which has been carried out by Ms Hammond on the issue of "due diligence or expedition". It is her clear assessment that there is "nothing to indicate that any of the scientists failed to work with diligence and expedition in assembling the current suite of scientific evidence". That opinion evidence from an expert in the field is a fact which itself we are entitled to accept.
173. Specifically, Ms Hammond has explained how the history of developments in DNA techniques demonstrates a dramatic increase in the sensitivity of DNA profiling since its introduction into forensic science, meaning that it is now possible to obtain DNA profiles from extremely small amounts of body fluids and also from traces of material which have not been identified as being a particular body fluid or biological material. It is possible to obtain a profile from a flake of blood, which may be invisible to the naked eye, a single flake from a dried semen stain or a single flake of dandruff. It is possible to recover DNA, which is invisible from surfaces such as clothing, tools and adhesive tapes.
174. Ms Hammond has assessed when it might realistically have been possible to assemble a suite of DNA profiling results of comparable scientific value to those presently available. In making this assessment, she has taken into consideration the methods and approach applied at the relevant time, in combination with the availability of DNA profiling techniques, explaining that it is not necessarily always appropriate to apply retrospectively a current state of knowledge to the approach, which might have been taken in the past. Ms Hammond's conclusion is that, although arguably the DNA recovered from the outside front of the Pinto sweatshirt might have been obtained at an earlier date, the key results obtained from the tapings of the inside of the Pinto sweatshirt and from the taping in respect of Karen's left forearm entailed only low amounts of DNA which would have been insufficient for SGM Plus profiling purposes (although Ms Hammond acknowledged that it is possible that useful profiles would have been produced had the examinations been carried out earlier and the same samples taken).
175. Applying our own judgment and adopting the approach described in *MH*, we see no basis for a conclusion that anybody involved in the review of the evidence in this case has acted in a way which is susceptible to criticism. There has been no lack of diligence. Nor has there been any lack of urgency. On the contrary, it is clear that the work performed by the forensic scientists at LGC has been assiduous and painstaking. It would, we are clear, be a most undeserved conclusion were we to conclude, in the

circumstances, that there has been a lack of due diligence or expedition, and we do not do so.

176. We are strengthened in this conclusion by the knowledge that, by virtue of s. 76(5) of the 2003 Act, the prosecution only had ‘one shot’ at making an application. It is understandable, therefore, particularly in a case as sensitive and high profile as the present case, that the prosecution would regard it as crucial to ensure that the evidence in support of the application was not only “new” but as “compelling” as it could be. In these circumstances, for this reason also, we consider that it would be especially harsh were we to decide that there had been a lack of due diligence or expedition. We would observe that, in a very real sense, events in this case, specifically the DNA findings matching Bishop to the taping taken from Karen’s left forearm, have demonstrated that the prosecution were right not to make an application earlier since the evidence now relied upon in support of the application is clearly stronger now than it would have been in 2005 or at any stage before that further DNA evidence was obtained.
177. Accordingly, we conclude that there has been no lack of “due diligence or expedition” as described in ss.79(2)(c) and (d) of the 2003 Act.

Interests of justice generally

178. Lastly, for the purposes of s. 79 of the 2003 Act, in considering “the interests of justice” and recognising that the s. 79(2) factors are not expressed to be exhaustive, we have stood back and had regard to the position more generally both individually and cumulatively. Suffice to say that, having regard to the overall merits of the application, we have no doubt that it is appropriate and a correct application of the 2003 Act to quash Bishop’s acquittals and order his retrial: indeed, in our judgment, the interests of justice point very strongly to that conclusion.

Conclusion

179. It is for all these reasons that, on 12 December 2017, we made an order quashing Bishop’s acquittals and ordering his retrial upon an indictment alleging the murders of Nicola Fellows and Karen Hadaway. Based on the evidence which is now available, with all the safeguards which the law provides, it should be for a jury to decide whether the prosecution have proved to the appropriate standard whether Bishop committed these offences.
180. Although we do not repeat the consequential orders that we made on 12 December 2017, for the sake of completeness, we repeat the order regarding publication which is in these terms:

The order restricting publication which was made by the Court on 12 April 2016 (and which was continued at the hearing of the application) pursuant to s. 82(9)(b) of the 2003 Act is continued and, therefore, there shall be no publication of the facts that the application was made, that it was successful and that this judgment was delivered until after the conclusion of the retrial.

181. We conclude by commending the dignity shown by the families of Nicola and Karen during the course of the hearing of the application. Whatever the merits of this application (and whatever result a retrial might bring) we are very aware that those families have had to endure enormous distress over more than three decades, and that this distress will never leave them.