



Neutral Citation Number: [2021] EWCA Crim 265

Case No: 201904615 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES

Saunders J
T20117037

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MRS JUSTICE MAY

And

MRS JUSTICE STACEY

Between :

**CRYSTAL HUNNISETT (formerly known as David
Andrew Hunnisett)**

Appellant

- and -

REGINA

Respondent

David Martin-Sperry (instructed by Ashley Smith and Co. Ltd.) for the Appellant
Duncan Atkinson QC (instructed by CPS Criminal Appeals Unit) for the Respondent

Hearing dates : 26 January 2021

Approved Judgment

Dame Victoria Sharp P.

Introduction

1. The appellant was born a male. For the past five years however, she has identified as female. Accordingly in this judgment we refer to her using female gender pronouns.
2. On 11 May 2012 at the Crown Court at Lewes before Saunders J and a jury, the appellant was convicted of the murder of Peter Bick. She was sentenced to Imprisonment for Life, the period of 18 years (less 493 days spent on remand) being specified as the minimum term under s269(2) Criminal Justice Act 2003. On 5 March 2015, her application for leave to appeal her conviction was refused by the full court: see [2015] EWCA Crim 523.
3. The appellant's conviction has now been referred to this court by the Criminal Cases Review Commission (CCRC) pursuant to s 9(2) of the Criminal Appeal Act 1995 (the 1995 Act), under a reference dated 18 December 2019. As no separate notice of appeal has been filed, the reference is to be treated as the notice of appeal: see Criminal Procedure Rule 39.5.
4. At the appellant's trial in 2012 the issues raised before the jury were diminished responsibility and loss of control. Extensive psychiatric evidence was placed before the jury. Pertinently for present purposes, this included evidence from Professor Jennifer Shaw for the prosecution. Professor Shaw's opinion was that the appellant was not suffering from any abnormality of mind for the purposes of the defence of diminished responsibility. In a report now prepared for and at the request of the CCRC however, Professor Shaw has revised her earlier opinion. She is now of the view that the appellant was suffering from a psychotic illness at the time of Mr Bick's killing and that the defence of diminished responsibility would have been available to her.
5. The CCRC has concluded that there is a real possibility of the court admitting fresh evidence from Professor Shaw and, on the basis of her revised opinion, quashing the appellant's conviction for murder, and substituting for it one of manslaughter on the ground of diminished responsibility: see paragraph 44 of the CCRC's statement of reasons. Were the court to take that course, the CCRC submits that a hospital direction and a limitation direction pursuant to section 45A of the Mental Health Act 2003 would be the most appropriate order for the court to now make.
6. For the reasons that follow we would refuse the application to admit the evidence from Professor Shaw and would dismiss this appeal.

Application for transcripts

7. Before turning to the background facts and the substance of the CCRC's reference we should deal briefly with a matter raised shortly before the hearing before us by David Martin-Sperry on behalf of the appellant. Mr Martin-Sperry has acted on behalf of the appellant before: at her 2012 trial, in 2010 at her appeal against her conviction in 2002 for a different murder, and at her retrial for that earlier murder in 2010. See further, paras 12 to 14 below.

8. In a note submitted to the court two days before this hearing, Mr Martin-Sperry asked the court to give directions and to adjourn the hearing of the reference, on the basis that he wished to consider adding a further ground of appeal. This potential ground arose (so he said) from the manner in which the prosecution presented the case at the 2012 trial. Mr Martin-Sperry explained that he had not yet formulated or submitted any further ground because he wished to consider full transcripts of the prosecution opening and closing, his client's evidence in chief and cross-examination and his own closing, in order to satisfy himself that there was a proper ground to advance. He said he had asked the Registrar to order production of the transcripts last year, but she had declined to do so. He told us that he has since obtained transcripts of much of what he needs through private funding but has not yet had time to consider them in any detail; moreover, he still lacked transcripts of the appellant's examination in chief and cross-examination at trial. He asked us to make an order for the remaining transcripts.
9. We declined to make the order for transcripts which Mr Martin-Sperry sought, or to adjourn the hearing of the reference. The CCRC referred this case over a year ago in December 2019. The Registrar's Office attempted to contact Mr Martin-Sperry throughout 2020 seeking to engage him in considering the reference, and inviting him to file grounds of appeal, to which there was no response other than a request for transcripts. When the Registrar (quite properly) declined this request Mr Martin-Sperry took no further steps until he submitted the note to which we have referred. As no ground of appeal was put before us, nor any application made to add a further ground, there was nothing for us to consider. Whether once he has reviewed the further material, Mr Martin-Sperry considers any further steps may properly be taken on the appellant's behalf remains to be seen. We simply note at this stage that nearly nine years has elapsed since the 2012 trial, and that extensive grounds of appeal against conviction were advanced by the appellant herself in 2014, for which leave was refused by the full court in 2015 in unambiguous terms: see para 22 below.
10. We turn now to the substance of the reference.

Background

11. There is a long background to the case which it is necessary to review, albeit briefly.
12. On 20 June 2002, at the Crown Court at Lewes before Moses J (as he then was) the appellant was tried and convicted of the murder of the Reverend Ronald Glazebrook (RG). Before her 2002 trial the appellant had pleaded guilty to Conspiracy to Prevent a Lawful Burial, an offence she committed with a friend, by cutting up and disposing of RG's body after his death. The appellant was aged 17 at the time of RG's death and 18 upon conviction. She was sentenced to Detention at Her Majesty's Pleasure with a minimum term of 11 years for murder together with a concurrent sentence of 4 years' detention for the conspiracy offence.
13. Eight years later, on 16 March 2010, the Full Court (Hooper LJ, Walker and Nicol JJ) quashed the appellant's conviction for the murder of RG and ordered a retrial (the decision is reported at [2010] EWCA Crim 514). The court found that there had been evidence available to the prosecution and defence before trial regarding paedophile tendencies on the part of RG. This evidence had not formed part of the evidence put before the jury as the appellant had categorically denied having been abused. However, over the years she had spent in custody whilst serving her sentence, the appellant had

come to recognise that RG had sexually abused her whilst she had been living with him and, in particular, that he had done so on the evening he died. In expert evidence before the court on the appeal, this process of gradual acceptance and disclosure of abuse by a young victim was explained as a normal progression. The court concluded that as the circumstances of abuse and the appellant's reaction to it had not been before the jury at trial, the conviction was unsafe, and a re-trial was ordered.

14. On 18 September 2010, following the re-trial, the appellant was acquitted of RG's murder. She was released from custody. On 10 January 2011, within 4 months of her release, she had killed Mr Bick.

The trial for the murder of Mr Bick

15. The circumstances of Mr Bick's killing were not in dispute. In short, on 10 January 2011 the appellant engaged in sexual activity with Mr Bick before tying him to his bed. She then killed him by strangling him and hitting him over the head several times with a hammer. She tied a leather thong around his genitals and then proceeded to clean up the flat, destroying or removing evidence. Later that day she told her sister and a friend what she had done, and they persuaded her to turn herself in. Accordingly, just hours after the killing, the appellant attended at Hastings Police Station to report Mr Bick's death and her part in it. In interview she admitted that she had killed Mr Bick as part of a mission to hunt down paedophiles and prevent them from committing sexual offences against young people. This was also what she said was the motive for the killing at her trial.
16. Although the appellant had told the police that Mr Bick was a paedophile, there was no evidence to substantiate this assertion. The extent to which the appellant was motivated to kill Mr Bick as part of a "mission" against paedophiles, rather than from a confused and repressed homosexuality, was a central issue at her trial. The appellant gave a detailed account in her evidence of her beliefs, arising, so she said, from the abuse she had received at the hands of RG and her experiences of sex offenders whilst she had been in prison for that murder, before her re-trial and acquittal. But scientific evidence at the scene contradicted the appellant's account to the police and to psychiatrists and other mental health professionals to whom she spoke, indicating a level of sexual intimacy more consistent with Mr Bick's report to a friend of a sexual relationship than the appellant's assertions of heterosexuality and entrapment of a paedophile.
17. In support of the defences of diminished responsibility and loss of control, the defence called evidence from Dr Fin Larkin, a forensic psychiatrist in charge of the specialist Personality Disorders unit at Broadmoor Hospital. He prepared a detailed report dated 30 December 2011, based on his interview with the appellant and his extensive review of the many psychiatric and psychological investigations and assessments of her which had taken place subsequent to her arrest for the murder of RG in 2001. Dr Larkin found no evidence of any delusions. At page 71 of his report, he said:

"No delusions uncovered. No delusions of control, passivity, thought interference, reference, persecution, grandiose or nihilistic themes.

Delusions in a medical sense refer to beliefs which arise through a pathological process in an illogical fashion which are "fixed"

and therefore not amenable to persuasion or evidence to the contrary and which are culturally inappropriate for that patient.”

18. Dr Larkin concluded that the appellant was suffering from a schizoid personality disorder when she killed Mr Bick. He considered and dismissed the possibility of other personality disorders but observed that without a period of in-patient assessment, exact diagnosis “*is not easy*”. He described the appellant’s personality disorder as longstanding in nature. His view was that the disorder would have substantially impaired the appellant’s ability to understand the nature of her conduct or to form a rational judgment and that it provided an explanation for her actions in killing Mr Bick.
19. Professor Shaw, a forensic psychiatrist (now Professor of Forensic Psychiatry at the University of Manchester) was instructed on behalf of the prosecution.¹ Like Dr Larkin, she interviewed the appellant and reviewed at length the considerable body of reports and assessments prepared on the appellants by a variety of mental health professionals since 2001. Professor Shaw’s report dated 20 February 2012 set out what the appellant had told her of the ideas and impulses which had led the appellant to kill Mr Bick. Professor Shaw noted that “[t]here was no evidence of psychotic symptoms including hallucinations and delusions.” In Professor Shaw’s opinion there was no evidence of any mental illness. She discussed the possibility of a personality disorder but concluded that the appellant did not meet the diagnostic criteria. Professor Shaw noted the observation of a fellow psychiatrist, Professor Eastman that “*the appellant has a strong tendency towards fantasizing and this makes relying on things he says more difficult.*” She herself concluded that the “*elaborate story*” which the appellant had given her to explain his killing of Mr Bick was untrue. She stated:

“In my view, whilst there is some evidence of [the appellant] retreating into a fantasy world, there is more evidence for [her] instead using [her] vivid imagination to develop lies about various aspects of [her] life.”
20. During the course of Mr Martin-Sperry’s closing speech, the appellant instructed her legal team that she no longer wished to advance the defences of loss of self-control or of diminished responsibility and asked that those defences be withdrawn from the jury.
21. In a summing-up that was conspicuously careful and fair, the judge nonetheless left both defences to the jury as well as self-defence, though neither prosecution nor defence raised self-defence as an issue. The jury were given correct and full legal directions on the defence of diminished responsibility; and an extensive review of the expert evidence (in a passage occupying 20 pages of the transcript) which helpfully identified which parts of that evidence was relevant to the separate questions on diminished responsibility that the jury needed to consider.

¹ In the trial transcript she is incorrectly called Professor Webb.

22. In relation to the appellant's request that diminished responsibility be withdrawn from the jury, the judge said this:

“Now whereas the fact that the defendant says that he did not act in self-defence and the fact that he says he did not lose his self-control is of some relevance, obviously, to your consideration of those two matters, the fact that he says he doesn't have diminished responsibility is neither here nor there. None of us, I suspect, are the best at judging our own mental situation, so I am afraid the fact that he has asked you to be told that has absolutely no relevance to your consideration whatsoever. I think someone said people don't often like their mental condition to be questioned and we all like to think we are always behaving in as sane and proper a way as anybody else, so just ignore what he said about that. That is not meant to be in disrespect to him, it is simply true of all of us...”

The appeal in 2015

23. On 10 June 2014, the appellant, acting in person, sought leave to appeal against her conviction for the murder of Mr Bick. Her handwritten grounds extended to over 105 pages. In refusing leave, Burnett LJ (as he then was) concluded as follows:

“10. The issues before the jury were clear-cut. The summing-up was comprehensive, fair and lacking in legal error. Endless complaints about the way in which the prosecution behaved, the way in which the evidence was deployed, the conduct of expert witnesses and such like, to our minds have no substance. In any event, they do not bear upon the question about the safety of the conviction.”

Application to the CCRC

24. The appellant made an application to the CCRC in 2015. The appellant's responsible clinician at HMP Frankland, where the appellant was then being held, told the CCRC that it was not clear whether the appellant met the criteria for any psychiatric diagnosis and advised that a significant period of assessment in a secure hospital would be necessary for any psychiatric diagnosis to be confirmed. The appellant was jointly seen by clinicians from Broadmoor and Rampton on 8 March 2017 and found not to require admission to high secure care. She was referred again to Broadmoor on 23 May 2017 because of ongoing concerns regarding management of her mental health and risks in prison. It was suggested she might be suitable for admission to Broadmoor, but no bed there was available. In the circumstances, the CCRC considered there was no basis for making a reference and closed the case.
25. In February 2018 the appellant was admitted to Ashworth Hospital. On 31 May 2018 she applied again to the CCRC informing them that she had been moved to a secure hospital and been diagnosed with schizophrenia. The CCRC made preliminary enquiries of Dr Melanie Higgins, the appellant's responsible clinician at Ashworth Hospital. Dr Higgins' working diagnosis was paranoid schizophrenia and she suggested

that the issue of diminished responsibility warranted a more detailed exploration. Amongst other things she said that over the last two years “additional symptoms have come to the fore including instability of her recognised gender, self-harm in the form of self-surgery to remove her testicles and other cuts to parts of her body some of which have been potentially life threatening.”

26. Thereafter the CCRC instructed Professor Shaw to assess the appellant and provide an updated report. The CCRC asked Professor Shaw to address a number of separate questions relating to the appellant’s mental condition at the time she killed Mr Bick.
27. Professor Shaw’s report is dated 16 September 2019. Under section 9, “Opinion and Recommendations”, Professor Shaw sets out the questions posed by the CCRC, and her answers to them. It is apparent from these answers that Professor Shaw now holds a different opinion to that which she held when she gave evidence at the appellant’s 2012 trial. Thus, in her answer to the first of the CCRC’s questions Professor Shaw said this:

“In the light of developments since Miss Hunnisett was sentenced in May 2012, can it be said that she was suffering from an abnormality of mental functioning when she killed Mr Bick?

At the time of the trial in 2012, I was of the view that there was no mental illness....since then, the nature of her beliefs has become clearer. In 2015/16 there was a significant change in her presentation with severe self-harm which led to her transfer to Ashworth Hospital. Since then she has disclosed much more detail about her belief system at the time of the killing of Mr Bick. Having reviewed her twice in the last year and also on reading details of her disclosures to Dr Higgins, it is now my view that she was suffering from an abnormality of mental functioning at the time she killed Mr Bick”

28. Professor Shaw’s current view is that the appellant suffers from a recognised medical condition, most likely “*delusional disorder or possibly schizophrenia*”. She believes that the onset of this condition would have been in the appellant’s mid-teens “*but significantly deteriorating in a stepwise manner from when she was at HMP Gartree and again in 2016*”. Professor Shaw’s report goes on to set out her views on each element of the defence of diminished responsibility, concluding as follows:

“It is now my view that the partial defence of diminished responsibility in respect of the killing of Mr Bick is valid”

And that:

“it has only been since she has been treated with antipsychotics that she has been willing to consider that she may have a mental illness. Indeed, she has only admitted this to me at the very recent interview.”

29. The Professor explained why she had changed her opinion since the trial:

“Miss Hunnisett had told me some of her beliefs at the time of the trial but since then and in particular since she has been in Ashworth, the disclosure of information to Dr Higgins has led me to believe that these ideas are delusional. She only disclosed a fraction of her true beliefs. It was therefore not possible at the time to make a diagnosis of schizophrenia because not enough information had been disclosed. I thought her beliefs about the need to bring sex offenders to justice at the time of her trial were strongly held and the description of her training, belief systems and tattoos unusual but I did not at that time think that her beliefs were delusional. Following her decompensation in prison in 2016, she has been more open about her beliefs and I am now of the view that these are delusional.”

30. In addition to the opinion of Professor Shaw, the CCRC also relies upon the views of Dr Higgins, recorded in an email from her dated 11 November 2019, in which Dr Higgins gives a diagnosis of schizophrenia and expresses her agreement with Professor Shaw’s conclusions. In fact, no separate report from Dr Higgins is appended to the reference; but her views are quoted at length in Professor Shaw’s report.
31. We note the reasons given by Dr Higgins for her recommendation that the appellant be made the subject of a section 45A order under the Mental Health Act (rather than a section 37 or 41 order) which were these. The appellant had not come to the attention of mental health services at all until relatively recently. Many eminent psychiatrists saw her for both trials and none made a mental illness diagnosis. Even whilst on medication her underlying beliefs are unchanged. The appellant disclosed to Professor Shaw that as yet she had not even disclosed the full amount of her beliefs to Dr Higgins. In Dr Higgins’ view the appellant remains an exceptional risk, possibly more so if she were ever successful in pursuing gender reassignment, which Dr Higgins is concerned is an attempt to transfer to female services. Dr Higgins suspects she may believe this will lessen people’s view of her risks. She could not confidently say that all the risks in the appellant’s case can be attributed to her mental illness. The risks to the public are such that a section 45A would better manage these risks over the very lengthy period of time the appellant’s risks are going to need to be managed.

Respondent’s Notice

32. In the absence of any grounds of appeal, or oral submissions from Mr Martin- Sperry to supplement what is said in the reference, we were assisted by written and oral submissions from Mr Duncan Atkinson QC on behalf of the respondent. Mr Atkinson QC relied in particular on a report dated 30 November from Dr Nigel Blackwood, Reader in Forensic Psychiatry at King’s College, London, served (with an updated Respondent’s Notice) in response to the report from Professor Shaw. The respondent sought to have this admitted as fresh evidence in the event that we admitted Professor’s Shaw’s report. We considered both expert reports *de bene esse*.

33. Dr Blackwood’s report comprehensively traverses all the reports and opinions about the appellant prepared by the many mental health professionals over the years; and sets out his own assessment of the appellant, made following a lengthy interview with her at Ashworth Hospital. In Dr Blackwood’s opinion, the diagnosis of schizophrenia advanced by Professor Shaw, and supported in the email from Dr Higgins, is “*misguided*”. On page 2 of his report Professor Blackwood summarises his conclusions as follows:

“5. [The appellant] has a narcissistic personality disorder and a moderate degree of psychopathy, characterised by deceptive interpersonal behaviours, a lack of empathy and remorse. [Sh]e is a profoundly unreliable narrator.

6. The symptoms, signs and course of h[er] disorder are not consistent with a psychotic disorder, whether conceived of as a delusional disorder or paranoid schizophrenia.

7. The personality disorder is a recognised medical condition, but there was no abnormality of mental functioning at the time of the killing of Mr Bick which substantially impaired h[er] ability to understand the nature of h[er] conduct, to form a rational judgment or to exercise self-control. I do not accept that the partial defence of diminished responsibility should have obtained at the time of the 2012 trial”

34. At paras 73 to 79 he explains these conclusions in more detail:

“Disorders are best identified by a coalescence of symptoms, signs and course. In my view the abnormalities which he demonstrates are securely in the domain of personality disorder. I concur with the personality disorder assessment conducted at HMP Frankland. He has a narcissistic personality disorder with moderate levels of psychopathy. His narcissistic personality disorder is characterised by his fantasies of power and ideal love; a rather grandiose sense of his self-importance and special nature; interpersonally exploitative behaviours and a prominent lack of empathy for others.

...His most prominent psychopathic traits consist of deceptive interpersonal behaviours (pathological lying and manipulative behaviours) and deficient affective experience (a shallow affect, a lack of remorse or guilt, callousness and a lack of empathy).

...The abnormalities which he has demonstrated emerge understandably from his disordered personality and help to explain his offending behaviours. He is a man who has had preoccupying fantasies since his teenage years. He enjoys living in a world of fantasy. He enjoys attempting to deceive others with elaborate stories and varied factual accounts. He is a

profoundly unreliable narrator. The killing of Mr Bick may have derived from vengeful fantasies and a mistaken judgment that he was a paedophile, but it may also be simply that Mr Hunnisett derived sadistic pleasure from the killing.

...Schizophrenia is a major mental illness characterised by symptoms from a number of domains. These include reality distortion symptoms (delusions, hallucinations, experiences of passivity and control); disorganisation symptoms (disorganized thinking and behaviour); negative symptoms (constricted, blunted or flat affect, alogia or paucity of speech, avolition anhedonia); depressive mood symptoms, manic mood symptoms; psychomotor symptoms (psychomotor agitation, psychomotor retardation, catatonic symptoms); and cognitive symptoms (particularly deficits in speed of processing, attention/concentration, orientation, judgment, abstraction, verbal or visual learning and working memory).

...Any diagnosis of a psychotic illness which is of relevance to the trial in 2012 fundamentally relies on characterising his 'mission' and alleged preoccupation with paedophiles in 2011 as delusion in nature. Such delusional concerns were not evinced in detailed assessments by Professor Eastman in 2007 (prior to the acquittal) or by clinicians such as Professor Perkins, Dr Noon or Professor Shaw after the murder of Mr Bick in 2011. They did not obtrude on the early months of his relationship with his new partner, Lucy Anderson. I would view these ideas as narcissistic and sadistic fantasies or overvalue ideas, and not as psychotic delusions. Equally, no clinician documented any other symptoms consistent with schizophrenic illness in their detailed assessments at that time.

...There is no convincing evidence of other symptoms deriving from the other symptom domains in the disorder. Mood symptoms have been short lived. Any observed lack of drive at Ashworth (characterised as a negative symptom) may be attributed to the sedating effects of anti-psychotic medication or the effects of prolonged institutionalisation. I am not aware of any cognitive testing conducted to demonstrate any cognitive impairment or decline."

The legal framework

35. Section 2(1)(a) of the 1965 Act as amended requires us to allow the appeal on a reference, if we think that the conviction is unsafe. The court's jurisdiction to receive

fresh evidence is governed by section 23 of the Criminal Appeal Act 1968 (the 1968 Act), the material parts of which provide that:

“(1)For the purposes of an appeal.... under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—”

.....

(c)receive any evidence which was not adduced in the proceedings from which the appeal lies.

(2)The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.”

36. The test to be applied in considering a fresh evidence appeal remains as stated by Lord Bingham in *Pendleton* [2001] UKHL 66; [2002] 1 WLR 72. The Court of Appeal must bear in mind that it is not privy to the jury’s deliberations and must not stray into territory which properly belongs to the jury:

“The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought unsafe.”

37. In *R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498, [2000] 1 Cr App Rep at 147G to 148E, Lord Bingham of Cornhill CJ explained the task of the Court of Appeal when considering an application to receive fresh evidence:

“Under section 23 as it now stands, it is plain that the Court of Appeal has a discretion to receive evidence not adduced in the trial court if the court think it necessary or expedient in the interests of justice to receive it. The Court of Appeal is never subject to a mandatory duty to receive the evidence, but is bound in considering whether to receive the evidence or not to have regard in particular to the specific matters listed in subsection (2). The Court of Appeal is not precluded from receiving fresh evidence if the conditions in subsection (2)(a), (b), (c) and (d) or any of them are not satisfied, but the Court would for obvious reasons be unlikely to receive evidence which did not appear to it to be capable of belief, or which did not appear to it to afford any ground for allowing the appeal, or which would not have been admissible in the trial court. The Court of Appeal would ordinarily be less ready, and in some cases much less ready, to receive evidence which the appellant had failed without reasonable explanation to adduce at the trial, since receipt of such evidence on appeal tends to subvert our system of jury trial by depriving the decision-making tribunal of the opportunity to review and assess the strength of that fresh evidence in the context of the case as a whole, and retrials, although sometimes necessary, are never desirable. On any application to the Court of Appeal to receive fresh evidence under section 23 in an appeal against conviction, the question which the Court of Appeal must always ask itself is this: having regard in particular to the matters listed in subsection (2), does the Court of Appeal think it necessary or expedient in the interests of justice to receive the new evidence? In exercising its statutory discretion to receive or not to receive fresh evidence, the Court of Appeal will be mindful that its discretion is to be exercised in accordance with the statutory provision and so as to achieve, in the infinitely varying circumstances of different cases, the objective for which the discretion has been conferred. The exercise of this discretion cannot be circumscribed in a manner which fails to give effect to the statute or undermines the statutory objective, which is to promote the interests of justice; the Court will bear in mind that the power in section 23 exists to safeguard defendants against the risk and consequences of wrongful conviction.”

38. In *Kai Whitewind* [2005] EWCA Crim 1092 Judge LJ said:

“Where expert evidence has been given and apparently rejected by the jury, it could only be in the rarest of circumstances that the court would permit a repetition, or near repetition of evidence of the same effect by some other expert to provide the basis for a successful appeal. If it were otherwise the trial process would represent no more, or not very much more than what we shall colloquially describe as a ‘dry run’ for one or more of the experts

on the basis that, if the evidence failed to attract the jury at trial, an application could be made for the issue to be revisited in this court. That is not the purpose of the court's jurisdiction to receive evidence on appeal."

Arguments advanced on the reference

39. In its reasons for the reference, the CCRC says (i) that it is necessary and expedient in the interest of justice for the court to admit the fresh evidence of Professor Shaw (which contains and endorses the opinion of Dr Higgins); (ii) that the criteria in section 23(2) of the 1968 Act are met; (iii) that the new evidence calls into question the safety of the appellant's conviction for the murder of Mr Bick; and (iv) that Professor Shaw's expert evidence is capable of belief, bearing in mind that Dr Higgins has been the appellant's responsible clinician in a hospital setting since February 2018 and Professor Shaw's involvement stems from 2011, when she was an expert witness for the prosecution. From Professor Shaw's interviews with the appellant in 2019 and on reading the appellant's disclosures to Dr Higgins, Professor Shaw has changed her earlier opinion that the appellant did not have a mental illness: it is now her view that the appellant was suffering from an abnormality of mental functioning at the time she killed Mr Bick. The CCRC reasons that given Professor Shaw's lengthy involvement in the case, she could not be described as an "expert for hire". Nor could the evidence advanced at trial in any sense be considered as a "dry run" for this appeal. The CCRC accepts that if Professor Shaw's evidence were to be so considered then this would militate against its admission. The CCRC relies on Professor Shaw's opinion that it was only with the passage of time and treatment that the appellant had been more willing to be open about her delusions. It concludes that the evidence could not have been advanced before the jury at trial as it has only more recently become apparent and therefore available.
40. Mr Atkinson QC, on behalf of the Crown, opposes the appeal on three main grounds. First, he submits that extreme caution must be adopted in relation to a diagnosis that relies on the accuracy of the appellant's account, given her tendency to fantasise and lie. He points out that the appellant has been prone to lie for personal advantage in the past and has given a number of inconsistent accounts over the years. Second, he emphasises that Professor Shaw has relied on significant changes in the appellant's presentation from 2015 to 2016, which relates to a development in her mental health since the time of the killing of Mr Bick. Mr Atkinson submits that observations about the appellant's condition after the trial could be of no evidential value in relation to her condition when killing Mr Bick. Third and in any event, he says, the issue of delusional ideation was before the jury at trial, in circumstances where the jury were directed to consider diminished responsibility and to ignore the request by the appellant that she wanted to withdraw that defence.

Discussion

41. Against this background our reasons for declining to admit the further evidence of Professor Shaw and dismissing this appeal are as follows.
42. As Mr Atkinson QC submits, much of the 'fresh' evidence now identified is not new but revisits that which was known about at the time of the appellant's trial; and which

was, moreover, considered and reviewed by a substantial number of psychiatrists and psychologists at that time. What was then known about included further evidence, not limited to psychiatric evidence, that undermined the partial defence of diminished responsibility.

43. Taking the psychiatric evidence first, there was a continuity of psychiatric opinion over a substantial period from very many highly experienced mental health professionals, that the appellant was an unreliable fantasist and did not suffer from a mental illness. In that context, it is to be noted that none of the many experts concerned, even those who identified traits of mental illness, including Dr Larkin, identified the condition of schizophrenia now diagnosed by Professor Shaw. It is unnecessary to recite the detail of that evidence, but it included for example, the evidence of Dr Perkins, a highly experienced psychologist from the high secure psychiatric state, who having obtained a full account from the appellant in 2011, identified no psychotic features and found no evidence of mental illness or severe personality disorder of a nature that could be identified and categorised.
44. It is to be noted that as appears from the summing up, both Dr Larkin and Professor Shaw modified their opinion when they heard the appellant give evidence. In relation to the criteria of ‘Emotional coolness, detachment or flattened affectivity’ for example, Dr Larkin had concluded that this was met but having heard the appellant give evidence said this was “clearly not met”. Professor Shaw became more convinced in court that her assessment was correct “having seen him in court, she found that there was rather more evidence of him showing emotion and less emotional coldness and detachment or flattened affectivity. She said when he was in court he became animated, he became angry.”
45. The apparent basis for Professor Shaw’s new conclusion and diagnosis is what she describes as the appellant’s “delusional ideas” (see paras 28 and 29 above). However, these delusions were described by a number of those who examined the appellant prior to her trial in 2012, including Dr Perkins and Dr Larkin, and indeed Professor Shaw, whose evidence and psychiatric assessments the jury had an opportunity to assess when considering (and ultimately rejecting) the defence of diminished responsibility. Amongst the matters relied on by Professor Shaw and Dr Higgins now for example, in connection with their diagnosis of schizophrenia is the appellant’s explanation for her tattoos. Yet this was explained to Professor Shaw in 2012.
46. Further, both Professor Shaw and Dr Higgins describe significant changes in the appellant’s presentation over the period *since* her conviction. In that context, it is to be noted that the appellant did not come to the attention of mental health services in prison between 2012 and 2015 and only did so, after she had self-harmed, self harm that was directly connected with her gender issues. But developments in the appellant’s mental health *since* the killing of Mr Bick and her trial cannot be relevant to determining the issues raised in this appeal.
47. Moreover, the new diagnosis now advanced is entirely predicated on the accuracy of the appellant’s recent disclosures to Dr Higgins and Professor Shaw, some 7 years or more after the trial, when all clinicians and experts agree that the appellant is not an accurate historian, that she has a pronounced tendency to fantasise and lie and has been a profoundly inconsistent and unreliable narrator throughout. There is no, or no credible, explanation proffered for the appellant’s failure to report significant aspects

of that which is now considered to be important, to a succession of psychiatrists and others over an extended period.

48. We simply note here the apparent similarity between the events in relation to this current appeal (where the appellant challenges her conviction by reference to psychiatric opinion based on material she failed to reveal at the time of her trial and which contradicts the account given by her at the time of that trial) with those that occurred in relation to her appeal in 2010.
49. As already indicated, the defence of diminished responsibility was firmly before the jury. The issue of the appellant's delusional ideation and its effect on her actions was central to the case. The appellant gave a detailed account in her evidence of what she said was her "mission" to punish those whom she believed were paedophiles. Nevertheless, there was a considerable body of material before the jury from which they were entitled to conclude that the appellant's account was unreliable and lacking in credibility. Examples include the careful and methodical destruction after the killing of potentially incriminating evidence such as Mr Bick's mobile phone and computer; the destruction of her own SIM card; the use of Mr Bick's phone after his death to manufacture evidence by creating messages that appeared to involve contact with a 15 year-old boy - activities which the judge described to the jury as the appellant "methodically covering his tracks" and the many different accounts given by the appellant of the cause of Mr Bick's death at various stages: from the police station to her account to Dr Larkin and Professor Shaw and to a Dr Noon whilst she was on remand. Her account at trial differed yet again.
50. The account upon which Professor Shaw now relies to support her opinion that the appellant was suffering from a psychotic illness (delusional disorder/schizophrenia) when she killed Mr Bick, namely the mission to punish paedophiles, was therefore indubitably before the jury. As Dr Blackwood puts it in his report, the nature of the appellant's "mission" against sex offenders and paedophiles "was fully rehearsed in the appellant's evidence at the trial and subject to critical examination. Dr Larkin presented schizoid personality disorder as a mental disorder which developed during late adolescence and extended into adulthood and which underpinned an inability to form a rational judgement...The jury rejected this approach and Mr Hunnisett was convicted of murder."
51. In our opinion, the fresh evidence presented in support of this appeal revisits in all essential respects the same ground as the evidence presented at the appellant's 2012 trial. We are not persuaded either that the account now provided by the appellant and upon which the new diagnosis is apparently based, is credible. It was, as we have said, very significantly undermined by other evidence presented at trial. The new diagnosis is further undermined both by the continuity of earlier psychiatric opinion (including that of Professor Shaw) carefully examined at the 2012 trial and by the extent to which that diagnosis has been based on developments in the appellant's mental health since the trial. We have formed this view without regard to the opinion of Dr Blackwood albeit that we have found his analysis to be compelling.
52. In the circumstances we have concluded that there is no proper basis to admit the fresh evidence or therefore to impugn the safety of the appellant's conviction. It follows that the appeal must be dismissed.