Neutral Citation Number: [2022] EWCA Crim 832

Case No: 2021/01792/01793/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
MR JUSTICE FRASER
T2020/7114

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2022

Before:

LORD JUSTICE FULFORD
MRS JUSTICE CUTTS
and
MR JUSTICE HENSHAW

- -

Between:

JENNIFER NANCY JOHNSON	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr Christopher Henley QC and Mr Andrew Bishop (instructed by **Bishop and Light Solicitors**) for the **Applicant**

(This was a renewed application for leave and the Crown was unrepresented)

Hearing date: 15 June 2022

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Approved Judgment

Lord Justice Fulford:

There are no reporting restrictions.

1. On 17 May 2021 in the Crown Court at Lewes before Mr Justice Fraser and a jury, the applicant (now aged 56) was convicted of count 1, perverting the course of justice and count 2, making a false statement.

2. On 19 May 2021, the applicant was sentenced by the judge to two concurrent terms of 6 years' imprisonment.

3. Before this court, she renews her application for leave to appeal against conviction and sentence following refusal by the single judge.

4. In November 1987 the applicant's then partner, Russell Bishop, was tried for the murders of two nine-year-old girls, Nicola Fellows and Karen Hadaway who had been killed on 9 October 1986 in a woodland called "Wild Park". The trial became known as the "Babes in the Wood" case. A crucial piece of evidence against Bishop was a blue sweatshirt with the word "Pinto" written on it. It had been found during the search for the girls and was linked to the murderer. As suspicion of Bishop's involvement grew, the police tried to establish if he owned the sweatshirt because it had been found on an obvious route from Wild Park and the flat where he and the applicant lived. If it belonged to Bishop, it was a critical piece of evidence against him.

5. The applicant provided the police with various witness statements during the police investigation. Bishop, by then the key suspect, was arrested on 31 October 1986. Police officers went to the applicant's address on the same day. PC Edwards, who knew the applicant and Bishop, accompanied the two detectives. The applicant was shown the Pinto top and she said words to the effect of "you've brought Russell's top back". The applicant thereafter provided a witness statement stating that she recognised the sweatshirt as being exactly the same as Bishop's. Although she did not examine the garment, she indicated that the one belonging to Bishop had red compound staining on one of the sleeves, something that had happened when he was "rubbing down one of his vehicles". She particularly recalled this substance because it would not wash off. She said a pair of Bishop's jeans also had the same red substance on them. Her description matched the sweatshirt. She could not recall when she last saw it, and she thought it was in their wardrobe; however, she was unable to find it. She had recently thrown some clothes away, but she did not recall that the sweatshirt was amongst those items.

6. On 1 November 1986, the applicant attended the police station and told the police that she was withdrawing the statement she made on 31 October and would not attend court. On 3 December 1986 Bishop was re-arrested and charged with the murders.

7. Whilst in custody awaiting trial, Bishop and the applicant wrote to each other. The letters included discussion about a 15-year-old girl with whom Bishop was sexually involved, and that Bishop would marry the applicant on his release. Bishop, however, did not think he would be at liberty in the near future due to forensic developments in the case and the Pinto sweatshirt.

8. On 2 January 1987 the applicant provided a signed statement to Bishop's solicitors stating that Bishop's behaviour was normal on 9 October 1896; that the police had not shown her any of her written statements and she had never seen the contents of them; that the police kept calling at her house and had taken numerous items of Bishop's clothes; that she could say with absolute certainty that she had never seen Bishop wear a Pinto sweatshirt; and that had he worn one she would have seen it.

9. She wrote a further statement on 13 October 1987, again denying that she had seen Bishop wear the Pinto sweatshirt

10. Bishop stood trial in November 1987. The prosecution indicated that they intended to rely on the applicant as a prosecution witness and the defence thereon served the prosecution with the applicant's withdrawal statement of 13 October 1987. The applicant gave evidence on 20 and 23 November 1987. She was treated as a hostile witness. She testified that she did not recognise the Pinto sweatshirt when shown it by the police; that it did not belong to Bishop, a fact which she claimed she had told the police; that she had signed for a pair of trousers only and had not made a statement about any other item; that whilst her signature was on the statement from 31 October 1986, she said she simply signed where indicated and, accordingly, she did not write the statement relied on by the prosecution; and that she signed it because of the poor way the police officers treated her, assuming she was guilty. Furthermore, she alleged her initials on parts of the statement had been forged.

11. Bishop was acquitted of the offences.

12. On 4 February 1990 offending occurred that resembled the murder of the two victims in the present case. A seven-year-old girl left her home, was grabbed, bundled into the boot of a car and taken to the Devil's Dyke area of Brighton, another wooded area. She was stripped, sexually assaulted and strangled. She was left for dead by her assailant in wooded undergrowth, but fortunately she regained consciousness and survived. She provided vital evidence that identified Bishop and his car. Bishop stood trial for the offence and on 13 December 1990 was convicted of attempted murder, kidnap and indecent assault and sentenced to life imprisonment.

13. In 2003 the double jeopardy rule was abolished and in 2017 advances in scientific analysis and DNA enabled the prosecution to apply to this court for Bishop's acquittals to be quashed on the basis of new and compelling evidence. Bishop was re-tried for the offences in December 2018 and convicted. He was sentenced to life imprisonment with a minimum term of 35 years for each murder. In 2019 the applicant was interviewed by the police about the witness statements and evidence she gave at the trial in 1987. She accepted that the statement of 31 October 1986, identifying the Pinto sweatshirt as Bishop's, was truthful and she admitted she had subsequently lied. In March 2020 she was charged with perverting the course of justice and perjury. Her defence was that she had been acting under duress. It is to be stressed, therefore, that it was not in dispute at the applicant's trial that the witness statements of 2 January and 13 October 1987 were false, as was the oral evidence she gave at Bishop's trial, and that the original statement of 31 October 1986 had been true.

14. By way of relevant background, the applicant turned 21 in November 1986 and worked as a cleaner. Bishop was a few months younger. They were parents to a son who had been born in February 1985, when Bishop was in prison for burglary. There was evidence that the relationship between the two of them was volatile. Bishop had assaulted the applicant, including when she was pregnant. This violence had particularly featured following the commencement by Bishop of an affair with a 15-year-old girl in October 1985, to which we have referred above. On 1 June 1986 the applicant told police officers that she had been assaulted by Bishop and requested alternative housing. There was bruising to her face and neck. A health visitor provided some support for the contention that Bishop was violent to the applicant. There was other evidence confirming Bishop's capacity for violence.

15. At the applicant's trial, the prosecution argued that when she provided the witness statements of January and October 1987 and testified at Bishop's trial, she was not acting under duress. It was suggested that the applicant had not given a credible account and that she lied when it suited her. The applicant suggested she had been subjected to imminent threats of death or serious violence and had acted as she did because of those threats. The applicant maintained that she had been in a coercive and controlling relationship with Bishop and effectively had no will. As a consequence, she was obliged to do as she was told by Bishop and his family.

16. In terms of the detail of her account, she recounted that her parents were strict and she was told she would have to move out of the family home when their first child was born. The local authority provided her with accommodation after the birth of their son, which coincided with a period when Bishop was in prison for burglary. The only support she had, therefore, was from Sylvia Bishop, her partner's mother. Bishop, she said, was violent towards her. He raped her and forced her to have anal sex. A letter he wrote from prison that contained graphic sex references was an example of how he treated her. He strangled and hit her if he failed to get what he wanted. She agreed that Bishop had told her of the significance of the sweatshirt because the person who wore it murdered the girls and she knew Bishop was the person who wore and owned it. She maintained that she did not know Bishop had killed the girls, because she did not think any human being could do such a thing.

17. She suggested that the police were at fault for her lies which would not have been told if they had protected her. She denied playing a part in Bishop's acquittal and indicated "you never get on the wrong side of his family". It was her contention that his family was violent.

18. Sylvia Bishop had taken her to visit Bishop in the prison every day. On one occasion, she visited Bishop's solicitor's office after visiting Bishop in prison. The solicitor gave her a document and told her where to sign. She did not read it – indeed, she was told she did not need to do so – but she knew it was something to do with Bishop. She accepted, however, she may have given the solicitors details to put in the retraction statement. She maintained she did not have a choice when giving evidence at Bishop's trial. Every time she met Bishop in prison he told her she had to change her statement or he would find her and kill her. She said she was naïve, stupid and scared of Bishop. When she arrived at court in 1987 she could see the Bishop family staring at her. She was nervous and frightened and decided to give a false account only once she was in the witness box. She wanted to tell the truth but she was unable to do so

because she had no choice. It is to be noted that there was a large measure of agreement between the defence and prosecution experts during the trial regarding our contemporary understanding of the linked issues of coercive control and domestic abuse.

19. Her case was, therefore, that she acted as she did on account of threats of imminent death or serious violence, in the context of a relationship which was coercive and abusive.

20. Turning to the three grounds of appeal, the applicant argues that:

    a. A fair trial was impossible over 30 years after the relevant events and the proceedings therefore should have been stayed,
    b. The summing up was demonstrably one-sided; it amounted to a direction to convict, and in the event the applicant was denied a fair trial, and
    c. The defence of duress as currently formulated fails adequately to address the circumstances of a violent, coercive and controlling relationship.

21. As to the first ground of appeal, the applicant relied before the trial judge on *R v Maxwell* [2010] UKSC 48, along with a number of other authorities, to suggest that the prosecution should be stayed as an abuse of process, both because it was impossible to give the accused a fair trial and because this step was necessary to protect the integrity of the criminal justice system.

22. It was submitted that the defendant's rights had not been protected or respected: she was not advised either as to her right not to incriminate herself by giving false evidence or of her right to seek independent legal advice. Neither the prosecution nor those defending Bishop advised her in this regard, given both sides had their own interests to serve from her evidence, and in those circumstances the trial judge should have warned and advised her. Instead, she was manipulated by the defence into giving the evidence and she was then trapped by the prosecution. She was, at the time, a vulnerable young mother in an abusive relationship with Bishop. It was contended that Bishop's mother pressured her to change her account; that Bishop's father once accompanied her to the police station for the same purpose; that she was taken by car to visit Bishop in prison regularly by his mother; that Bishop accused her of being responsible for his situation; and that she was taken to see Bishop's dishonest solicitor in London. It is alleged that the prosecution knew prior to calling her that she would disavow her statement of 31 October 1986. We note that this latter assertion is somewhat misleading, given, as we have just set out, the applicant's own account was that she had wanted to tell the truth and decided to lie only once she was in the witness box. However, we accept it was evident that she might renege on the truth when called.

23. The judge ruled that the difficulty with these submissions was that they did not make it unfair to try the applicant; indeed, the majority of the points raised went to the very heart of her defence of duress. There was no basis for concluding that prosecuting the defendant risked damaging the integrity of the criminal justice system, nor was there any unfairness in trying her. The prosecution was of a person who accepted in 2019 that in 1987 she gave false evidence on oath at a murder trial. Whilst the prosecution came a long time after the event, that substantial period should not be viewed in isolation since there were other relevant factors.

First, advances in science enabled the prosecution to demonstrate that the sweatshirt belonged to Bishop and clearly linked him to the murders of the two girls; second, the acquittals had been quashed by the Court of Appeal in 2018; and third, Bishop was convicted of those murders later that year.

24. Notwithstanding the above, when performing the balancing exercise referred to by Lord Steyn in the case of *R v Latif* [1996] 2 Cr App R 92, namely weighing countervailing considerations of policy and justice, the judge determined that that exercise of judgment came down on the side of permitting the prosecution to continue. Whilst it was accepted that the protection afforded to witnesses and vulnerable people is very different now than in 1987, that change did not make it unfair to try the defendant. Indeed, the judge held that the integrity of the criminal justice system would be damaged by upholding the application and staying the prosecution, rather than the converse.

25. In relation to the submission that the delay had made a fair trial impossible, the judge ruled that simply because there had been a substantial delay did not mean that a fair trial was impossible. There were directions on delay that would be given to the jury and this was not a case where the gap in time had had a material adverse impact upon the availability of relevant evidence. By way of example, this was not a case in which important dates or locations, for example, had become unavailable. As the Crown submitted, there was a significant body of contemporary material available, including social services records, and in one sense the defendant would benefit from the delay due to improved understanding of the consequences of domestic violence and coercive control, as compared to 30 years ago. As to the defence submission that there were limitations on the psychiatric evidence, given the reliance on the applicant's account as to her circumstances decades earlier, any difficulties in this regard would be dealt with within the trial process by way of conventional directions on delay.

26. The judge concluded, additionally, that the application had proceeded on an erroneous factual basis, namely that all the ingredients were present for a prosecution of the defendant to have been brought far earlier, *viz.* in the late 1980s or in 1990 after the conviction of Bishop for attempted murder, kidnap and sexual assault of the seven-year-old girl. The judge observed that it was not correct that all the relevant facts that the prosecution relied on were available at the end of 1987. The judge accepted the Crown's submission that it was not until later scientific advances in DNA occurred that it was possible to establish a secure link between the sweatshirt, Bishop and the murders, thereby providing a realistic prospect for a conviction for perjury.

27. The judge additionally set out that a further reason why any prosecution of the defendant prior to the above would have been impeded was that, before 2018, Bishop's acquittals in 1987 would have been presumptive as to whether he had or had not murdered the two girls. Prior to those acquittals being quashed, the defendant would have been able to advance the compelling argument that the verdicts of the jury in 1987 indicated that the sweatshirt did not belong to Bishop. That position changed in 2018. The defendant was interviewed in September 2019 and charged in March 2020. That was not an unreasonable delay. In any

event, adverse impact due to delay could be accommodated within the trial process by suitable directions to the jury.

28. With all of those conclusions we agree without reservation, as did the single judge. The trial judge directed the jury impeccably as to how they were to approach the issue of delay and there was no particular feature of the evidence or the issues in the case, or a combination thereof, that meant a fair trial was impossible. There is no material support for the broad contention by Mr Henley Q.C. on behalf of the applicant that she was at "an impossible disadvantage (occasioned by the delay), not remotely remedied by any judicial decision, intervention, direction or comment". To the contrary, the judge's direction in the Final Directions in Law was a model of its kind, as follows:

> "Delay
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> 29. The events relating to both of these charges took place almost 34 years ago, in 1987. As you have heard, the two little girls were murdered in October 1986, but Bishop was only convicted of this in November 2018. He was originally acquitted in 1987 and obviously the circumstances in which that occurred are at the heart of this case.
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> 30. There is an undoubted passage of time between the events of 1987 and now. This passage of time is bound to have affected the memories of witnesses. Some witnesses have given evidence by reference to statements made by them at the time in 1986 and 1987, and so in those circumstances therefore delay will have lesser impact. A lengthy delay between the time when an incident is said to have occurred and the time when the complaint is made and the matter comes to trial, is something that you should bear in mind when considering whether the Crown has proved its case or not. Necessarily, the longer the delay the harder it may be for someone to defend themselves because memories will have faded and material that might have been of assistance may have been lost or destroyed. If you find that the delay in the case has placed her at a material disadvantage in meeting the case against her, that is something that you should bear in mind in her favour.
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> 31. Someone describing events long ago will be less able to remember exactly when they happened, the order in which they happened, or the details, than they would if events had occurred more recently.
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> 32. You have to judge the issues in this case on the indictment by reference to the Defendant as she was at the time in 1987, and not by reference to her now and/or how she appears now. A great deal can happen in that period of time, and the person you see in the dock in 2021 is not the same as she would have been in 1987, which is the period of time that the indictment covers.

> 33. You have also heard from the Defendant that she was raped by Russell Bishop, and this is something that she first mentioned to the psychiatrists in this case. The Crown rely upon this lapse of time as support for the challenge to its truthfulness. In relation to this, you should consider why she said that she had not referred to this earlier. This is dealt with further at paragraph 41 below. If, having looked at all the circumstances, you conclude that what the Defendant has told you is or may be true then you can take this into account as supporting the evidence that she gave in court. If you are sure that this is not true, then this would undermine the evidence that she gave in court.
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> 34. You should take these matters into account when considering whether the Crown have proved, so that you are sure, that she is guilty in respect of each of the two counts on the indictment.
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> […]
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> 41. The Defendant has told you that she was regularly raped by Russell Bishop, and was subject to sexual violence by him. This is challenged by the Crown, who also rely upon the fact that the first time this is recorded is when she was interviewed by the two psychiatrists in this case in 2021.
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> 42. Experience shows that people react differently to serious sexual assault. There is no one classic response. Some may complain immediately whilst others feel shame and embarrassment, and may not mention it for a very long time, if at all. The fact that someone does not mention it at the first opportunity does not mean that it is a false complaint.
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> 43. This is, as with all matters of fact, something for you to decide, if you think it helps you resolve the issues in the case, taking into account all of the circumstances of the case."

29. The suggestion that the judge in the first trial, Mr Justice Schiemann, should have cautioned the applicant against incriminating herself is unsustainable. Although there was a possibility that she would give evidence supporting Bishop, as we have already rehearsed above, the applicant's own evidence in the present trial was that she did not know what she was going to say until she was in the witness box and she had wanted to tell the truth. In those circumstances, the suggestion that Schiemann J should have cautioned her before she testified is without proper foundation. Indeed, on Mr Henley's formulation every witness in a contested criminal trial would have to be given this warning before giving oral testimony, in case it was later established or suspected that they had lied.

30. Although the applicant has suggested that the trial should have been halted because this step was necessary to protect the integrity of the criminal justice system (one of the two limbs of abuse of process), no substantive submissions have been advanced in this regard.

31. As to the second ground of appeal, namely that the summing up was so one-sided that it amounted to a direction to convict and that Jennifer Johnson was denied a fair trial, it is necessary to consider the examples provided by Mr Henley which are said to support these contentions. It is accepted by the applicant that she gave conflicting descriptions in her evidence as to when Bishop first raped her. As summarised in the Grounds of Appeal (we interpolate to note that we do not have a transcript of the applicant's testimony), in her evidence-in-chief she said this occurred in 1985 when living in bed and breakfast accommodation, whilst in cross-examination she indicated that this was in 1987. It is suggested that the judge placed undue emphasis on this change of evidence on her part. It is necessary to consider exactly what the judge said at this stage of the summing up set, as follows from page 23 H to page 24 D:

> "The defendant in her evidence told you that she was regularly beaten and raped by Russell Bishop. That he forced her to have anal sex with him. That he tried to strangle her and that she did not know how someone should be treated properly until she'd met her late husband later in the 1990s, which is after Russell Bishop's later conviction for the attempted murder of the seven-year-old girl. That account of her relationship with Russell Bishop is challenged by the Crown. The defendant gave evidence over three days you may remember, members of the Jury, and you may feel that even making allowance for the passage of time she gave conflicting accounts on different occasions when she was asked about these matters. Whether you feel that or not is entirely a matter for you, they're matters of evidence as I've explained.
>
> She said at one point that the rapes started after the babes in the wood case and after she'd had Hayley, which was on boxing day '86 as I've explained. If that's right then such behaviour by Russell Bishop didn't start until after the events identified in the two counts in the indictment, because Russell Bishop was in custody from 3 December 1986 onwards. The degree to which you take that into account when you're considering the issues is entirely a matter for you."

32. In submissions criticising the approach of the judge, Mr Henley suggests this was not a fair summary of her evidence and was, instead, "extraordinarily partial", clearly inviting the jury to disregard her claims of rape as being relevant to the defence of duress or the fear she claimed to be in in 1987. By way of emphasis, it is argued the judge's approach was "very damaging". It is suggested that this approach became a pattern as the summing up developed and all the interventions were hostile. In a linked submission it is argued that the sentencing remarks revealed that the judge was biased against the applicant.

33. These criticisms are without foundation. The nature of the relationship between Bishop and the applicant was of fundamental importance in the trial. The prosecution did not accept the applicant's account and it was entirely appropriate for the judge to point out apparent contradictions in the evidence of the applicant, emphasising to the jury that these were factual decisions which were for them to make and not for him. As the respondent observes, the true effect of this change in account on the applicant's credibility is simply not confronted by Mr Henley in the Grounds of Appeal. If, as the applicant accepted in cross-

examination, any suggestion of rape having taken place was only after Bishop's release from prison after the murder trial in October 1987, then his alleged abuse of her formed no part of the relevant circumstances leading to the commission of the offences. It was suggested by the Crown that the applicant's inability to maintain a consistent account as to when she said she had been raped by Bishop significantly undermined her credibility on this issue. It was wholly correct for the judge to remind the jury of this difficulty with her evidence rather than simply ignore it. As to the suggestion that the applicant gave this evidence when she appeared to be tiring, there is no basis for suggesting that the judge did not afford proper breaks in her evidence or that he otherwise did not treat her with sensitivity. It is not suggested that Mr Henley intervened at any stage to suggest the witness was tired or needed greater consideration.

34. We have read the summing up with particular care, given the substantive and essentially generalised criticisms of the judge. In the event, the suggestion that the summation was vitiated by hostile, biased or inappropriate remarks is without any sustainable foundation. Mr Henley sought to address arguments of this kind to the judge, not during breaks in the summing up as it progressed, but compendiously, immediately before the jury retired. He failed then to provide more than slight examples of these suggested objectionable remarks or a failure to achieve appropriate balance. Essentially, it was suggested that the judge could have given greater details on certain issues, for instance that the police had failed adequately to protect the applicant, that Sylvia Bishop had demonstrated aggression to the applicant, that the judge's precis of the letters was inadequate, and that Dr Bartlett did not know the applicant in 1986 and 1987. These submissions were essentially inaccurate, as the judge pointed out at the time, given he had dealt with all of these issues entirely correctly during the summing up, sometimes on more than one occasion. Similarly, on the present application, sweeping allegations are made as to the judge making "negative comments" which have not been substantiated.

35. The single other suggested example provided to this court by Mr Henley relates to when PC Edwards asked the applicant if she thought Russell Bishop could have committed the murders, and he said that she told him she had said to Sylvia Bishop that Bishop could have done it together with Marion Stevenson (with whom Bishop also had a relationship). That was challenged by the applicant. It was also put to the officer that he had upset the defendant and that he had been persistent in questioning her on a difficult topic.

36. On this issue, the judge observed to the jury:

> "Now, as I've said to you, various matters were put to PC Edwards by Mr Henley about the way he pressed the defendant in asking her questions and including following up her answers when he asked her if she thought that Russell Bishop could have done it. You may think members of the jury, it's entirely a matter for you, that it's the duty of a police officer particularly somebody who's investigating or involved in investigating the murders of two children, to ask difficult questions of people and not necessarily to accept the very first answer that they're given by the person to whom they're addressing questions, and at that stage Russell Bishop was a suspect in the murders of those two girls."

37. Of this, Mr Henley complains that it was a partisan intervention which served no purpose in relation to the real issues in the case and it was designed to support or rescue PC Edwards. There then follows in the Grounds of Appeal an extended criticism that the judge, first, undermined the applicant's account of her relationship with Bishop and, second, failed at this stage to emphasise that the applicant had been honest about the Pinto sweatshirt, thereby rendering the summing up unbalanced. With respect to Mr Henley, these submissions are entirely baseless. The questioning by PC Edwards concerned whether at that point in time the applicant believed Bishop was culpable and was not concerned with the extent or the nature of her relationship with Bishop or whether she had been honest about the sweatshirt. Indeed, as regards the latter point, the fundamental underpinnings of the trial, accepted by the prosecution and the defence, were that in her first statement she had told the truth.

38. If counsel allege that a judge has made a series of unjustified or prejudicial remarks during the summing up, it is incumbent on the advocate to give precise details as to when this is said to have occurred. It is unacceptable to make unparticularised criticisms, suggesting that the summation was biased, without citing the examples relied on and explaining why it is contended that each individual passage was unfair.

39. As to certain letters Bishop sent the applicant from prison at Lewes, in the Grounds of Appeal, Mr Henley suggests as follows:

> "There was plenty of evidence of his violence, and there was also the contents of the 1985 prison letters, in which he bragged that *'I always get what I want'*. In particular, in the letter exhibited at J1-580 Bishop wrote *'I am going to come up you so many times you won't have just one baby you [will] have 20. When I fuck you for a long time I do not want you to say that's enough I will not be happy with you if you do, I will rape you one day when I am out and fuck you by fist….'* This important passage from the 1985 Lewes prison letters was not referred to in the summing up. Indeed His Lordship made no reference to any passages from these letters in the summing up."

40. This contention is substantively incorrect. The judge set out, inter alia, at page 31 E to page 32 C of the summing up:

> "Now the letters in relation to Lewes, the ones at tab 12, as I've said they were found by police in a handbag. Russell Bishop had been arrested in January 1985 for burglary. Those letters were sent by him while he was in custody following that arrest.
>
> You may remember that during the reading of the agreed facts which Mr Lloyd did in terms of the letters, he read out many passages from those letters, but he didn't read them all out. Some of them are highly sexual and graphic. Not all the passages were actually read out, but all the letters are in your tabs.
>
> You'll remember that Mr Henley read out certain passages to the defendant when she was giving her evidence to you, and some of the passages in those letters are relied upon by the defence as supporting the claims that Russell Bishop was sexually

violent to the defendant, that he raped her, that he had anal sex with her without her consent and that he would strangle her.

That interpretation of the letters is not accepted by the Crown who point out that in other passages Russell Bishop says to the defendant phrases for example: "Thank you for saying I can fuck your bum", asking her to tell him if his sex letters turned her on and other references where the entries are, the Crown say, consistent as being part of a consensual sexual relationship between Russell Bishop and the defendant.

The Crown also relies upon the fact that the letters were kept and found in a handbag, and as I've said they were seized as part of the enquiries or the investigation into Russell Bishop.

All of the contents of those letters, at all three of the tabs, are evidence in the case and the prosecution and the defence have agreed that the letters should be in the bundle. Both the prosecution and defence have drawn your attention to different parts of the letters. The weight you give them either as a whole or to any part of them is a matter entirely for you.

As with all matters of evidence, what you make of them is completely up to you."

41. In our judgment, far from the judge having failed in his duty to summarise or read out the evidence in this regard, this was a model way of setting out for the jury material which they had in their bundles, reminding them in outline of the rival positions of the prosecution and the defence. This criticism of the judge is unwarranted.

42. It is argued that the judge in the summing up completely failed to engage with the magnitude of this intimidation and manipulation of a prosecution witness, and how terrified and vulnerable these circumstances must have made her feel. This, again, is a wholly unsupported contention. From pages 58 to 63 of the summing up the judge set out a full and balanced summary of the medical evidence. This included the testimony of Dr Bartlett, the applicant's general practitioner, who spoke of her depression and her inability to cope. Additionally, Dr Bartlett indicated the applicant had never told him that Bishop subjected her to systematic rape, or that Bishop was obsessed with anal sex, or that Russell Bishop had had other women sleep with them. The doctor said domestic violence was never brought to his attention. The judge additionally summarised the evidence of the two psychiatrists, Drs Cummings and Thakkar, and within the written directions was the following:

"We both agree on the historical narrative of Ms Johnson experiencing violence at the hands of Russell Bishop. Ms Johnson has a history of anxiety, depression and, potentially, PTSD. She has periodically been on treatment for such. She also has a history of self-harm. Outside of the account of Ms Johnson, it's not possible to determine if these diagnoses were operative at the time of the offence for which she is charged. Though battered women syndrome, learned helplessness and coercive control are potential narratives, outside of the account of Ms Johnson the only issue

> confirmed is violence from Russell Bishop. We believe that there are other potential narratives and invite the jury to consider the wider evidence."

43. It was agreed that it was difficult to assess what a person was like 35 years earlier and this was something the jury would need to have in mind when considering the issue of delay. It follows that in our judgment, this criticism of the judge is undermined by the full summary the judge provided of the evidence, to which we have just referred, and Mr Henley has failed to suggest what else the judge was supposed to have included in the directions, based on the evidence.

44. It is submitted that the judge made an observation to the jury that amounted to directions, first, to convict and, second, that the defence of duress was nonsense. The passage relied on is as follows from page 38 F to page 39 C of the summing up:

> "Jennifer Johnson was called by the prosecution as a witness during the (*original*) trial, and she gave evidence on oath on 20 and 23 November 1987, so that was either side of a weekend. She said to you in her evidence she was told just to answer yes or no by Sylvia Bishop. She also explained to you in her evidence that she didn't know what she was going to do until she went into the witness box, that all his family were in court looking at her, that nobody from her family was there. She said that she was all alone and that, she also said that the police did not protect you in those days. You may wish to consider, members of the jury, and it's entirely a matter for you, whether there's any evidence at all about any consideration or attempts by the defendant regarding potential help she could obtain in the situation that she says she found herself in that time or any evasive action or any escape. Alternatives that you may consider were available but it's entirely a matter for you, are the police, the authorities when she got to the court building or even the judge. The defendant's case is that she was being threatened that she would be killed or seriously injured immediately or almost immediately afterwards.
>
> This was, in 1987, a murder trial. It was actually a double murder trial. You may consider that perhaps so far as the issue of protection is concerned that without the defendant telling anyone of the nature of the threats, or the existence of the threats, who was in a position to help her, it would have been rather difficult to have offered her protection but that is entirely a matter for you. It's an evidential matter and it's something that you will, or you may wish to consider."

45. Once again, the criticism of the judge is without sustainable foundation. This passage from the summing up involved the judge giving a simple rehearsal of one of the critical issues that the jury needed to address when considering the defence of duress. This observation by the judge highlighted the issues they needed to have in mind, applying the Route to Verdict which he had provided to them at an earlier stage for count 1, as follows:

> "5. Did the Defendant do what she did because she genuinely and reasonably believed that if she did not, she or a member of her immediate family would be killed or seriously injured, immediately or

> almost immediately? If you are sure that this was not the case, your verdict will be "Guilty". If you decide this was or may have been the case, then you will go to the question at 6.
>
> 6. Before acting as she did, are you sure that she had an opportunity to escape from or avoid the threats without suffering death or serious injury, which a reasonable person in her situation, and sharing such characteristics of hers as you accept, would have taken? If the answer to this is yes, you are sure, your verdict will be "Guilty". If you are not sure, then you will go to the question at 7.
>
> 7. Would a reasonable person, in her situation, believing what she did and sharing such characteristics of hers as you accept, have done what she did? If you are sure that such a reasonable person would not have done, then your verdict on count 1 will be "Guilty". If you decide that such a reasonable person would or may have done what she did, then your verdict on this count will be "Not Guilty".

46. And for count 2:

> "12. Did the Defendant do what she did because she genuinely and reasonably believed that she or a member of her immediate family would be killed or seriously injured, immediately or almost immediately, if she did not? If you are sure that this was not the case, your verdict will be "Guilty". If you decide this was or may have been the case, then you will go to the question at 13.
>
> 13. Before acting as she did, are you sure that she had an opportunity to escape from or avoid the threats without suffering death or serious injury, which a reasonable person in her situation, and sharing such characteristics of hers as you accept, would have taken? If the answer to this is yes, you are sure, your verdict will be "Guilty". If you are not sure, then you will go to the question at 14.
>
> 14. Would a reasonable person, in her situation, believing what she did and sharing such characteristics of hers as you accept, have done what she did? If you are sure that such a reasonable person would not have done what she did, then your verdict on count 2 will be "Guilty". If you decide that such a reasonable person would or may have done what she did, then your verdict on this count will be "Not Guilty"."

47. The judge, therefore, in this observation reminded the jury of the critical factual question that they needed to address, and it followed a lengthy summary of the applicant's evidence regarding the pressure she had come under, for example from page 36 G to page 37 C of the summing up:

> "The defendant told you she came under pressure from Sylvia Bishop and from Russell Bishop to change her statement. She said in evidence she was taken to the prison five days a week by Sylvia Bishop. She was driven to Her Majesty's prison in Brixton, she was told the whole time she had to change her statement and Sylvia

> Bishop also said to her that she, Sylvia, knew that Russell Bishop could not have done the murders. She said that Russell Bishop constantly told her she had to change her statement and also accused her of putting him in there.
>
> I've already shown you the letters that he was writing to her at about this period of time and the defendant also told you that Russell Bishop told her that the Pinto sweatshirt was linked to the murderer, which is why she had to say it was not his. She said that Russell Bishop threatened to kill her and said he would get her when he got out of prison. She said that she remembered going to Ralph Haeems offices (Bishop's solicitor), she was taken there directly from a prison visit at Brixton.
>
> She said she remembered Hayley being only a few days old, she had to breast feed her. She said she remembered the photos of the Kray twins being on the walls, that Sylvia Bishop was here and that one of Ralph Bishops, I beg your pardon, and that one of Russell Bishop's brothers was there.
>
> She was asked specifically by Ms Morgan about threats. She said they only had to raise their voice. She said Ralph Haeems had been paid to represent Russell Bishop by the News of the World which I know you'll all remember; it was a Sunday tabloid newspaper which is no longer published. She said Ralph Haeems had represented the Kray twins and had their picture on his wall. She said that there was shouting and that Sylvia Bishop and one of Russell Bishop's brother was there."

48. The judge did not direct the jury to convict; to the contrary, he directed them to consider all the evidence and only to convict they were sure the applicant was guilty.

49. The third ground of appeal is extreme in its terms, namely that the defence of duress as currently formulated is not fit to deal with the circumstances of a violent coercive and controlling relationship. No substantive submissions have been advanced in support of this contention, save for the general argument that the defence "fails to take adequate account of the effect of sustained domestic violence, where the victim's autonomy to act is broken, there is the certainty of future violence, and the possibility of escape or protection does not exist". As the respondent observes, the judge properly directed the jury as to the law of duress. The legal directions, moreover, were agreed by the parties in advance as properly reflecting the law. There was no suggestion that the judge should direct the jury differently because of the particular circumstances of this case. We stress, therefore, that the legal framework for duress set out in *R v Hasan* [2005] UKHL 22 was accepted by the prosecution and the defence to be the correct approach for the judge to follow. It was further accepted, consistent with the Court of Appeal's judgment in *R v GAC* [2013] EWCA Crim 1472, that Battered Woman's Syndrome may be a relevant factor to be taken into account when considering whether or not an individual is acting under duress. Contrary to the applicant's assertions, the trial judge properly identified precisely how the jury was to have regard to the applicant's case that she had been in a violent, coercive and controlling

relationship within the legal framework for the defence of duress. The judge set out as follows in the Final Directions on The Law:

> **"Defence of duress**
>
> 25. Duress can potentially, in law, be a defence to each of these two counts. The defence of duress can arise where the duress results from threats.
>
> 26. The Defendant relies upon this defence. She does not deny that she did what she did in 1987. She says that she was driven to do what she did by threats of violence made against her. Because it is for the Crown to prove the Defendant's guilt on the two counts she faces, it is for the Crown to prove that the defence of duress does not apply in this case. It is not for the Defendant to prove that it does apply.
>
> 27. In this case, the defence of duress would mean that the Defendant was forced or compelled to act against her free will by threats such that the criminal law would, if the defence were made out, excuse her responsibility for her actions at the time.
>
> 28. You must first decide – in relation to each count - whether the threats which the Defendant told you about were or may have been made. If you are sure that they were not made, or sure that the Defendant did not reasonably believe them to have been made, then the defence of duress does not arise and your verdict on that count will be "Guilty". However, if you decide that the threats were made, or may have been made, or that the Defendant may have reasonably believed them to have been made, then go on to consider the following questions.
>
> 1. First you must ask whether the Defendant acted as she did because she genuinely and reasonably believed that if she did not do so, she or a member of her immediate family would be killed or seriously injured, either immediately or almost immediately. You must consider this separately in relation to each count. The circumstances are different, and for the first count the evidence is that the statements were made in Russell Bishop's solicitors' offices. For the second count the evidence was given in the Crown Court. If you are sure that she did not genuinely and reasonably believe that she or a member of her immediate family would be killed or seriously injured immediately or almost immediately, then the defence of duress cannot apply to that count and your verdict will be 'Guilty'. However, if you decide that this was or may have been her belief you must go on to consider a further question.
>
> 2. Before acting as she did, did she have an opportunity to escape from/avoid the threats without death or serious injury, which a reasonable person in her situation would have taken but she did not. Such an escape route from her predicament could have been going to the police after the threats were made. Further and specifically in relation to count 2, other

> escape routes could have been telling the police when she actually came to Lewes Crown Court before she was called as a witness; or telling other members of the authorities when she was at court; or telling the judge when she was in the witness box in court. If you are sure that there was a course of action she could have taken to avoid the threat she reasonably believed to exist without having to commit the crime, the defence of duress does not apply and your verdict will be 'Guilty'. However, if you decide there was or may have been no opportunity to escape or avoid the threatened action then go on to the next question.
>
> 3. You must ask whether a reasonable person, in her situation and believing what she did, would have done what she did. By a reasonable person I mean a sober person of reasonable strength of character sharing her characteristics as at the time of the offences. These characteristics are her age and sex, the fact she had two young children, as well as such features of her relationship with Russell Bishop at or prior to 1987 as you decide were or may have been true (such as violence, sexual violence including rape, and any controlling behaviour), and any psychiatric condition that you decide she was or may have been suffering from. The reasonable person you are considering would share these characteristics. If you are sure that such a reasonable person sharing her characteristics would not have done what she did, the defence of duress does not apply, and your verdict will be 'Guilty'. However, if you decide that a reasonable person would or may have done what she did the defence of duress does apply and your verdict will be 'Not Guilty'."

50. As the prosecution contend, it is untenable – for self-evident public policy reasons – to suggest that the defence of duress ought to operate without a clear requirement of immediacy or imminency. It was not argued at trial that this requirement should be removed. It is clear from all of the relevant authorities, including Hasan, that immediacy and the inability to take evasive action is a key aspect of the defence. Otherwise, this would risk becoming an open-ended defence, which is difficult or impossible to disprove. The judge – as are we – was bound by authority and a negligible basis has been provided for departing from it save for the general proposition that if the individual believes he or she had no choice, then the defence of duress "simply does not work".

51. Furthermore, this complaint sits ill with the facts of the present case for a number of reasons. First, the judge summed the case up to the jury, without objection, on the basis that the applicant had said that she had been subjected to threats of death or serious violence that would follow immediately, or almost immediately, after the acts in question, and, as a result, she was entitled to rely on the defence of duress. It was because of those threats that she acted as she did. Accordingly, she was not suggesting that she was only able to advance some other, lesser, or different form of duress that was not catered for in the classic formulation. Second, the applicant asserts that the police did not protect her in 1986/87 or offer her protection, thereby implying she would have accepted assistance. It follows that on her evidence she did not consider she had "no choice" – she would have welcomed and accepted police protection – yet she took no steps to secure that help. Furthermore, as set

out in the agreed facts, there had been police involvement in earlier incidents of violence, and advice had been given to her about injunctions which she failed to take up. She was offered alternative housing. At one stage plans were put in place for her to move to a women's refuge. She declined to take up those offers. Third, right up until the last moment when she was in the witness box in 1987, on her own account she was intending to tell the truth, only changing her mind at the last moment. Even on entering the witness box, she did not consider she was without choice.

52. To summarise, this argument was not raised at trial; it contradicts binding superior appellate authority; and the complaint that if the accused believes he or she had no choice, then the defence of duress "simply does not work", fails to reflect key ingredients of the applicant's own evidence, in that she said she did act because she was subject to threats of death or serious violence that would follow immediately, or almost immediately, after the acts in question (to paraphrase, she was "covered" therefore by the defence), and she recognised that she did have a choice of protection by the authorities, one which they never offered and she never sought.

53. For all these reasons, the grounds of appeal against conviction are unarguable and the application for leave to appeal is refused.

54. Turning to the application for leave to appeal sentence it is suggested the judge failed to give adequate consideration, first, to the coercion and intimidation by Bishop and his family, falling short of duress; second, to the age of the applicant at the time of the offence (she was 21 to 22 years old and had spent a year at special school and left school with no qualifications and had been in a relationship with Bishop from the age of 17 and was abused by him); third, to the delay in prosecuting the case (34 years); fourth, to the applicant's mental disorder as a result of her relationship with Bishop, the abuse she suffered and the realisation of his culpability for the crimes; and fifth, to the steps the applicant has taken to lead a productive life over the past 25 years, including raising four children, being a grandmother to ten and working with disabled children. Finally, it is submitted the sentencing remarks were unreasonable and, in places inaccurate; it is averred they betrayed an unusual level of personal hostility to the applicant. The sentence passed was very close to the maximum on count 2, giving, it is suggested, far too little effect to the mitigating factors.

55. The respondent suggests that the applicant made clear that by the time of the offences alleged in Counts 1 and 2, she knew that Bishop must have been responsible for the murders of the two young girls. She admitted this clearly, if indirectly, by accepting that she knew that the person who wore the Pinto sweatshirt was responsible for the murders and by also accepting that she knew that the person who wore the sweatshirt was Bishop. Her case that "she had no choice" was rejected by the jury. It was entirely open to the judge to sentence her on the basis that she had her own ends to serve by supporting Bishop as she did. As the judge observed, "[...] *the prime motivation for your criminal behaviour was that you simply*

could not face life without him [...] *there were elements of infatuation in your relationship with Bishop*". The judge expressly took into account her background circumstances, including her age, the young children and the incidents of domestic violence. However, based on the medical records, he was entitled to conclude that her mental health issues did not arise until some years later and were linked to other issues in her life.

56. It was not until her interviews in September 2019, once Bishop had been convicted, that she revealed she had lied about the Pinto sweatshirt. The judge afforded little weight to the applicant's suggestions that she had suffered for many years as a result of Bishop's crimes given the applicant's on-going support for him over a long period of time and her failure to admit her lies until well after the convictions of Bishop in 2018.

57. Bishop, to the applicant's knowledge, had committed terrible crimes and she sought to enable him to escape justice by giving false evidence. The judge was entitled to conclude that she remained a strong supporter of his for many years afterwards. The judge was right to observe that her evidence was important as regards Bishop's acquittal given that, if she had provided true evidence in 1987 as to the Pinto sweatshirt belonging to Bishop, this would have substantively increased the chances that he would have been convicted at his first trial. As she accepted in cross-examination, Bishop had told her of the significance of the jumper because the person who had worn it murdered the girls. Her crimes, therefore, struck at the heart of the administration of justice in exceptionally serious circumstances. The judge, notwithstanding the significant mitigation as regards the applicant's life in more recent years, was entitled to reach the conclusion that a substantial custodial sentence was appropriate, indeed was inevitable in this case. He was obliged to reach his own conclusions as to the relevant factual basis for the sentence, consistent with the jury's verdict. He was well within the proper ambit of his discretion when he made a number of factual findings which were highly critical of the applicant. There was nothing inappropriate in what the judge said during the sentencing remarks. We agree with the single judge that the sentence is not arguably manifestly excessive. This application is also refused.