



Neutral Citation Number: [2024] EWCA Crim 103

Case No: 202300637 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
HHJ ARNOLD
T20200686

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2024

Before :

PRESIDENT OF THE KING'S BENCH DIVISION
MRS JUSTICE CHEEMA-GRUBB DBE

and

MR JUSTICE SWIFT

Between :

GRAEME BROOKER

Appellant

- and -

REX

Respondent

Mr M Graffius KC (instructed by **Cheesemans, Solicitors**) for the **Appellant**
Mr G Burrows (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates : 13 December 2023

Approved Judgment

This judgment was handed down remotely at 2pm on Tuesday 13 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Victoria Sharp, P.

Introduction

1. On 1 December 2022, at the Crown Court at Lewes, the appellant, Mr Graeme Brooker, was convicted after a trial of two counts of theft (Counts 1 and 2). He was acquitted of a third count of theft (Count 3). On 13 January 2023 at the same court he was sentenced to three years imprisonment. He appeals against conviction by leave of the single judge, who granted an extension of time of 60 days.
2. The appellant has three adult siblings: Cheryl Brooker (“Ms Brooker”), the appellant’s older sister), Tracey Brooker and Glen Brooker. On all three counts that he faced, the appellant was alleged to have stolen money from Ms Brooker.
3. The appeal is concerned with the fairness of the trial. It is said that there was a clear challenge to Ms Brooker’s allegations by the appellant: in his interviews under caution, in his defence statement and in the evidence he ultimately gave in his own defence at the trial. Notwithstanding, the appellant’s former counsel, Mr Martin-Sperry took a decision at an early stage not to challenge Ms Brooker’s evidence by cross examination, a stance he maintained at trial in the face of a ruling from the judge that he was professionally obliged to do so. It is said in this appeal that Mr Martin Sperry’s professional misconduct and incompetence in this (and other) respects resulted in significant unfairness to the appellant such that it renders his conviction unsafe.

The factual background

4. Ms Brooker had been a senior social worker. Since 2005 however she had suffered from ill health, including epilepsy. Between 2005 and 2012 she had a series of strokes which led to weakness on her left side and significantly reduced mobility as well as hearing loss. Ms Brooker took medical retirement in 2012. She had been prudent and saved for her retirement; she had also received a substantial lump sum from a critical illness policy as well as a pension and disability living allowance.
5. Following her retirement, it was agreed evidence that the appellant had given up work to care for Ms Brooker and assisted her with managing finances, albeit there was a dispute about the degree of access and control he was given to her online banking and whether he had possession of her bank card. After about four years, the appellant returned to work and Ms Brooker reduced the amount that she paid him for looking after her. By the end of 2018, the relationship between the appellant and Ms Brooker had broken down: Ms Brooker wanted Tracey Brooker to move into a bungalow which the appellant had had built for Ms Brooker: the building of it was financed by Ms Brooker, but the bungalow was in the garden of the appellant’s family home, and he did not agree with Tracey’s lifestyle. Ms Brooker broke off relations with the appellant and turned more consistently to her other siblings.
6. The indictment covered a seven-year period between the beginning of January 2013 and the end of December 2019. The thefts alleged had all taken place by March 2019. Count 1 alleged that during the indictment period, the appellant stole money belonging to Ms Brooker by drawing cheques on her Barclays bank account. Count 2 alleged that he stole from her by making online payments from the same account.

Count 3 alleged that over the same period he had stolen money by making ATM withdrawals also from that account.

Ms Brooker's account and the prosecution case

7. The allegations first came to light in March 2019 when a police officer took an account from Ms Brooker in the presence of and with the assistance of her sister Tracey.
8. In July 2020, an ABE interview was conducted with Ms Brooker. It lasted nearly three hours and formed the principal prosecution evidence at trial. Ms Brooker was accompanied by an appropriate adult (unrelated to her) to facilitate communication. Ms Brooker told the police that following her last stroke in 2012 she found numbers, spelling and reading difficult. She could not do maths anymore but had since learned to recognise her numbers up to 50. She had difficulty recognising or retaining larger sums. Her spelling was phonetic and she needed help with shopping, housework and personal care as well as with managing money.
9. Ms Brooker said initially her mother had taken care of these things for her. When her mother died in 2014 her the appellant took over her finances so she did not get into debt. She told the police that the appellant had wanted to look after her following her medical retirement because she had looked after their parents in the past. She said that he arranged for a power of attorney to be signed and he would give her money as she needed it, from her pension and her disability living allowance (it was not suggested by the prosecution that the appellant had ever used or abused the power of attorney). Ms Brooker said she wanted to try and help the appellant and his wife; and some payments were made to them with her knowledge, including money for the appellant's Open University course. But over time they seemed to expect more money from her. There came a stage where they were asking for £30,000. She did not know what to do and it was then that Tracey had found her crying. She and Tracey had looked through the accounts and Ms Brooker then realised quite what sums she had been paying out - payments that had been made, she said, without her knowledge. Ms Brooker said she was paying sums to the appellant for things such as dog-walking and gardening but she did not need either of those services. She also said that the appellant held her bank card to use to withdraw cash, because she couldn't get to the bank herself and it was a weight off her mind that he was safeguarding her and ensuring that she got the money she needed. She believed her sister-in-law, Jen (the appellant's wife) had also made cash withdrawals. The appellant's wife was never interviewed by the police.
10. Ms Brooker said that at the time she retired she knew certain payments were already set up, such as her utility bills which were met by direct debit. When her brother decided to build a bungalow on his property for her to live in, the invoices were sent to him, and he would pay them from her account. There was no evidence before the jury of how those payments, made using the faster payments system with internet banking, had been set up.
11. The total disputed amount transferred to the appellant's account was £74,617, including a single payment of £20,000 to the appellant's young son with the son's name as the reference. There was an issue in the case as to whether these payments had been put in place by the appellant or Ms Brooker herself. Ms Brooker was shown

a number of cheques drawn on her bank account. She explained that the appellant held her chequebook. He wrote the cheques out because she could not write cheques anymore and she would sign them. Sometimes she signed cheques for him to make out later when they were needed. She was asked about a cheque used to pay off the appellant's credit card bill but said she did not remember agreeing to do that. Including the credit card bill, the cheque payments in dispute totalled £13,932.

12. The police obtained Ms Brooker's bank statements and those of the appellant. A number of cash withdrawals, amounting to £84,492, were identified. The withdrawals had been made using cash machines at different locations, some of which were close to Tracey Brooker's address, where Ms Brooker had stayed from time to time. Other withdrawals were made close to the appellant's home. There was no CCTV evidence to show who had made these withdrawals. The cash withdrawals formed the basis of Count 3. At trial, the officer in the case expressed surprise that any charge had been pursued in respect of the cash withdrawals. As we have said, the appellant was acquitted on Count 3.
13. On Counts 1 and 2 the prosecution's case was that the appellant had taken advantage of his sister who had obvious medical issues which made her vulnerable; and that under the guise of helping her manage her financial affairs he had set up payments which she did not authorise and had obtained her signature on cheques which were not for her benefit and which she would not have agreed to sign. By doing so he had used up most of her savings.

The appellant's account

14. On 6 September 2019, so some ten months before the ABE interview, the appellant was interviewed by the police. He said that he had given up work to look after his children and care for Ms Brooker and she had agreed to pay him on a monthly basis to be a stay-at-home dad. When the police pointed out that he received a carer's allowance for her, he described the sums from his sister as gifts rather than payments. The sums she gave him were labelled by her in her bank account as being for "cleaner, gardener, laundry, shopping, loan repayment, dog walker, window cleaners" as well as for G&J Brooker which was his joint account with his wife. The appellant said these were Ms Brooker's choice of descriptions and might have been to do with the way she claimed her benefits. Other direct payments were made over time for such things as his university degree fees which she had agreed to pay, contributions towards holidays they had taken together, to pay off his credit card and for him to buy a new car. He had never had access to Ms Brooker's bank accounts and could not have set up direct debits on her account. She managed all her own bills, set up her own transfers and the only time he helped her write cheques would be at her request because her writing was illegible. He had made some cash withdrawals from the cash point on her behalf because of her limited mobility, but he would always give the card back afterwards. Other relatives including his son and his wife had also done this.
15. In November 2017, the appellant had returned to work, and she had reduced the amount she was paying him monthly to £600. When their mother died he had decided to build a bungalow especially adapted for her to live in, on his own family's property. It had two bedrooms, one for a carer to occupy should that become necessary in due course. Although Ms Brooker had paid for this, having sold her previous home, the appellant had not charged for the land, and he had since paid her

back £250,000. No sums transferred in respect of this building project, which had come from Ms Brooker's NatWest account, were the subject matter of the indictment.

16. The appellant told the police that Ms Brooker had medical issues but was strong willed. She was in control of her bank account, and he did not control it for her. She was lying about him receiving money from her account without her knowledge and consent. He said this was probably because she did not want to reveal to their siblings the extent to which she had given money to him over the years. As well as the criminal investigation there was an ongoing civil dispute about the bungalow. He was content for the police to look into all his correspondence and the messages between him and his sister on all of these matters. He provided some documentary material including copy emails written by his sister which referred to some of the monthly sums for gardening and dog walking, as demonstrating her knowledge of the payments.
17. There was, accordingly, a stark issue between the prosecution and defence as to whether, as the prosecution alleged, the appellant had taken effective control of all Ms Brooker's financial affairs and abused his position to steal from her, or, as he claimed, she managed all her own bills and was fully aware of and in control of all payments made from her account by whatever means, even if he sometimes wrote out cheques for her to sign and took out money from cashpoints at her request.

The pre-trial proceedings

18. The appellant had the benefit of a representation order held by Cheesemans Solicitors. Mr Martin-Sperry was instructed by Cheesemans by about September 2021. Mr Martin-Sperry was called in 1971 and has been in practise at the Bar for more than 50 years.
19. On 10th December 2020, the appellant's case was sent to the Crown Court. On 7 January 2021, he appeared for a pre-trial preparation hearing at which he entered not guilty pleas.
20. On 13 January 2021, the prosecution made an application under section 16 Youth Justice and Criminal Evidence Act 1999, for a special measures direction for Ms Brooker: for her ABE interview to stand as her evidence in chief and for cross-examination to take place via a video link.
21. The basis of the application was Ms Brooker's health difficulties. She takes medication for epilepsy, Crohn's disease, high blood pressure, anaemia, depression and to prevent further strokes. Her GP had provided a statement to the prosecution on 5 October 2020, in which he summarised her history of strokes and described her as having ongoing anxiety and depression. He also said she suffered from "dissociative identity disorder" a condition which manifested itself when she was particularly stressed. Having known her for many years however, he expressed the opinion that she was alert and orientated, had a good memory for short- and long-term issues, the capacity to understand the long-term implications of giving away her life savings and she would remember authorising payments and transfers.
22. The reasons why the special measures sought were likely to improve the quality of Ms Brooker's evidence were expressed in these terms:

“The witness / victim has suffered a series of strokes that have resulted in certain physical and cognitive impairments. Walking is difficult and laborious for her. Her General Practitioner also states that stress can cause her to manifest dissociative and identity disorder. Cheryl is intelligent but can become confused when fatigued.

The witness / victim has a dissociative identity disorder used to be called "multiple personality disorder". An episode could result in gaps in the witness' memory which would defeat the point of bringing her as a witness, and an episode could result in the witness acting completely contrary to her normal behaviour which would provide a greatly misleading impression on the judge and jury.”

23. On 1 February 2021, the prosecution's special measures application was granted. On 4 March 2021, following discussion with Ms Brooker, the prosecution made a second special measures application on the basis of fear and distress as well as disability. It also applied pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1998 for pre-recorded cross-examination to take place. In this respect the application stated:

“Section 28 has been requested by witness care alongside the evidence in chief already approved. Pre-recorded cross examination will help achieve best evidence for Cheryl because her disabilities may impact the detail and quality of evidence she can give in an open court room with the knowledge the Defendant will be there. ”

24. The second application was granted. On 22 April 2021, the Court made the standard section 28 directions required by the criminal procedure rules (Crim. PD 6.3): cross-examination questions to be submitted by defence counsel by 10 May 2021; a ground rules hearing to take place on 17 May 2021 and the cross examination to be conducted by defence counsel on 27 May 2021 with the appellant to attend. The court directed that the trial was to be listed for 29 November 2021, with a time estimate of 4 days.
25. On 4 April 2021, the defence statement was served. Consistent with the appellant's account in interview, most of Ms Brooker's evidence was denied. The defence case was that the appellant did not have access to her online banking; she would write her own cheques although he sometimes wrote them out for her; she set up online payments herself and he only withdrew cash for her when she gave him her card which he would return to her afterwards. The appellant asserted that although she had agreed to pay for a variety of things for him and his family, she arranged those herself, and she was in control of her financial affairs. The defence statement also included a table of ATM cash withdrawals which the appellant said could not have been made by him. Finally, the appellant invited the prosecution to consider whether Ms Brooker's testimony was reliable in light of what was described as “a diagnosis” of dissociative identity disorder.

26. Ms Brooker was a fully bound witness at trial. Few, if any of the numerous case management directions made by the Court had been complied with. The directions referred to in para 24 above were no exception. No questions for cross examination were submitted within the timetable laid down (indeed none were ever submitted). The hearing on 17 May 2021 was listed for a mention only. An adjourned ground rules hearing was listed for the 13 September 2021.
27. On 10 September 2021, the appellant's solicitor, Mr Barry Cheeseman, sent an email to the court. This said:
- “[W]e have advised David Martin-Sperry - trial counsel- of the position last week. He takes the view that he will not be cross examining the complainant due to her fragile medical condition. However, we have not had that confirmed in an advice yet. We have requested that he get back to us by 4:00 PM latest today so we may confirm the position in writing to yourselves and the CPS.”
28. Mr Martin-Sperry telephoned the court the same day. He told an administrative officer that he had been instructed recently. A note was made of what he said: “it is not appropriate to cross examine the witness as she is very fragile and has had two strokes already and he will propose that her statement is read instead but will not cross examine the witness under no circumstances.” The Resident Judge ordered that the case be listed for mention only, rather than for the ground rules hearing which had been due to take place.
29. Mr Martin-Sperry then served on the prosecution a note he had prepared, dated 11 September 2021. In the note (the first note) he urged the police to review the case: he said that in view of the witness's medical history he was reluctant to cross examine her at all, even to suggest simply that she was wrong in what she said, if that ran the slightest risk of potentially triggering an adverse reaction in her health. He provided a copy of research he had carried out on dissociative identity disorder and said he believed that because of her mental state Ms Brooker may “in her own mind have adopted as factually correct what from her would be essentially hearsay material, being unable to distinguish between what she has worked out first hand for herself and what she may have been told by [other] siblings.” He concluded:

“That said, at any trial that takes place the defence proposal would be for the Complainant's statement be read, but subject to an agreed resume/explanation of her various medical conditions, together with an opportunity for the defence to explain why it is undesirable that she be subjected to any cross-examination arising out of that statement. It may be that this would be an appropriate case for the Defence briefly to ‘set out its stall’ to the jury before any evidence in the case is called. I can in any event confirm that for my part, I will not be cross-examining Cheryl, allowing the s 28 hearing date now to be vacated.”

30. The proposed date for the section 28 cross examination was then vacated. The prosecution obtained a statement from Ms Brooker dated 26 September 2021 to deal with the question of dissociative identity disorder. She explained that during stressful or traumatic times in her work as a social worker she would, “switch off the part of me that felt emotions and just be the other professional me until the situation was dealt with.” She had been told by a therapist (since deceased) that what she experienced was dissociation, a normal reaction to trauma, albeit with a risk that it could develop into dissociative disorder. On the therapist's recommendation she had spoken to her GP, but the GP could not find anyone to refer her to. She said, “I do have some difficulties with my short term memory that are due to the stroke, I don't have blank spots in my long term memory, I haven't had any hallucinations, and the only person in control of me is me.” In a further report dated 28 September 2021, her GP for his part, confirmed that Ms Brooker had told him in 2010 that a private psychologist had diagnosed her with dissociative identity disorder which was only an issue under severe stress or when she was very ill. He was unable to find a specialist to see her, but in treating her for over 22 years he had observed no variation in her personality, including at times when she was unwell and when he had to examine her in circumstances that caused her distress.
31. On 8 October 2021, a further case management hearing took place attended by Mr Martin-Sperry. Amongst the case management directions that had still not been complied with, were the collation by the defence of any suggested edits to the ABE interview. Mr Martin-Sperry maintained his stance regarding cross examination and the prosecution indicated that the case would be reviewed.
32. On 29 November 2021, there was a further case management hearing attended by Mr Martin-Sperry. The prosecution said it intended to proceed. Mr Martin-Sperry sought disclosure of Ms Brooker's medical records so an expert's report could be commissioned. Further and extensive case management directions were made, including for the disclosure of Ms Brooker's medical records.
33. On 19 January 2022, a further pre-trial review took place. A different counsel was in attendance for the defence. The prosecution said on this occasion that they had complied with the orders made and were ready to proceed. The case remained in the warned list for March.

The hearing before Recorder Roques

34. On 2 March 2022, the case was listed for trial before Mr Recorder Roques (now HHJ Roques). The appellant was present in court. We commend Mr Recorder Roques' approach to the case as it was presented to him. The parties were still not ready for trial. The prosecution had not disclosed Ms Brooker's medical records and no edits for the ABE interview had been proposed by the defence.
35. Mr Martin-Sperry produced a hard copy bundle of documents (many of which were eventually uploaded to the Crown Court Digital Case System (the DCS) and relied on at trial). The Recorder noted that very few of the previous directions had been complied with, either by the prosecution or the defence. The defence position was still that Ms Brooker could not be cross examined. Mr Martin-Sperry reiterated his request for the entirety of the witness's medical records, maintaining this was the barrier to serving ABE edits, instructing a defence expert to report and making any other kind

of progress in the case. He also suggested that “false memory syndrome” may be an area of expert evidence he would seek to explore. Mr Recorder Roques deprecated the failure of both sides to list the case for non-compliance or to mention the lack of trial readiness at the pre-trial review held in January 2022.

36. Mr Recorder Roques summarised the situation concisely:

“..the Defence decided not to cross examine the witness at all, notwithstanding the fact that her evidence is challenged almost in its entirety. The reason for their having taken this stance is that Defence counsel unilaterally decided that to cross examine the witnesses would inevitably cause her stress and this may in turn have an adverse impact on her health..... There is no medical evidence in the hands of either party to indicate this is likely and the Crown take the view the complainant is both competent and more than fit enough to give evidence. As a result of the above the complainant has not been warned to attend and the Crown take the view that if she is to be called they will revert back to seeking a s28 timetable.”

37. The Recorder observed that whether a witness is medically fit to be cross examined is a matter for the court to decide based on expert evidence and the availability of appropriate special measures, not for defence counsel. He noted that defence counsel had indicated he may wish to consult with the Bar Council and the Recorder had warned him that the court should be notified as a matter of urgency if counsel took the view that he should withdraw.

38. The orders made by the Recorder included:

“10. Today’s fixture broken.

11. Whether the Complainant is medically fit to be cross examined is a matter for the court to decide based upon expert evidence and the availability of appropriate special measures, not for defence counsel.

NB- Defence counsel (Mr Martin Sperry) indicates he may wish to consult with the bar counsel ethics line. Counsel informed that it is a matter entirely for him but the court are to be notified as a matter of urgency if counsel takes the view he should withdraw. Defence agree that no such conversation will be able to take place until the experts have provided reports on the Complainant’s health (see orders below).

12. Defence to upload a written list of outstanding disclosure requests with justification as to why items should be disclosed by 16th March 22. This document need not include medical records which are dealt with specifically below but should identify which bank account statements are sought and why.

13. Prosecution Jury Bundle to be uploaded in digital form by 16th March 22 (hard copy given to defence today).

14. Prosecution to serve the Complainant's medical records on the Defence by 23rd March 22. These records are to include (unredacted) information that could impact her current state of health including any history of strokes, TIAs or epilepsy as well as entries about DID.

15. Prosecution to serve an expert report in relation to whether the Complainant is suffering from DID and if so, what impact it has on her by 11th May 22.

16. Prosecution to serve any intermediary report (if relied upon) by 11th May 22.

17. Addendum Defence Statement to be served by 22nd June 22 outlining what issues the Defence will ask the jury to consider as potential explanations for the Complainant's assertion that the Defendant has defrauded her.

18. Any Defence expert to be relied upon by 22nd June. This is to include: any expert as to DID, any expert in relation to the Complainant's health more generally and her ability to give evidence specifically, any expert in relation to False Memory Syndrome.

It is made clear that this defence will not be left to the jury absent expert evidence.

19. Defence to supply ABE edits to Crown by 22nd June 22

20. Defence Jury Bundle to be uploaded in digital form by 22nd June 22.

21. Defence to notify the court in writing whether they seek to cross examine the Complainant and if not, what the legal basis for that decision is, by 22nd June 22.

22. PTR fixed for 24th June with a time estimate of an hour. Trial counsel to attend (both confirm today they are available)
....

24. Trial fixed for 21st November 22 with a current time estimate of 7 days. This is on the basis that the Complainant will need to be called (whether via s28 or over a video link) and experts will be required on both sides.

25. Either party is to notify the court as a matter of urgency if the orders above are not complied with...

39. On 16 March 2022, Mr Martin-Sperry uploaded a further note to the DCS (the second note). He referred to the first note of 11 September 2021 and said that the appellant's solicitors had written to the prosecution on 4 November 2021 drawing attention to it. He continued:

“The issue I was concerned about was not the complainant's diagnosed DID [dissociative identity disorder] which is not in any sense a life threatening condition, but rather her history of suffering strokes: it is well established that strokes are in some instances capable of being stress induced, where such stress leads to an increase in blood pressure, the stroke then being occasioned by an interruption to the flow of blood to the brain. It is for this reason that the defence required the totality of her medical records to be disclosed, so that relevant documents could be seen by experts in these two fields - an expert in strokes to deal with the one condition, and a psychologist familiar with the dissociative identity disorder to deal with the other. It is not, in the first instance at least, anticipated that reports from either expert would require any further investigation to be conducted in person with the complainant herself.

The purpose of the former will be to quantify the risk, if such a risk exists, of a further 'stroke episode' being provoked by the very fact of the complainant being required to give her evidence-in whatever circumstances that may take place- and having to be cross examined about her account. Her evidence would of necessity be centred round a detailed examination as to whether the account she has given- and the surrounding circumstances of how she came to give it- is in any sense reliable. This might be expected, however conducted, to place her under some considerable stress: whether that can be conducted without occasioning any additional risk to her health will, with respect to the court, be a matter for medical and not legal determination.”

40. In this second note, Mr Martin-Sperry went on to make further requests for disclosure of Ms Brooker's full financial position, including records of every bank account in her name, together with copies of each and every cheque signed by her” which he said would demonstrate that she was largely in control of her own finances and would be inconsistent with the prosecution's analysis of the financial and personal relationship between the appellant and his sister.
41. On 5 May 2022, the prosecution disclosed Ms Brooker's medical records.
42. On 24 June 2022, HHJ Arnold conducted a further pre-trial review attended by Mr Martin-Sperry. Mr Martin-Sperry maintained his refusal to cross examine Ms Brooker. The judge adjourned the case for 14 days directing that a letter from the Chief Crown Prosecutor detailing the failures on behalf of the Crown should be filed by 4 July, accompanied by a full timetable through to the trial date.

43. On 1 July 2022, the appellant wrote to the Crown Prosecution Service by email asking for a review to be undertaken of the decision to prosecute him. He referred to the documentary material he had provided at interview and gave some specific details of cash point withdrawals which he said could not have been made by him because of their location at times when he was elsewhere. He expressed his frustration with the police and said:

“I have no previous experience of the legal system and have been shocked by the lack of interest in actually looking at the evidence and the amount of public money and court time that has already been wasted in this case....I am assured by both my solicitor and barrister that this is not unusual and that when the case finally gets to court the prosecution will not be successful, but as an outsider to the legal system it amazes me that the case has to run its course even though it does not pass the initial evidential stage.”

44. On 4 August 2022, the prosecution served an expert report from Dr Roderick Ley, a consultant forensic psychiatrist. Dr Ley explained the distinction between dissociation, a perfectly normal process which may happen during a traumatic incident so that a person dissociates from the overwhelming event to escape fear pain or horror, and who may thereafter find it difficult to remember the details of the experience, and dissociative identity disorder, previously referred to as multiple personality disorder.
45. Dr Ley expressed the firm conclusion that Ms Brooker did not suffer from dissociative identity disorder. He noted she had never been formally diagnosed with any mental health disorder despite having presented to health care professionals in the past with depressed mood, anxiety and emotional problems which she related to the impact of her work as a social worker. Nor could Dr Ley find any compelling evidence that she suffered from dissociative amnesia over the period of the indictment. Further, whilst recognising this was ultimately a matter for the jury, he expressed the view that her history of mental health problems would not alone render her testimony unreliable. The most likely diagnosis was a recurrent depressive disorder. He did note that she had problems with word finding, reading and an inability to process numbers and perform calculations.
46. The prosecution subsequently obtained and served the report of an intermediary which identified a number of communication issues. The intermediary also assessed Ms Brooker as having significant problems with numbers and money, particularly with zeros. The intermediary described well known strategies, familiar to every Crown Court and defence advocate, which would enable the witness to give her best evidence.
47. On 13 October 2022, in light of these reports, the prosecution made a third special measures application. This was for Ms Brooker to give her evidence at the trial with an intermediary, and through a live link from a police station where her mobility needs could be accommodated. On 7 November 2022, that application was granted.

48. On 9 November 2022, the appellant sent an email to Mr Martin-Sperry. Privilege having been waived we have seen it. The appellant endorsed Mr Martin-Sperry's decision not to cross-examine Ms Brooker. In that email, the appellant said:

“[M]y counsel Mr David Martin-Sperry has repeatedly made clear to the court his intention not to cross examine Ms Cheryl Brooker if there is a risk of it having a negative impact on her health and I fully endorse his decision to leave the courtroom should Ms Cheryl Brooker be asked to give evidence in any format.”

49. On 10 November 2022, Mr Martin-Sperry made an entry on the DCS which said that if the prosecution insisted on calling Ms Brooker, he had his client's full support to leave court while that happened. By then, the defence were in possession of Ms Brooker's medical records, the expert report of Dr Ley and the report of the intermediary. Mr Martin-Sperry did not then or subsequently, provide any legal basis for his refusal to cross examine Ms Brooker. He reiterated his suggestion that Ms Brooker's evidence should be put before the jury in writing and that evidence would be called by the defence to contradict it. On 17 November 2022, the defence uploaded to the DCS a number of documents. Some were inadmissible: others were introduced into evidence during the defence case. A further pre-trial review took place the week before the trial.

The trial

50. The trial began on 21 November 2022. The jury was not sworn on the first day which was wholly taken up by legal argument, focusing, yet again, on the cross examination issue. We have the advantage of full transcripts.
51. Mr Burrows who appeared for the Crown, as he does in this appeal, confirmed to the court that the case had been reviewed in light of the documents submitted on 17 November 2022 and his instructions were to proceed.
52. Mr Burrows summarised the position with regard to Ms Brooker. In support of the submission that there was no bar to her cross examination using appropriate methods, he relied on the passage of time since her last stroke in 2012, the report of Dr Ley and the use of the intermediary. He submitted that if the defence case was not put in cross examination then then the defendant should be warned that an adverse inference would be drawn viz. that if in due course criticism was made of Ms Brooker's reliability and truthfulness, the jury would be directed that she had not been given an opportunity to answer those points.
53. Further, Mr Burrows submitted the defence approach was a deliberate one to avoid putting the case to Ms Brooker and allowing her to answer it as she had done in her ABE interview. The core of the prosecution case was that Ms Brooker had been paying the defendant about £1,000 a month over and above what she gave him for caring for her and those payments were described on her account as being for such services as gardening and dog-walking but she had not authorised them. He said whatever the family history, these matters called for an explanation from the defendant. Ms Brooker should have an opportunity to answer the defendant's

explanation that the defence was going to give the jury. This was an obligation defence counsel had which he should not be allowed to side-step.

54. In his response, Mr Martin-Sperry said he had taken a personal and professional decision for the following reasons:

“[T]he defendant has a decade of experience with this particular person. She has had numerous transient ischemic attacks, TIAs, which are mini strokes. They have an effect on her, which is she then comes back to normal, but slightly less normal than before she had that particular one. She's had numerous of those. She has had a number of strokes and her medical history of strokes I don't think has been disclosed to the defence, but the defence knows precisely because he's been living with her and assisting her for quite some time. He knows what is liable to happen. In those circumstances I have taken advice. I am not prepared, and I've put down my marker very clearly.”

55. He said that if he were to be criticised, he would withdraw from the case. He said that if it was to be suggested that the defence were taking advantage of Ms Brooker by not cross examining her, then he “would not stay on board in the case” because it was his decision. He said he had had a number of conferences with the defendant (i.e. the appellant) and the defendant's wife and he had no intention of subjecting Ms Brooker to further medical examination or cross examination – implying thereby that his own assessment of the purported risk to Ms Brooker's health was based on what he had been told by the appellant. In the absence of any evidence from the defence on the issue, Mr Martin-Sperry nonetheless revisited the reference to dissociative identity order in the initial statement from Ms Brooker's GP. He submitted that the prosecution was withholding evidence. When these submissions did not find favour with the judge, Mr Martin-Sperry said he intended to absent himself from the courtroom while Ms Brooker's evidence was adduced.
56. The judge did not give a formal ruling. Her conclusion however was that whether a witness is able to give evidence and be cross examined is a matter for the court. The judge said Ms Brooker was fit and available for cross examination with an intermediary using a video link and whatever the defendant might think, there was no (evidential) support for a fear of risk to her health if questioned. Mr Martin-Sperry said he would consider withdrawing from the case.
57. The judge rose for a short period and then provided counsel with the draft of the material part of a written direction she proposed to give to the jury in the event that Mr Martin-Sperry maintained his stance. This said: “you may conclude that there is no sensible explanation for Cheryl Brooker not having been afforded the opportunity to answer questions.”
58. In further submissions that afternoon, Mr Martin-Sperry criticised the draft. He maintained that the appellant should not be held responsible by the jury when counsel had taken what he described as “a personal and professional” decision not to cross-examine Mr Brooker. He said he would ask the defendant himself to describe the

strokes he knew her to have suffered. The judge pointed out that the defendant was not a medical professional and that he had agreed with his counsel's decision. It followed that he knew the consequences of it. There then followed these exchanges:

“Mr Martin-Sperry: He hasn't agreed with it. I have simply told him, that is what I'm going to do.”

Judge Arnold: Well, I thought you'd indicated quite clearly this morning that he agreed with it.

Mr Martin-Sperry: Well, yes, but it's not something – it's not something I have negotiated with him. I have simply told him, this is what I am going to do, and if he doesn't agree with it, he can withdraw instructions from me.... And he has not chosen to withdraw instructions.

Judge Arnold: well then, he agrees with it, I would imagine.

Mr Martin-Sperry: well, he respects it. I think there is a difference in language here. He respects the decision that I have taken. I have no doubt that the decision that I have taken is correct. If I thought it wasn't correct, I would review it... and I have been in touch with the Bar Council a year and a half ago... on exactly this issue.

59. In due course the judge spelled out her understanding of the defendant's position.

“Judge Arnold: I hear you say that it's your decision, [I] respect that decision and the reasons you make it, but the defendant has a choice. You say he hasn't agreed, but you've made it plain to him that that course of action being taken by you, he could continue to give you his instructions or not, and he's decided to continue to give his instructions. So one assumes, therefore that he's happy with your decision and he has to bear the consequences of it, and one of those consequences, of course, it leaves untested the account before the jury. So far as the prosecution are concerned that may weigh against them. But, equally, the jury may conclude that, as I've indicated in the direction... there may be an alternative explanation.”

Again, a little later,

“Judge Arnold: ...This defendant has chosen to continue obviously instructing you and on that basis he has to stand by the consequences of that decision... I am not saying it's the defendant's fault. It's the defendant's conscious decision to continue to instruct a lawyer knowing what the likely consequences might be from the decision taken not to cross examine her.”

60. Mr Martin Sperry repeated that the reason he had made the decision he had was because of what the defendant knew from his experience with his sister, and he had taken it from the defendant at face value.
61. Mr Burrows said that all of these matters had been rehearsed when the case was listed for trial before Mr Recorder Roques, and that there was no expert evidence to support the defence approach, despite the service of 500 pages of medical notes. In the circumstances, he said, if the decision taken by counsel was on the basis of what the defendant had said about his sister, the defendant could not hide behind it and it would be fair for him to bear the consequences.
62. After a further adjournment for Mr Martin-Sperry to review the draft direction, the court sat to consider some amendments Mr Martin-Sperry had proposed. It is sufficient to say that the amendments were not agreed. Mr Martin-Sperry then repeated his intention to withdraw from the case if the prosecution insisted on a direction that was capable of leading to any form of adverse inference against the defendant. Nonetheless, the judge finalised her direction and having seen it, Mr Martin-Sperry must have decided he would continue with the case.
63. The direction was delivered orally to the jury before the ABE interview was played. The judge also included the direction in her written legal directions delivered in the first part of her split summing up, the material part of which said:

“In a criminal trial a witness whose evidence is not accepted by the defence is called to give that evidence by the prosecution. The witnesses first asked questions by the prosecution so the jury hear the evidence which the prosecution say supports their case. Thereafter, it is the duty of the defence to put their case to the witness and so they will ask the witness questions - that is the process known as cross examination which is designed to expose, for example, inconsistencies, to demonstrate that the evidence is not true or that the witness cannot be relied on.

Whether a person is fit to give evidence (and that includes being asked questions in cross examination) is a matter for the judge. I have considered material in this case and have decided the witness Cheryl Brooker is fit to give evidence and to be asked questions in cross examination. The consequence of that is that the defence are required to put their case i.e. To give the witness the opportunity to answer what they assert. However, defence counsel has decided that he does not wish to risk putting any stress on the witness at all and so he will not ask her any questions. That is his decision, but it has important consequences for the defendant.

... the decision not to cross examine her means that you will not have the opportunity of seeing her account tested in front of you. There may in due course be other evidence from which it may be suggested you will be able to gauge the accuracy and reliability of what she has said to the police, but importantly

you will not have been afforded, as a jury properly should be, the opportunity to form your own assessment by seeing and hearing her direct responses to questions put to her by the defence. In short, whilst the defence challenge her evidence, they do not seek to do so by what I have determined in this case to be the perfectly proper mechanism of cross examination.

Whilst you must not speculate, you are entitled to draw conclusions from the evidence you accept. The defence will suggest that the decision not to ask Cheryl Brooker questions is borne out of concern for the impact on her health notwithstanding my finding her fit to give evidence and be cross examined. The prosecution will contend that in those circumstances the only sensible conclusion for you to draw from that action is that the answers she would have given would have been such as to make you sure her evidence is true. It will be a matter for you to draw the conclusion you think appropriate when you have considered all of the evidence in the case.”

64. The transcript of the delivery of legal directions prior to speeches includes a refinement of the penultimate sentence of the second paragraph set out above. We include that here for convenience. When the judge addressed the jury she said:

“.. defence counsel, for his own and perfectly good reasons - which I know he'll tell you about - didn't wish to put any stress on the witness, or indeed, risk putting any stress on her and so chose not to ask her any questions.”

65. After the ABE interview had been played, some statements were read by agreement, including those of Ms Brooker's GP and Dr Ley and police evidence was called. The jury was provided with summaries of the disputed payments, redacted copies of the Ms Brooker's bank statements, cheques written on her account, a list of agreed payments and other documentary evidence as well as the defendant's police interview transcript. There was no handwriting evidence or any evidence of how or by whom the payments from Ms Brooker's account which she said she knew nothing about, had been set up.
66. Mr Brooker was of good character. He gave evidence consistent with his account in interview that his sister was very much in control of her financial affairs and kept her own records. He produced a bundle of documents which was shown to the jury. It included a number of texts and emails written by his sister in her distinctive phonetic style of expression. In one text she referred to making a payment by bank transfer (BAC). In an email she wrote to West Sussex Council in February 2015, copied to the appellant, she appealed against a financial assessment of disability benefit and said that the sums allowed for her gardener and cleaner were insufficient because

“[b]oth my privetley employed peepawl charge more than this gardener £15 an ower, cleener/lawndry ladey £12 an ower.”

67. He told the jury he had not seen his sister since 2018 and had not viewed her ABE interview until the trial. In his view she had deteriorated markedly in that time. He left his job in 2014 to care for her, along with caring for their mother who had since died. He said he had been paid by Ms Brooker to do so via standing order. He identified the standing order payments and how they had changed over time including when he returned to work himself. Other payments such as those described as being for domestic help, she had set up herself for her own purposes. Having looked at her cheques paid into his account he identified nine of the eleven as wholly in her writing. He repeated his belief that she had been compelled go to the police because she had fallen out with him, and their sister Tracey and brother Glen had gained influence over her.
68. The handwriting on the cheques varied because sometimes he would write them out for her, not because he wanted to hide the payments from her. He told the jury that he had no access to her cheque books. All the online bank payments such as standing orders and transfers were made by her, and the descriptor references were hers. She gave him her bank card to withdraw money on occasion, but he always gave it back to her. The printouts of emails and correspondence involving his sister demonstrated how capable she was. Other evidence in the defence bundle included medical appointments, evidence of ill health of the defendant himself and other records which he said demonstrated he could not have made some of the cash withdrawals he was accused of making. Although he denied being the person who withdrew all the sums alleged from ATMs using her card, in general, the appellant did not suggest that his sister had not given him and his family the sums of money alleged. His case was that he had not stolen them and that at the time his sister had generously and freely given them to him. The issue for the jury on counts 1 and 2 was therefore whether the prosecution had proved he received the sums dishonestly.
69. The appellant's wife gave evidence supporting his account and a number of character witnesses were also called.
70. In his closing address to the jury Mr Martin-Sperry explained his approach to the case. He began by giving an illustration of a child who was asked if he could see a squirrel in a tree, and through leading questions, the child purporting to describe a squirrel, which had not in fact been there. He then drew a distinction between someone who tells an outright lie and somebody who agrees with the suggestion despite not being confident that the suggestion is correct. His invitation to the jury was that they should determine the case on the background history and the reasons for the breakdown of the relationship between the appellant and his sister which were unrelated to any of the contested payments. He highlighted the influence that the appellant said his other siblings had had on Ms Brooker thereafter. Then came this passage,

“And so it is that our own perception – it can change. Now, I'm quite certain that all of you will have in your mind things that you think are correct from your past and maybe they're not, never mind what everyone's told you, and they become part of your memory. I'm no great memory expert. Recovered memory, false memory, it's a well known phrase, a well known

topic. It does happen. It's not the sort of thing that you can call an expert and say, "That's a piece of false memory."

71. At this the judge interjected:

"Well, Mr. Martin-Sperry you're treading on dangerous ground suggesting false memory when there's been no evidence for it."

72. Mr Martin-Sperry continued:

"I may be treading on dangerous ground, much more dangerous if I don't tread there. I will not be giving evidence here, but the phrase false memory may be my own mistake. I have made some mistakes in this case, oh yes I have."

73. He referred to some minor errors in his reading of character witnesses' evidence and returned to the topic he had been dealing with,

"But, be that as it may, the more important thing is that we come back to squirrels because what I'm going to investigate with you is whether there is any room for you even to consider that Cheryl was lying. I don't say she was lying at all. She's not a liar. We do know about liars in these courts and Cheryl Brooker is not one of them. I'm sorry to disappoint the crown but the crown seem to have missed the point and have said, "Well, she must be a liar. The defence must be saying that she's a liar," and all the rest of it. You'll remember I got rather excited in the middle of all that and said, "That's not for the defendant to say", and he doesn't say that she is a liar either. The crown can't quite follow it. She is no more a liar than the little child who saw or didn't see the squirrel. She is telling the truth about an image that she has in her mind."

74. Mr Martin-Sperry then moved on to the reasons he had not cross examined Ms Brooker. Having made reference to her medical history and the deterioration the appellant had described between when he had last seen her in 2018 and the ABE interview in 2020, he said:

"Her way of dealing with it - remarkable! I pay tribute to her and if you think that I am going to cross examine somebody like that in a court of law, Oh no, I'm not. I don't mind who tells me to. I'm not going to do it and the reason I'm not going to do it may well be selfish. Do you think I want on my record, "this is the very experienced barrister who cross examined a disabled person, caused them to have a stroke which killed them?" Oh

yes, am I going to want that on my record? No, I am not and if I think there is any risk of that, I will simply drop anchor which is precisely what I've done and I dropped anchor at a very early stage and I said, "I'm sorry, we will have to find another way of dealing with her."

75. Later in his speech he reminded the jury of the appellant's character, his selfless care of his sister and mother and made reference to the large amount of money that the appellant had returned to his sister in respect of the building of the bungalow. He also recalled the evidence of a police officer that when Ms Brooker made her first complaint to the police, her sister Tracey had done most of the talking. Finally, he mentioned, albeit not in detail, the correspondence and other material produced by the appellant (though he said he anticipated none of the documents in the case for either side would assist the jury) and the failure of the police to re investigate the case in light of that evidence.

The appeal

76. Following conviction, Mr Brooker withdrew instructions from Mr Martin-Sperry and instructed Mr Graffius KC who mitigated at sentence and has argued this appeal. Legal professional privilege was waived in a letter to the appellant's solicitors on 9 February 2023 and appeal counsel carried out the necessary enquiries with Mr Martin-Sperry. We directed that Mr Martin-Sperry and the appellant should make themselves available to give evidence on the appeal. In the event, both did so and were asked questions by Mr Graffius and Mr Burrows for the respondent.
77. The grounds of appeal come to this: defence counsel's incompetence resulted in identifiable errors in the trial process and rendered the convictions unsafe. No criticism is directed towards the trial judge. Mr Graffius relies on seven specific features of Mr Martin-Sperry's conduct of the case.
78. Firstly, his refusal to cross-examine Ms Brooker, due to his personal opinion that it could be dangerous for her, despite the fact that there was no medical basis for such a conclusion. Mr Graffius describes the decision as 'seismic' and the key factor in the trial. It meant the jury lost the opportunity fairly to assess the two principal witnesses, Cheryl and Graeme Brooker. Given that failure, which was not the fault of the appellant, he should not have suffered the consequences of the unusual direction drafted and delivered by the judge. He emphasises the fact that Ms Brooker had agreed to be cross examined and measures had been put in place to enable her to give her best evidence.
79. In his evidence to the court Mr Martin-Sperry said he had reliable material to indicate that there was a substantial risk in subjecting the witness to stress. He could not identify that material. Eventually, he said it might have been what Mr Brooker told him. Mr Martin-Sperry agreed that directions had been made for service of defence medical evidence. He could not recall whether he had drafted an advice on evidence for his instructing solicitor; he said had difficulty reaching the solicitor on the telephone although he acknowledged that the solicitor may have tried to communicate with him by email. We gave him an opportunity after the hearing to provide any written advice he could find in his records. It is accepted that none has been identified.

80. Mr Martin-Sperry told us that he sought agreement by email for this approach from his client shortly before the trial, because the situation was unusual. However, he did not accept the general proposition that if he failed to challenge a witness's evidence if it was controversial, he would be taken to have accepted it. On 21 November 2022, prosecution counsel had made submissions in line with this general proposition. Mr Martin-Sperry told us he thought this was, "frankly, a disgraceful conclusion" to come to because it was his personal decision, not that of the appellant. He was asked whether he recognised the duty of barristers to promote fearlessly and by all proper and lawful means their client's best interests. He said this was an irrelevant question because "trumping that.. is my overriding duty on both a personal and professional level not to put at risk the very life of a vulnerable prosecution witness." He said he had decided not to seek medical evidence for the defence, despite Mr Recorder Roques' order, because the interview for any report in his view, would have placed Ms Brooker under more stress and he was not prepared to do that.

81. Secondly, the refusal to accept that the judge's ruling that Ms Brooker was fit to be cross examined, despite his professional duty to do so and to put his client's case. Mr Graffius relies on section 53 of the Youth Justice and Criminal Evidence Act 1999 which provides, as far as material:

53 Competence of witnesses to give evidence.

(1)At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2)Subsection (1) has effect subject to subsections (3) and (4).

(3)A person is not competent to give evidence in criminal proceedings if it appears *to the court* that he is not a person who is able to—

- (a)understand questions put to him as a witness, and
- (b)give answers to them which can be understood.

(4)A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).

[Emphasis added]

82. In a passage of quite remarkable evidence, Mr Martin-Sperry told the court this was not a matter of law but one of "medical fact" for him to make his own decision about; that he found the judge's decision that the witness was fit to be cross examined "extraordinary" and he did not consider himself bound by it.

83. Thirdly, the failure to advise the appellant that if Ms Brooker was not cross examined the judge may direct the jury to draw an adverse inference. The 9 November 2022 email from the appellant made no reference to his having been advised that any consequence may flow from the decision counsel had taken. In responding to a request for information from Mr Graffius, Mr Martin-Sperry supported the appellant's evidence to us that he had not made the appellant aware that any adverse outcome would result; indeed he had not turned his own mind to the possibility until, at the

earliest, the trial judge agreed with the prosecution's submissions to that effect on the first day of trial. Later on in his evidence, Mr Martin-Sperry said that he did not recollect the proposed direction being confirmed until the close of evidence in the case. Still later, he conceded that he had seen the direction early in the trial, but he did not appreciate that it was the court's decision which had important consequences for the defendant. He came to understand that much later in the trial: it had 'got lost in the wash' at the beginning of the case.

84. In a statement prepared for this appeal and in an email of complaint against Mr Martin-Sperry which he sent to his solicitor after the trial, the appellant said that it had never been made clear to him how the judge and prosecution might react to counsel's decision, or that it might lead to the suggestion, or inference that the decision had been taken to hide information from the jury. Mr Martin-Sperry had seemed to be very confident in the strength of the defence case and joked that he would jump of Westminster Bridge if Mr Brooker was convicted. As a lay person, he was wholly reliant on the professional support of a barrister with fifty years' experience and trusted him to act in his best interests as well as in accordance with his professional obligations. The appellant's evidence to us was that he may have had a copy of the direction or a draft and he was in court listening to what was being said but he did not fully understand it; during one of the breaks he had asked Mr Martin-Sperry what the impact was of what the judge had said. The appellant said he was told that cross examination was not important or necessary and defence counsel was still 'buoyant' because of the evidence the appellant himself had produced. The appellant encapsulated the position in this way: Mr Martin-Sperry "basically implied that the evidence I provided would outweigh the lack of cross examination." Mr Graffius submits that the appellant could not be expected to follow the legal argument at the start of the trial and when he asked, he was reassured by his lawyer.
85. Fourthly, the failure to withdraw from the case when the judge had ruled and despite the judge's observation that if he did not wish to question the witness he should withdraw. Mr Graffius points out that this was foreshadowed by what had been said by Mr Recorder Roques. In failing to provide appropriate advice and, if so indicated, to return his instructions Mr Martin-Sperry deprived the appellant of proper, regular representation and this was grossly unfair. The appellant told us that at the time, he did not understand what was meant by 'withdrawing instructions' and similar phrases. He did not realise it would mean leaving him without representation. Mr Martin-Sperry's evidence was that he believed he had his client's confidence and Mr Brooker understood that if he did not like his decision not to question the witness he was at liberty to obtain alternative representation by speaking to his solicitor. He was taken by Mr Burrows to the passage in the transcript for the first day of the trial at para 58 above. He agreed that he must have given the appellant the choice to withdraw his instructions but the appellant had not done so. He added that he had little idea what was going on in the appellant's mind at the time and he had no note or endorsement of any decision made.
86. He said they spent a lot of time together in conversation, but it is not his habit to make notes of any conferences he has with his clients. He agreed that the normal course would be for a solicitor to be present at important conferences, for the protection of the barrister and the client, but this did not happen at any stage in his involvement with this case.

87. Fifthly, a failure to ensure that the defence case was put fully and fairly to Ms Brooker and the witness challenged. Mr Graffius illustrates the simplicity with which Ms Brooker could have been cross examined by reference to the email she had sent to West Sussex Council in February 2015 in which she asked for greater allowance to be made for her payments to a gardener and cleaner, payments which went to the appellant's account and which she told police she did not know about and had never authorised.
88. Sixthly, making a closing speech in which he advanced his personal opinion first, that Ms Brooker may have false memory syndrome - despite the absence of any evidence of false memory syndrome; and secondly, that she may have believed she was telling the truth. Mr Graffius said the speech made by prosecution counsel had focussed the minds of the jury on the simplicity of the issue before them: either Ms Brooker was lying about somebody else having written the references on standing orders from her account and causing her to write cheques which she did not remember and would not have authorised, or the appellant had lied in his evidence when he asserted that his sister had no difficulties managing her finances and did so more or less independently. Defence counsel's speech was at odds with the defence case. Much of what he said was entirely inapposite. He would have known that there was no evidence of false memory syndrome and the appellant's account from start to finish was that his sister was lying to cover up her previous generosity to him and hide it from their other siblings. Mr Graffius suggests the effect would have been to confuse the jury at best, and at worst, to persuade them that the appellant had no real defence at all. Mr Martin-Sperry's explanation to us was that false memory syndrome was a possible reason for the witness to say what she did. He thought the judge's interruption of his speech at this point was "very odd."
89. Seventhly, undermining the appellant's evidence in his closing speech, including dismissing the defence bundle of documents, rather than reminding the jury of the evidence of Ms Brooker's apparent control over her finances and her ability to write. Although he referred to some of the material the appellant had produced. Mr Martin-Sperry said that the jury had probably not looked at either the prosecution or defence bundles very carefully and asked, "Why should you. They're not going to help you."
90. Though he could not remember those sentences specifically, Mr Martin-Sperry's justification of this to us, was that he wanted the jury to approach the case with an open mind; he also made what in our view was inappropriate and unattractive criticism of the biased attitude, as he saw it, of the foreman of the jury.
91. Mr Graffius acknowledges that the judge summarised the defence case, including the appellant's evidence effectively. She reminded the jury that the appellant had said from the start of his police interview that any money he received from his sister had been given to him freely and with her full knowledge and he did not have access to her online banking. However, the judge concluded her recital with a reminder that Ms Brooker had not been able to answer her brother's contentions as they had never been put to her in cross examination and the jury would have to make of that what they could.
92. The respondent agrees with Mr Graffius that defence counsel's conduct of the trial was incompetent. Mr Burrows seeks however to uphold the convictions. He submits that the adverse inference direction adopted by the judge favoured the appellant more

than it did the prosecution. Further, it could be seen that the appellant was not prejudiced by the direction because the jury acquitted him of one of the counts that he faced. The respondent submits that the true issues were put clearly before the jury and they must have applied the legal directions, the correctness of which are unchallenged, in deciding that the prosecution had failed to prove one count. So defence counsel's closing submissions had not influenced the jury against him.

The approach

93. In *R v Farooqi and others* [2013] EWCA Crim 1649, another appeal concerned primarily with what was said to be egregious misconduct by defence counsel, Lord Judge CJ delivering the judgment of the court, said at 100:

“In this jurisdiction it is axiomatic that every defendant has an absolute right to a fair trial.”

94. The circumstances in which the quality of defence representation has been found by the courts to have led to an unfair trial are exceptionally rare. This is principally because there are many other guarantees of fairness in our adversarial system. These include the fact that solicitors instruct counsel, and can provide independent advice to the client when this is called for; the duty of prosecution counsel to act as a minister of justice; the role of the trial judge in ensuring proceedings at trial are fair to both sides and who can swiftly remedy any error which – uncorrected - may affect the fairness of the trial; and the role of the jury in determining contested issues of fact. Further, exceptionally high standards of conduct are required of advocates in our criminal courts. In consequence, it will be difficult for a convicted defendant to persuade this court that, despite the safeguards we have mentioned, his conviction should be overturned because his representation was incompetent. It certainly does not follow that a finding that there has been incompetence on the part of counsel necessarily leads to the conclusion that the conviction is unsafe, although in some circumstances, that may be the case.
95. As Buxton LJ said in *R v Mark Darren Day* [2003] EWCA Crim 1060 at 15:

“While incompetent representation is always to be deplored it is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in *Thakrar* [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.”

The failure to cross examine and put the defence case

96. Mr Graffius who has presented this appeal moderately and with skill, realistically grounds his submissions on the effect of the decision not to cross examine the only important prosecution witness. However, what happened at the trial was predicated on defence counsel's approach for over a year before the trial started. We agree that it would be obvious to any competent counsel that Ms Brooker had to be cross examined and challenged. There was no medical or other basis for refusing to question a witness whose evidence was directly contradicted by his client. The ABE interview had been served and was relied on. Having viewed it, we can understand that a tactical decision might have been made to limit the challenge so far as possible in order not to evoke sympathy for an obviously vulnerable witness. Another reason might be to reduce the damage to the appellant's case that the answers provided in cross examination might cause. But that is not what Mr Martin-Sperry told us his approach was. He denied any element of strategy. He maintained that he had formed a firm view, based on some evidence which he could neither recall nor produce that there was a serious risk of harm if he were to ask the witness any questions.
97. The only information upon which this view could have been formed is what the appellant may have told counsel Mr Martin-Sperry of his experience of Ms Brooker over the years he had looked after her. We allow for the possibility that this is what led counsel to form an early provisional view, one he expressed to his instructing solicitor and set out in writing in his note of 11 September 2021. Once matters had been fully aired in court however (which had happened as early as March 2022) and the medical records had been disclosed and the report of Dr Ley had been served it was clear beyond peradventure that Mr Martin-Sperry could have no justification whatever for maintaining his stance on cross examining Ms Brooker. In this context it is to be noted that he never did provide his instructing solicitors with an advice on this issue, even though they had asked him to do so as early as 10 September 2021.
98. It is a well-established rule founded on justice, that in a criminal trial the case for the prosecution and for the defence must be fairly put and the witnesses challenged where possible. The general rule and the rationale for it is described in the current edition of *Phipson on Evidence* 20th ed (2022) at 12-12:

“In general a party is required to challenge in cross examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point...

This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.”

99. The duties of counsel are spelled out in the Bar Standard Code of Conduct (the current version in force from 20 September 2023, but is not different in any material respect). Core Duty 1 is to observe the duty to the court in the administration of

justice. The Code makes clear that this duty overrides any other core duty, if and to the extent that the two are inconsistent. Core Duty 2 is to act in the best interests of each client. Core Duty 7 is to provide a competent standard for work and service to each client. The core duties are supplemented by the conduct rules. Rule C7 could not be clearer:

“rC7 Where you are acting as an advocate, your duty not to abuse your role includes the following obligations:

1. you must not make statements or ask questions merely to insult, humiliate or annoy a witness or any other person.
2. You must not make a serious allegation against a witness whom you have had an opportunity to cross examine unless you have given that witness a chance to answer the allegation in cross examination.
3. ..
4. You must not put forward to the court a personal opinion of the facts or the law unless you are invited or required to do so by the court or by law.”

100. The treatment of vulnerable witnesses, whether called by the prosecution or the defence, has changed beyond all recognition in recent years. This has involved a shift in professional culture and all advocates who practise in the criminal courts are aware of the changes. There are many tools available to enable all witnesses to give evidence to a satisfactory standard. The Criminal Practice Directions and the Criminal Procedure Rules provide the necessary framework. Counsel are expected to have developed the skill-set necessary to carry out fair and effective cross examination in accordance with ground rules set by the trial judge. Where pertinent, those rules can include requiring questions to be framed shortly in easily understood language, providing regular breaks in the evidence, allowing an independent communications expert (an intermediary) to intervene if questions are inappropriately worded and giving a witness a variety of ways of signalling the need for a break. A wide range of special measures can be deployed and objections to these are now rare. The consequence is that a far more compassionate and practical mode of examination of witnesses prevails, leading to a shorter and more focussed examination of vulnerable witnesses. There is however no diminution in the opportunity (or the professional requirement) to test disputed evidence within the parameters set by the court. Indeed with heat and emotion removed the genuinely probing question is capable of “hitting home” with greater effect.
101. Returning to the case before us, the specific tools of pre-recorded cross examination under section 28 Youth Justice and Criminal Evidence Act 1999 and the use of an intermediary were available in this case. What was required was relatively straightforward. The lengthy ABE interview called for extensive editing which could have reduced its impact in a perfectly permissible way. Ms Brooker had to be challenged, sensitively, on her evidence that she had not known about any of the questioned payments. The appellant had provided counsel with a selection of emails she had sent concerning specific payments of money which, he said, demonstrated that at the relevant time she had full knowledge of where her money was being spent. Cheques which he said were in her handwriting, and certainly not his own were available. At least some of these documents should have been shown to her for her

response. Furthermore, as the appellant intended to give evidence of what he said was her motive for the lies she had told the police, this should have been put to her for a response. None of this was beyond the skill of an averagely competent criminal advocate, newly qualified. All these matters could have been put to Ms Brooker as long ago as May 2021, as the prosecution and court originally envisaged.

102. We deprecate the approach taken by Mr Martin-Sperry in relation to this issue. It was not a display of professional independence. It was recalcitrant and unprincipled. Mr Martin-Sperry is, in a word, unrepentant.

Refusal to accept the judge's determination

103. The competence of a witness can be raised by any party to proceedings or by the court of its own motion. When the issue is raised it is for the party calling the witness to satisfy the court on the balance of probabilities that the witness is competent, taking into account any expert evidence available. Once the court has ruled on the issue however, the parties are bound by the ruling.

104. The transcript of the first day of the trial makes for concerning reading. It is plain that Mr Martin-Sperry simply refused to accept the trial judge's decision that Ms Brooker should be cross examined, notwithstanding that he should have expected exactly that outcome. The duty to the court in the administration of justice is counsel's paramount duty. In circumstances where Mr Martin-Sperry disagreed with the ruling, he had two options: to comply with the direction of the judge, and, in the event of a conviction, challenge the ruling on appeal; or to withdraw from the case and return his instructions. It seems that he considered this latter course but he did not pursue it. Thereafter, the only choice he had, consistent with the primary core duty of an advocate, was to cross examine the witness.

105. Conduct rule C26 provides as follow:

rC26 You may cease to act on a matter on which you are instructed and return your instructions if:

1. Your professional conduct is being called into question..

106. In this case, it is obvious that the judge *was* calling Mr Martin-Sperry's professional conduct into question. In circumstances where, according to Mr Martin-Sperry, the decision not to cross examine Ms Brooker was his and not that of the client, it was incumbent upon him to advise his client in clear terms of the options available and their different implications. Mr Martin-Sperry should also have referred the matter to his instructing solicitors, so as to ensure that the appellant, if he wished to have it, had access to his solicitor's advice.

107. Following the judgment of Fulford LJ in *R v Daniels* [2021] EWCA Crim 44, the Bar Council has provided revised advice on when counsel should withdraw during a trial. The guidance is called "Returning Instructions in Criminal Cases: R v Daniels – Feb 2022" and includes passages dealing with late returns of instructions and the obligation of advocates to comply with the cab rank rule in taking instructions even if there is limited time to prepare. This is illustrative of the pragmatic approach expected of advocates when matters of professional compromise arise.

The 'adverse inference' direction and withdrawal

108. We reject Mr Martin-Sperry's evidence that he did not realise until the first day of the trial that the appellant was in jeopardy of an adverse direction if he failed to challenge the evidence of Ms Brooker. It was, frankly, obvious that this might happen. We do not accept either that the direction drafted by the judge on 21 November simply "got lost in the wash". It was the product of a full days' argument in the absence of the jury. Given the unusual situation that counsel had himself engendered, it is inconceivable that he simply let this direction drift out of his mind.
109. We also reject the appellant's evidence that he did not realise that the discussion that took place on the first day of the trial concerned what was to be said *to the jury* about the decision not to cross examine his sister, a decision with which he had already agreed. Firstly, it is apparent from the material before us that the appellant was fully engaged with the issues raised by his trial and was taking the closest possible interest in them. Secondly, albeit that Mr Martin-Sperry's submissions were on occasion, repetitive and discursive, the debate before the judge was generally clear and coherent. Thirdly, the appellant told us that a representative from Cheesemans was present on that day. No doubt the appellant could have spoken to that representative if he wished to do so and if he did not follow what was being discussed. Fourthly, the directions that emerged after the debate before the judge, namely that drafted by her, and the final version which went to the jury were provided to the parties in hard copy. Fifthly, as the appellant was eventually constrained to accept, he had seen a copy of the judge's direction and was indeed aware that the judge intended to direct the jury that they could criticise the defence for the approach they had taken.

The closing speech

110. It is trite that Counsel are not permitted to give evidence. It is also trite that counsel should not allude in their closing speeches to (alleged) facts or matters which have not been the subject of evidence.
111. Plainly, Mr Martin-Sperry should not have given the jury the benefit of his personal views and reasons for not cross examining Ms Brooker, nor should he have made the wholly speculative reference to false memory syndrome. The latter reference led to an intervention from the judge, the former did not (perhaps out of a concern that the effect, if any of the wrong decisions of his counsel, should not be visited upon the appellant). Beyond this however, we consider the various criticisms of defence counsel's closing speech and their effect, if any, to be overstated.
112. Counsel has a wide discretion in how to address the jury in closing. This includes for example deciding what evidence to refer to, the overall approach (be it a broad brush or a closely analytical one) and whether the prosecution case should be met head or attention drawn away from it. These are all matters of judgment on which reasonable professional advocates may disagree. The trial judge is responsible for ensuring that the defendant's case is left fairly to the jury. In doing so a judge may have to correct, distil and augment the points made by defence counsel, as this trial judge did. It is not suggested she fell into error in this connection, or that the way the jury had been addressed should have led her to discharge them. In this short trial, completed within nine days, the issues between the prosecution and defence were fairly placed before the jury in the written directions they were given and in a full summing up which has

not been the subject of criticism. Whatever Mr Martin-Sperry had said in his closing speech, the jury can have been in no doubt as to the nature of the appellant's case and his defence to the charges against him.

Outcome

113. Mr Martin-Sperry was an unimpressive witness. It is a matter of regret that there are ample grounds for criticising his conduct in what was a relatively straightforward case.
114. We do not find his unorthodox approach to counsel's duty to put his client's case is one that can be tolerated. The rationale for Mr Martin-Sperry's approach was opaque and unsupported by material which we would expect experienced advocates to seek out before making such a significant decision about the tactical approach to a contested case. We are forced to conclude that he recognised the difficulty of successfully challenging the video recorded evidence of Ms Brooker and decided that the appellant's best chance lay with his own account to the jury, as a man of previous good character, with as little attention being drawn to his sister's account as possible. Mr Martin-Sperry fixed variously on dissociative identity disorder, Ms Brooker's strokes and what the appellant was able to tell him about how his sister reacted when under stress. Having failed to persuade the prosecution and the judge that a transcript of the ABE interview should be provided to the jury rather than the footage (as suggested in his first note to the court) he sought to limit the damage her evidence might cause, by presenting the appellant's oral and documentary evidence "fresh", and unchallenged and uncontradicted by Ms Brooker. It follows that we find that Mr Martin-Sperry has not been frank with the court.
115. In addition, behind this, there was a catalogue of elementary professional errors. Mr Martin-Sperry communicated directly with his lay client, including using his personal email address; he took no notes of those discussions or of the advice that he gave; he apparently ignored the request for advice from his instructing solicitors; he failed to comply with directions made at a series of preparatory court hearings and there is no indication that he ever analysed the extensive medical records disclosed during the case.
116. In all the circumstances we are satisfied that his performance of his duties fell below the standard to be expected of a member of the Bar of England and Wales. We are not convinced that the accurate description is incompetence which implies a lack of skill. Here, having made an erroneous strategic decision on the basis of his personal judgment Mr Martin-Sperry, in his role for the defence, failed to comply with orders of the court before the trial and during the trial itself. He is a highly experienced advocate. It is hard to escape the conclusion that this was a deliberate course of conduct. It is regrettable that this is the position at the end of Mr Martin-Sperry's long career.
117. We turn then to the safety of the conviction. Notwithstanding the conduct of Mr Martin-Sperry we are satisfied that the appellant's conviction is safe for a combination of reasons we can state shortly.
118. Firstly, the rationale for the general rule on cross examination is that set out in *Phipson* i.e. it serves the important function of giving *the witness* the opportunity of

explaining any contradiction or alleged problem with his evidence. The unfairness, if any engendered therefore was to the prosecution and not the defence. Ms Brooker was not given the opportunity to answer the appellant's case against her, which was that her complaint of theft was made to disguise from her siblings how much she had given to the appellant. This meant the appellant then had a relatively free hand in giving *his* evidence unencumbered by what Ms Brooker might have said in response to the case as put to her, as did Mr Martin-Sperry in commenting on her evidence in his closing speech. Secondly, *the effect* of the adverse direction as finally delivered was fairly anodyne. It did not clearly identify the process of reasoning the jury should follow or the factors, if any, the jury had to weigh when deciding whether to conclude that questions were not asked because to do so would simply confirm the witness's account. Nor did the direction suggest that a failure to cross examine Ms Brooker meant the defence accepted her evidence. When the final direction was repeated, shortly before counsels' closing speeches, the judge told the jury that defence counsel had "his own and perfectly good reasons" for his approach, which they would hear about from him, thereby neutralising any adverse effect the direction may have had on the appellant's case (as well as opening the door for Mr Martin-Sperry to explain himself to the jury, as he did). Thirdly, we are not persuaded that the appellant did not understand that an adverse inference might be given or that he could have changed counsel, if unhappy with Mr Martin-Sperry's stance. The appellant was present to hear the debate in court, and we consider he understood what was being said, about the direction to the jury (he had seen a hard copy of it) and by Mr Martin-Sperry about the conversations he had had with the appellant regarding the withdrawal of instructions. In our view, his current stance is no more than "buyer's remorse" in respect of the tactical decisions of his counsel which he fully supported at all material times. Finally, as we have already said, the judge's summing up is not the subject of any criticism in this appeal. It was full and fair; it set out the appellant's case in detail and can have left the jury in no doubt as to the issues they had to decide.

119. For these reasons, the appeal against conviction is dismissed.
120. We cannot leave this case however without making some observations arising from the procedural defaults with which it was replete, and the number of hearings these and other issues engendered. In this relatively straightforward criminal case, listed for four days, there were numerous pre-trial hearings of one sort or another and a catalogue of failures on the part of both parties to comply with court orders and/or to ensure that the timetable for case preparation was adhered to. This lamentably lackadaisical approach did not merely have serious implications for the progress of this particular case; it will have had an impact on the ability of the court to deal with other cases and was a waste of precious court resources.
121. The Criminal Procedure Rules were introduced in 2005 as a result of a recommendation of Lord Justice Auld's Review of the Criminal Courts of England and Wales. As the rules state in terms, each participant in the conduct of the case must prepare and conduct the case in accordance with the overriding objective; they must comply with the rules, practice directions and directions made by the court; and they must inform the court and all parties at once of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by the Rules, any practice direction or any direction of the court: see Crim. PR 1.2. It should not be necessary to state that the objectives Lord Auld identified of fairness,

efficiency and effectiveness are more critical than ever to the working of the criminal justice system given the significant pressure under which it is now operating; or that the achievement of those objectives requires close attention and adherence to the rules.

122. Although the particular circumstances of this case are unusual, the history we have set out above reveals some concerns of general and current importance. The current outstanding workload of the Crown Court is very high because of various events which have happened over the past few years. The level of receipts into the Crown Court is presently rising. This situation requires that cases are managed as efficiently as possible so as to use the limited resources of the system to the best possible effect. For this reason, the Crown Court Improvement Group was established by the former Lord Chief Justice and has met monthly over the last 2½ years to attempt to improve the functioning of this jurisdiction. All major executive agencies which contribute to the running of the Crown Court are represented on it. It is chaired by a judge. The efforts which have been made by all involved to run the Crown Court effectively require participants, including counsel, to assist in that end. Wasted hearings and trials which do not proceed when they should are to be avoided as far as possible. In this case the PTPH was on 7 January 2021. There were then 5 further hearings before the trial. One of these, on 2 March 2022, involved the case being listed for trial but not proceeding. When the trial did eventually start, the whole of the first day was taken up by legal argument about Mr Martin-Sperry's approach to the evidence of Ms Brooker. This was the reason for all the delay, and this was compounded by a repeated failure, by both parties, to comply with the directions of the court.