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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 20 December 2019

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE SPENCER

HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the CACD)

R E G I N A

v

ABDUL MOSAVER CHOUDHURI

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Mr Christopher Daw QC appeared on behalf of the **Applicant**
Mr Benjamin Douglas-Jones QC appeared on behalf of the **Crown**
(**Mr Johnson** appeared on behalf of the **Crown** at the judgment)

J U D G M E N T

Hearing: 11 and 12 December 2019

LORD JUSTICE SINGH:

1. Introduction

Mr Abdul Choudhuri (the applicant) has applied for an extension of time, of 1085 days, in which to seek leave to appeal against his convictions on three counts: count 1 was fraud; counts 2 and 3 were perverting the course of public justice. The underlying issues raised in this application are whether the applicant was fit to plead and stand trial in September 2013; and whether he had capacity to form the mental element required for the offences of which he was convicted.

2. To this end the applicant seeks leave, pursuant to section 23 of the Criminal Appeal Act 1968 ("the 1968 Act") to adduce fresh evidence, in particular from two psychiatrists, Dr David Ho and Dr Raman Deo.

3. Factual and Procedural Background

Count 1 - Fraud

On 4 October 2010 shortly before 5.00 pm the applicant, a qualified doctor, attended a Starbucks coffee shop in South Parade, Nottingham, with his wife. At about 6.00 pm another man, a tourist from Singapore called Kenny Quek, who had also been in Starbucks, left. He did so without his wallet, which contained a $1000 Singapore dollar note and approximately £2,500 in cash. The wallet was found by the applicant's wife, who handed it to Ms Lisa Wright, a member of staff.

4. A short time later the applicant made enquiries about the wallet and, having given satisfactory answers to Ms Wright, was given it. Thereafter, he remained in Starbucks with his wife before leaving. At 7.30 pm Mr Quek returned looking for his wallet.

5. *Applicant's arrest/Interview*

On 7 November 2010 the applicant and his wife returned to Starbucks where he was recognised by the staff. Police were contacted. On their arrival the applicant left his seat, went toward the toilets and locked himself in a cubicle. However, he was arrested soon after. In reply to caution he said: "I know Dave Walker, a police superintendent, and you are going to lose your job". He was searched and found inside his wallet was the $1000 Singapore dollar note, which, on later examination, was found to have Mr Quek's fingerprints on.

6. In interview the applicant denied any wrongdoing. He said that he had several wallets for different reasons and thought he had lost one in Starbucks. He said he might go on holiday to Singapore and the $1000 note had been in his wallet for some time.

7. He was re-interviewed after being positively identified by Ms Wright. He answered "no comment" to all questions except to deny involvement in any fraud.

Charge/Defence Statement

8. On 21 April 2012 the applicant was charged with fraud (count 1). He entered a not guilty plea and elected trial in the Crown Court. In his first Defence Statement he put forward an alibi defence.

9. His trial was listed for hearing in January 2013 but was adjourned for police inquiries into the facts leading to count 2 (an offence of perverting the course of public justice).

10. *Count 2 - Perverting the course of public justice*
On 1 January 2013 Ms Wright was contacted by a man purporting to be from "witness protection". She was told that the trial had been cancelled and that she was not required to attend.

11. Investigations revealed that the number ending 616, which had been used to contact Ms Wright, stemmed from an unregistered Pay-As-You-Go mobile phone. The number was active only in December 2012 and January 2013 and had been used to contact the applicant's wife, the applicant's then solicitors, and another member of the solicitors' staff. Moreover, cell site evidence placed the 616 SIM card close to the applicant's home address, his clinic and his solicitors' office and in the same area as a BMW car registered to the applicant's business address.

12. *Count 3 - Perverting the course of public justice*.
On 1 August 2012 the applicant sent his accountant, a Mr Waheed Rehman, an e-mail with attachments. He asked: "FYI Can you remember this meeting on 4 October 2010? It is very important ..." This email itself was within a chain. There was a second purported one dated 27 September 2010 which read: "Next Monday can we change to late afternoon around 4.30 pm?" Mr Rehman could not recall receiving that email and could find no record of it. His recollection was that the meeting had taken place in the morning. In fact the email was a fraudulent concoction.

13. The applicant subsequently attended Mr Rehman's offices and showed him CCTV footage on his iPhone. The applicant persuaded Mr Rehman that the CCTV showed them at a meeting in the afternoon of 4 October 2010. In fact the footage was of other people. Mr Rehman thereafter altered his records to state that he had been in a meeting with the applicant between 4.00 and 6.00 pm on 4 October 2010.

14. On 7 February 2013 Mr Rehman made a further statement. He explained that a business meeting had been arranged (and indeed took place) with the applicant at 10.30 am on 4 October 2010.

15. *Defence case/Evidence*
Following an inquiry the police discovered that the applicant's American Express card had been used in the South Parade Starbucks at 5.00 pm on 4 October 2010. In a second Defence Statement dated 15 July 2013 the applicant disclosed that he had changed his defence. He now admitted having been in Starbucks on 4 October 2010; that he had taken possession of the wallet but said that, when he did so, he believed it was his.

16. He denied making calls to Ms Wright and said that Mr Rehman was lying and was manipulative.

17. In his evidence at the trial, which took place between 2 and 12 September 2013, he maintained his denials and the account given in the second Defence Statement.

18. *Trial and subsequent developments*
On 12 September 2013 in the Crown Court at Nottingham the applicant was unanimously convicted of fraud (count 1) and two counts of perverting the course of public justice (counts 2 and 3). On the same date he was sentenced by HHJ Teare to concurrent sentences amounting to a total of 30 months' imprisonment. Two orders were made: (a) a compensation order in favour of Mr Quek in the sum of £4,000; and (b) a costs order in the sum of £23,395.

19. The present applications were lodged on 29 September 2016 and were referred by the single judge to the Full Court. On 9 March 2018 the Full Court gave directions, which have led to present hearing before us.

20. The Crown opposed the applications and in accordance with the Full Court's direction they instructed an expert, Dr Cumming, who prepared a report dated 10 July 2018.

21. The trial representatives, Mr Jeremy Dein QC and Philip Smith (Solicitor) were contacted, privilege having been waived. They provided written responses. They also gave live evidence at the hearing before this court.

22. <u>Grounds of Appeal</u>
On behalf of the applicant Mr Christopher Daw QC submits that the applicant's convictions are rendered unsafe as a result of evidence, now available, as to the state of his mental health at material times.

23. Mr Daw submits that there is credible evidence to support the conclusions that:

1. The applicant was incapable of forming the specific intent necessary to commit the offence of fraud on 4 October 2010.
2. Throughout the period of the criminal investigation and prosecution he was affected by a serious, undiagnosed psychotic illness, which adversely affected his engagement with police interviews and his conduct of the defence.
3. He was unfit to stand trial in September 2013.
4. In the absence of evidence of psychiatric illness the jury were presented with a dangerously incomplete picture of his mental state which undermines the safety of their findings of *mens rea*.

24. The applicant seeks leave pursuant to section 23 of the 1968 Act to adduce evidence from Dr David Ho, a forensic psychiatrist (including the documents reviewed by him - see paragraph 59 of the Grounds of Appeal). Dr Ho, in two reports dated 14 December 2015 and 6 September 2016, is of the opinion that the applicant "presents with features consistent with a diagnosis of a psychotic mental disorder, the most likely being paranoid schizophrenia". Furthermore, Dr Ho has "significant concerns that [the applicant] was deemed fit to plead and stand trial in September 2013".

25. There is also "a broad body of evidence from the [applicant's] wife, and many other friends and family members, to support the proposition that the [applicant] was suffering from serious mental health symptoms prior to and after the visit to Starbucks on 4 October 2010."

26. **Material Legislation**

Section 23 of the 1968 Act, so far as material provides:

"(1) For the purposes of an appeal, or an application for leave to appeal under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—

...

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

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

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

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

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

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

27. **The Applicant's Submissions**
In the written grounds of appeal Mr Daw concedes at paragraph 33 that the trial judge made no significant errors of law and there were no material irregularities in the trial process.

28. Mr Daw also concedes that there was "an overwhelming case" on the evidence at trial against the applicant on all three counts.

29. He submits however that, in the light of the psychiatric evidence which is now available to the court, there is credible evidence to support the conclusions that (i) the applicant was unfit to stand trial in September 2013; and (ii) he was incapable of forming the specific intent required for the offence of fraud on 4 October 2010.

30. Mr Daw submits that the issue of an extension of time is inextricably linked to what view the court takes about the psychiatric evidence. He submits that, if the court views that evidence as incredible, and refuses to admit it, then it will equally find that there is no good reason to extend time. If, however, it is accepted that the psychiatric evidence is sufficiently credible as to justify admission on appeal, it is submitted that the passage of time should not be a bar to the appeal being heard. Put shortly, submits Mr Daw, it would be unjust in the extreme to refuse to extend time were the court to accept that there is credible evidence of serious psychiatric illness such as may arguably undermine the safety of the convictions.

31. Under section 23 of the 1968 Act, Mr Daw submits that it is necessary in the interests of justice to admit the evidence: these are the reports of Dr Ho, together with the documents reviewed by him and the witness statements contained in File 1, Tabs 9 - 23 of the Applicant's Bundle.

32. We note that those witness statement include the one by the applicant's wife, Dr Fatima Choudhuri.

33. At paragraph 62 of his written grounds in his conclusion, Mr Daw acknowledges that the applications to the court face "strong legal and evidential headwinds". However, he submits that there is a real and substantial basis for each of the applications such that permission to appeal should be granted.

34. **The Respondent's submissions**
We have also had both written and oral submissions on behalf of the respondent from Mr Benjamin Douglas-Jones QC. He observes that the applicant needs an extension of time of 2 years, 11 months and 19 days.

35. He also observes that the applicant was represented from June 2013 until his trial in September that year by a highly experienced Queen's Counsel (Jeremy Dein) and a highly experienced criminal solicitor (Philip Smith). They were of the firm and clear view that the applicant was fit to plead and fit to stand trial. He also submits that contemporaneous evidence tends to show that the applicant was fit to do so. He observes that no-one at the time including Dr Cree, who saw the applicant and provided a report, dated 5 April 2013, identified any possibility that he might have been unfit to stand trial.

36. The chronology is that the applicant was on bail until 7 February 2013. He was then remanded in custody and remained there until his release on 27 December 2013.

37. In relation to the report prepared by Dr Cree in April 2013, Mr Douglas-Jones observes that a decision was made by the applicant's legal team not to use it at the time. As Mr Smith, the applicant's solicitor, explains the report was considered to be "double edged". There was potentially a disadvantage at the trial since the applicant would then have been open to cross-examination on its contents.

38. Between February and September 2013, submits Mr Douglas-Jones, the applicant's prison patient records show that he was in regular contact with members of the medical profession. Those records show that, while there were concerns about depression, the applicant's medical state "improved" by July 2013. In August, it was recorded that there were "no concerns" about his behaviour and mental state.

39. In September 2013, before the trial, Mr Peter Corvin FCPN noted that there were no concerns in respect of the applicant.

40. Mr Douglas-Jones also observes that, in late June 2013, Mr Smith was alive to the suggestion that a prison psychiatrist had found the applicant's mental health was "deteriorating rapidly" and that therefore Mr Smith had cause to consider whether a psychiatric report should be sought to show that the applicant was unfit to plead and/or give instructions. However, on the basis of his regular meetings with the applicant, Mr Smith was of the view that the applicant continued to provide him with clear instructions and that he remained fit to plead.

41. **Fitness to plead**

The legal principles governing fitness to plead in a criminal trial were considered by this court in R v Marcantonio [2016] EWCA Crim 14; [2016] 2 Cr App R 9, in which the judgment of the court was given by Lloyd Jones LJ. At paragraph 2 he cited the seminal case of R v Pritchard (1836) 7 C & P 303 at 304-305, in which Baron Alderson gave a direction to the jury, which has become "firmly embodied in our law" - see R v Padola [1960] 1 QB 325, at 353 (Lord Parker CJ). The test was expressed in terms more

appropriate for the modern trial process in R v M (John) [2003] EWCA Crim 3452, where this court approved of the written directions given to the jury by the trial judge in that case. He directed them that, in order to be fit to stand trial, a defendant must be capable of doing six things:

(1) Understanding the charges;
(2) Deciding whether to plead guilty or not;
(3) Exercising his right to challenge jurors.
(4) Instructing solicitors and counsel;
(5) Following the course of the proceedings; and
(6) Giving evidence in his own defence.

42. At paragraph 7 Lloyd Jones LJ said that the court is required to undertake an assessment of the defendant's capabilities in the context of the "particular" proceedings rather than in the abstract.

43. At paragraph 8 he said that:

"... the current test as developed in the judicial authorities is expressed as a single, indivisible test which must be met in its entirety. A defendant will not be fit to plead or stand trial if any one or more of the specified competences is beyond his capability..."

44. As this court made clear in Marcantonio at paragraph 11, the burden of proof on the issue of fitness to plead lies upon the party which raises the issue. If it is raised by the prosecution, the burden of proof is on the prosecution and the standard of proof is the normal criminal standard of "beyond reasonable doubt": see R v Podola [1960] 1 QB 325. If the issue is raised by the defence, the burden of proof is on the defence but the standard of proof is a balance of probabilities - see R v Robertson (Eric John) (1968) 52 Cr App R 690.

45. At the hearing before us Mr Daw submitted that, while those propositions are correct at the stage of a trial at first instance, when it comes to an appeal to this court, the burden of proof does not lie upon the defence. He submits that it is sufficient to raise a credible doubt about the safety of the conviction. We reject that submission. No authority was cited to support it. It is inconsistent with what this court actually did in Marcantonio, in which the court had two cases before it.

46. In one case (Chitolie) the issue was treated as if it had been raised by the prosecution on the appeal. The trial had taken place in the applicant's absence as he was unrepresented and refused to take part. In his grounds for applying for leave to appeal to this court, the applicant still did not raise the question of fitness to plead. Nevertheless there was medical evidence before the court which led it to conclude that the issue did need to be addressed. It did so as if the prosecution had alleged that the applicant was unfit to plead

and as if that were contested by him. Accordingly, the court had to be satisfied to the criminal standard that the applicant was unfit to plead (see paragraph 96). The court concluded that this was not a case where there should have been an acquittal but there should have been findings that the accused was under a disability and that he did the acts charged against him (see paragraph 101). In consequence a restriction order was made under section 41 of the Mental Health Act 1983. The consequence of such an order would be that, should the defendant recover his fitness, and further prosecution was considered appropriate, he could then stand trial.

47. In contrast, the case of Marcantonio was based on the submission that the appellant's conviction was unsafe in the light of three psychiatric reports, all of which considered that he was unfit to plead at the time of his arraignment. That is very similar to the submission made in the present case. The court concluded (at paragraph 60), having considered all the evidence before it, that the defendant had failed to persuade the court, on the balance of probabilities, that he was unfit to plead at the relevant time.

48. Furthermore, Mr Daw's submissions appear to us to fail to engage with what this court said at paragraph 16 of Marcantonio:

"This court has emphasised the need to exercise caution in addressing the issue of fitness to plead when on an appeal against conviction it is submitted that an accused was not fit to plead at the time of his trial. In *Erskine* [2009] EWCA Crim 1425; [2009] 2 Cr App R 29, Lord Judge CJ stated (at para.89):

'Assuming that the defendant is legally represented (and in cases like these, he will normally be represented by leading and junior counsel, as well as solicitors) his legal representatives are the persons best placed to decide whether to raise the issue of fitness to plead, and indeed to seek medical assistance to resolve the problem. There is a separate and distinct judicial responsibility to oversee the process so that if there is any question of the defendant's fitness to plead, the judge can raise it directly with his legal advisers. Unless there is contemporaneous evidence to suggest that notwithstanding his plea and the apparent satisfaction of his legal advisers and the judge that he was fit to tender it, and participate in the trial, it will be very rare indeed for a later reconstruction, even by distinguished psychiatrists who did not examine the appellant at the time of trial, to persuade the court that notwithstanding the earlier trial process and the safeguards built into it that the appellant was unfit to plead, or close to being unfit or that his decision to deny the offence and not advance diminished responsibility can properly be explained on this basis...' "

49. Further, and in any event, even if Mr Daw were correct that the proper test on this appeal is a lower one than the balance of probabilities, we are satisfied that this application comes nowhere near crossing the threshold. There is simply no properly arguable basis for saying that the applicant was unfit to plead and stand trial, according to the strict

definition of that concept in law.

50. First, we consider the expert reports which have been filed in this case.

51. In his main psychiatric report (dated 14 December 2015) Dr Ho addresses the issue of fitness to plead and stand trial at paragraphs 12.24-12.25, where he says the following:

> "12.24 Dr Choudhuri's trial was conducted in September 2013. It is not ideal circumstances to examine whether Dr Choudhuri had indeed been fit to plead and stand trial given the passing of a significant period of time. However, from Dr Abdul Choudhuri's police interview, and trial transcripts, he appears to be able to answer questions in a fairly articulate manner.
>
> 12.25 It is likely that Dr Abdul Choudhuri had sufficient cognitive reserve and therefore intellectual ability to navigate questions put to him. However, what had remained undetected was the presence of the onset of a severe and enduring psychotic mental disorder. His paranoid beliefs would have been important to assess in relation to him for fulfilling Pritchard (1836) criteria with any degree of certainty. This was evidently not explored and therefore, *I have a degree of concern* regarding his progression through the judicial process and subsequent imprisonment." (Emphasis added).

52. In his addendum report (dated 6 September 2016), at paragraph 4.2, Dr Ho says the following:

> "From the material above, I was not able to detect any descriptions or observations, which would directly be contradictory to my formed opinion. If anything, the observations which were noted that Dr Choudhuri was able to participate to some degree with the trial, would support my assertion that he was indeed, in the early phases of developing a full blown psychotic mental disorder."

53. In the psychiatric report by Dr Raman Deo (dated 14 July 2017), in the section setting out his opinion and recommendations at paragraph 10, he says following:

> "On the basis of my assessment, I am of the view that consideration ought to be given as to the client's fitness to participate not only in the court proceedings that led to his conviction but also to his fitness to partake in the GMC (General Medical Council) proceedings that he underwent. While it is difficult to say more than this given the fact these events were some time ago, based on the information and evidence available to me as well as the likely development of his illness, *I would have concerns* regarding fitness." (Emphasis added).

54. In his psychiatric report (dated 10 July 2018) Dr Ian Cumming (instructed by the respondent to this appeal) sets out his opinion and recommendations at paragraphs 204-218. At paragraph 209-210 he says the following:

"209. Retrospective assessments of fitness to plead have a wide margin of error. Usually of course a person is assessed at the point of trial or beforehand. He had been assessed by Dr Cree and I noted there is no mention of being either fit or unfit. Though the issues raised by Dr Deo and Dr Ho are reasonable, this is retrospective and it is not automatic that having an illness such as depression or paranoid schizophrenia renders an individual unfit to plead and stand trial. Of course, in any event, many defendants have such an illness and go ahead for trial and in varying degree of illness and acuity.

210. Though it is of course not possible to have an accurate assessment of his functioning at the time of trial, as the issue is more one of trial than plea, his functioning during the trial is key. There is of course a transcript of his evidence during the trial to make an appreciation of how his reported illness was impacting on his functioning during the trial. From my review of his evidence it did not appear to make any significant impact and I found his ability to tackle difficult questions if anything, impressive. This should be taken in conjunction with the position of Mr Dein QC and Phil Smith. Though of course they are not experts they have both represented many defendants and would be in a position to comment on his overall functioning with a particular emphasis on giving instructions. Solicitors and counsel of this calibre would quite regularly have sought to have individuals assessed if there was any concern in their dealings with defendants. Though they are not mental health professionals, it would be unreasonable to accept the statements of friends but not those of Mr Dein and Mr Smith, particularly as the pertinent issues are those of functioning within his case preparation and trial. Though his wife, who was present at the time of the trial gives a description of ranting and jumping from topic to topic, this is not evident in the transcript of his evidence or within the police interview. Furthermore, Mr Dein has commented that she was 'a constant presence and help' and 'at no stage did she express concern as to the matters now raised in support of a belated appeal.' I noted that during the period before the trial, Dr Choudhuri provided and drafted his own proof of evidence; again, there is no evidence of any such beliefs within that proof."

55. We will return to the evidence of the three expert witnesses later, when we consider the live evidence they gave at the hearing before us.

56. Secondly, it is important to recall that the issue of the applicant's mental health was not ignored in the period running up to his trial in September 2013. As we have mentioned on 5 April 2013, there was a psychiatric report prepared by Dr Cree. This was prepared primarily for the purpose of making an application for bail although it was not in the end deployed. It is the best evidence of the applicant's mental health because it is closer in time to the trial, which took place in September 2013.

57. Dr Cree did observe that there was evidence of mental health issues, in particular depression, and some evidence of persecutory and paranoid beliefs, including auditory

hallucinations (see paragraphs 4.17-4.18). Nevertheless, what is significant for present purposes is that Dr Cree made no reference to the possibility that the applicant might not be fit to stand trial. Although express instructions from Tuckers Solicitors did not specifically ask him to address that question, we have come to the clear view that he would have been free to say so if he had had any significant concerns about the applicant's fitness to stand trial. If he did not think it right to include such concerns in his report, he could (and we are sure he would) have raised them in a separate letter to the solicitors, or in a telephone conversation.

58. In a letter dated 2 February 2016, from counsel who appeared on behalf of the applicant at his trial, Jeremy Dein QC, it is said at paragraph 2:

"At no stage before, during or after Dr Choudhuri's trial were issues of fitness to plead, fitness to stand trial, the effect of his mental health on capacity, or admissibility, live issues. These matters simply did not arise for consideration despite numerous conferences, nor was there any basis whatsoever for consideration of any of them. Moreover, despite Dr Choudhuri's obvious intellect and proactive stance throughout at no stage did he ever canvass any such matter with us. He was clearly fit to plead and stand trial and nothing by way of material, evidence, information or instructions suggested that any related issue of capacity or admissibility arose."

59. On 27 July 2016, Mr Dein added some further comments to his letter of 2 February 2016. At paragraph 3 he said the following:

"i) My dealings with Dr Choudhuri were extensive. Based upon approximately 30 years of defending at the Criminal Bar, I repeat, that at no time was it suspected that Dr Choudhuri was unfit to plead or stand trial. Equally, there was no basis for believing that his mental capacity at the time of the commission of the offences should be placed in issue.

ii) Instead, Dr Choudhuri was a vigilant and demanding client whose grasp of the case, and that of issues, was excellent. The scenario with which I dealt in preparing for, and at trial, was unrecognisable from that suggested by Dr Ho in his very recently commissioned report. Self evidently, Dr Ho was not party to the course of proceedings. More significantly, no request has been made by him to verify any matter before reaching his recently formed conclusion.

iii) In addition, throughout the trial itself, Dr Choudhuri's wife was a constant presence and help. Herself a doctor, like Dr Choudhuri, at no stage did she express concern as to the matters now raised in support of a belated appeal.
...

v) It is clear, obvious and inevitable that had we (the legal team) had grounds to pursue unfitness and/or lack of intent, this would have been done. The suggestion that in the face of experience, commitment and concern for the

importance of this case, we somehow missed the glaringly obvious, is self evidently an untenable state of affairs and one that is wholly rejected ..."

60. This court has before it a recent witness statement from the applicant's then solicitor, Philip Smith, dated 15 November 2019, which is to similar effect. At the time Mr Smith was a partner at Tuckers, with some 20 years' experience of criminal practice. At paragraph 4 of his witness statement Mr Smith says that he has experience of fitness to plead cases and is more than familiar with the principle and has deployed it on more than one occasion. He also observes that no-one throughout the trial process communicated any such concerns to him, including the applicant's wife.

61. Both Mr Dein and Mr Smith in essence maintained their written evidence when they gave oral evidence before this court in the face of rigorous cross-examination. Despite the sustained criticism of their evidence which was made by Mr Daw, in his closing submissions, we accept their evidence.

62. In this context we would note the following pieces of contemporaneous evidence:
    (1) In a solicitor's attendance note dated 20 May 2013 [PS/ 1 page 170] there is specific reference to Dr Cree having "stopped short of saying that AC [the applicant] is not fit to plead." His solicitor (Mr Smith) clearly appreciated that they had nowhere to go on this issue.
    (2) The detailed document entitled "Comments/Question/Disclosure" dated 31 May 2013 [Respondent's Core Bundle tab 4, page 235] is entirely inconsistent with the suggestion that the applicant was anywhere near to meeting the criteria in Pritchard. It is unclear who produced the document but it is clearly based on the applicant's instructions. Of note is the fact that, amongst the many various issues identified over many pages, his mental state is not mentioned.
    (3) The contemporaneous medical records from the prison where the applicant was being held in 2013, both before and after his trial in September [Applicant's file 1 tab 4, page 16 and also pages 14-15]. These entries are referred to in Dr Cumming's report, at paragraph 131-132 but not referred to by Dr Ho or by Dr Deo. This is one reason why we find the evidence of Dr Cumming is to be preferred to that of Dr Ho or Dr Deo.

63. **Capacity to commit the three offences**
    It is important to keep firmly in mind that the applicant was charged with, and convicted of, three separate offences. Further, those offences took place not on a single day but, in the case of count 3 in particular, over some six months in late 2012 and early 2013. The first offence took place on 4 October 2010, some 2 years earlier. The applicant's case therefore has to be that he was suffering from such a mental disorder that he was incapable of forming the requisite intention or other mental element required for each of those offences. In our view, there is simply no evidence to support that contention. The fundamental difficulty with Mr Daw's submissions is that there is no arguable nexus

between the mental disorder relied upon and the requisite elements of the offences concerned.

64. On analysis, what the submission would amount to is that the applicant was in fact "insane", according to the legal definition of that term. There are hints of that in the evidence in Dr Ho's report, at paragraph 12.22, where he refers to "a defect of reasoning". What is much more likely, and accords with the experience of each member of this court, having conducted criminal trials, is that, even if there were symptoms of psychosis which went undetected at the time, they did not mean that the applicant was incapable of forming the requisite intention to commit the offences charged.

65. We note that, at page 4 of the summing-up, on 11 September 2013, the trial judge directed the jury that:

> "In the circumstances of this case the prosecution have to prove that this defendant knew that the wallet and the money inside it were not his but dishonestly claimed it as his in order to obtain the money."

66. So far as counts 2 and 3 were concerned he directed the jury that the prosecution had to prove that:

> "The defendant embarked upon a course of conduct which had a tendency to, and was intended to pervert the course of justice."

67. With regard to count 2 the jury had to be sure that he was knowingly responsible for the call being made to Lisa Wright, telling her that she would not be needed at the trial on 7 January. With regard to count 3, they had to be sure that the defendant set out to persuade Mr Rehman to provide him with a false alibi.

68. Mr Daw placed reliance on the decision of this court in R v Gibbons (Andrew John) [2009] EWCA Crim 2988, in which the judgment was given by Stanley Burnton LJ. We were referred in particular to paragraphs 24-25. We did not find that passage helpful. We observe that in that case, as appears from paragraph 24, it was "common ground" that the appellant was mentally ill at the time of the offence. It is also clear that the court had in mind the question of insanity since it referred to the M'Naghton rules (1843) 10 CI & Fin 200.

69. It was common ground before us that the correct approach as a matter of principle is that set out by this court in R v Blackman [2017] EWCA Crim 190, in which the judgment was given by Lord Thomas CJ, who presided over a five-member constitution of this court, which included the President of the Queen's Bench Division (Sir Brian Leveson)

and the Vice-President of the Criminal Division (Hallett LJ). At paragraph 80 the Lord Chief Justice said:

"Unfortunate though that may have been, the totality of the evidence before us is now clear. If the expert evidence of the psychiatrists and the other evidence which we set out fully at paragraphs 86–106 below had been before the court martial, we are in no doubt but that the defence of diminished responsibility would have had to have been left to the Board and that it could have affected their decision to convict. It matters not for this purpose that the evidence as to conditions in Afghanistan is disputed by the prosecution. That evidence plainly had sufficient force and credibility (even if disputed) together with the psychiatric evidence to form the basis of a case that the defence of diminished responsibility that could be advanced. Such a case, if it had been advanced before the Board could have raised a doubt as to guilt in the minds of the Board. As a result, the verdict is unsafe and the conviction for murder must be quashed."

70. Mr Daw also placed reliance upon the recent decision of this court in R v Challen [2019] EWCA Crim 916, in which the judgment was given by the Vice-President of the Criminal Division (Hallett LJ). That case concerned the question of "coercive control" in a case where the appellant had been convicted of murder and her plea of guilty to manslaughter on the grounds of diminished responsibility was not accepted at the time.

71. We note first that cases such as Blackman and Challen concern the offence of murder, to which alone there is a partial defence of diminished responsibility. This will reduce the offence to one of manslaughter. It was not held in those cases that the appellant was incapable of forming the requisite intention. Diminished responsibility is not a defence generally in the criminal law and is not available in respect of other offences. In contrast, the defence of insanity is a general defence but is rarely raised, in part because of the stigma attached to the label and in part because of the potential consequences, which may include a hospital order being made. The analogy to the present case therefore is not exact.

72. Secondly, and more fundamentally, the difficulty for Mr Daw's submission is that there is no arguable nexus between the condition which is now known about (psychosis, which has now been diagnosed to be paranoid schizophrenia) and the mental element required for each of the offences of which this applicant was convicted.

73. In order to assess Mr Daw's submissions further, we will now turn to the evidence we heard from the expert witnesses in more detail.

74. **The evidence of Dr Ho**
The evidence of Dr Ho consists of two reports, as we have mentioned, dated 14 December 2015 and 6 September 2016. We also heard live evidence from him at the hearing before this court.

75. We bear in mind first that Dr Ho assessed the applicant on 9 December 2015 and did so for one-and-a-half hours. That was some 5 years after the first offence charged; some 2 to 3 years after the second and third offences charged: and more than 2 years after the trial in this case.

76. Secondly, we bear in mind that inevitably Dr Ho had to assume many of the facts to be true. Many of those were taken, again inevitably, from accounts given to him by the applicant and by his wife, Dr Fatima Choudhuri. For reasons that will become apparent, we do not regard the evidence of either the applicant or his wife as being necessarily reliable.

77. Thirdly, in relation to the question of fitness to plead and stand trial, Dr Ho appeared to accept that the applicant did indeed give a good account of himself, both in police interviews and when he gave evidence at his trial. Dr Ho appeared to distinguish this, which he regarded as relating to "cognitive" abilities, such as the ability to understand, and the applicant's "motivation". He told us, in cross-examination before this court, that the applicant is intelligent but that he believed the applicant was in a prodromal (in other words early) phase of schizophrenia, where people can frequently function to a degree but nonetheless experience real and disturbing psychotic features.

78. Even if that were so, in our view it comes nowhere near meeting criteria for unfitness to plead or stand trial.

79. Fourthly, in relation to the underlying offences, we bear in mind the following pieces of evidence before us:
    (1) The applicant was able to function in the conduct of his medico-legal practice for many years, including in the period between 2010 and 2013. Indeed, while he was in prison on remand in 2013, his wife was making arrangements for him to continue to receive files so that he could continue doing his professional work on them.
    (2) There were character references provided as to his ability to do that work well in the period leading up to October 2010 and later.

80. There is simply no arguable nexus between a belief (even if the applicant did have it at the time) that he had not committed the underlying offence in count 1 and his alleged inability to form the intention required to commit the offences in counts 2 and 3. It is perfectly possible, as Mr Daw accepted during the hearing before us, that an entirely innocent person may be guilty of an offence of attempting to pervert the course of justice, for example, by trying to interfere with witnesses or to get a witness to provide them with a false alibi defence. In our view, there is no relevant distinction between such a case

and the situation in which the applicant found himself in 2012-2013. Even assuming for the purpose of the argument that he believed himself to be innocent of the fraud offence in count 1, there is no reason to suppose that he was incapable of forming the intention to commit the offences of perverting the course of justice. To the contrary, it might be thought to be a perfectly rational thing to do given his belief that he was innocent on count 1.

81. It is in part for that reason that we find much of the evidence given by Dr Ho in this context confused and unsatisfactory. Dr Ho appeared not to distinguish between the applicant's state of mind in relation to count 1 and the many things he was able to do over the months and years subsequently, which were the subject of counts 2 and 3. For example, the applicant had the capacity to persuade Mr Rehman to take the view that CCTV footage in fact showed the two of them at a meeting on the afternoon of 4 October 2010 when that meeting had not taken place that afternoon. The applicant also had the capacity to have communications with Mr Rehman over a period of some 6 months between August 2012 and January 2013. This was not some brief episode, which might have been explained by reference to psychosis.

82. Dr Ho's evidence on this in cross-examination was telling. He said that the evidence should be seen in the context of a man who was experiencing psychosis following the first charge with regard to the wallet. He said that what followed does not make rational sense because there was overwhelming evidence that what he was doing was going to be found out. So the alternative explanation, in Dr Ho's opinion, would be a man so driven by his conviction that he is innocent and therefore willing to do acts which, on the face of it, are fairly obvious that they would be traced.

83. In our respectful view, that evidence simply does not grapple with the obvious alternative explanation, which is that the applicant was indeed guilty of the offences at least in counts 2 and 3. As we have said, there is no arguable nexus between the medical evidence, which is properly the subject of Dr Ho's opinion, and the applicant's capacity to form the requisite intention to commit the offences charged.

84. A further reason why we find the evidence of Dr Ho less than satisfactory is that he appears to draw one set of potentially contentious inferences from the "fact" of the alleged offence and has not even attempted to consider possible alternative inferences, for example that the applicant may indeed be guilty. That could be a plausible reason why the applicant appeared to be advancing a defence which was so fanciful as to not to be reasonably capable of belief.

85. **The evidence of Dr Deo**

The evidence of Dr Deo consists of a report by him dated 14 July 2017. We also heard

live evidence from him at the hearing before this court.

86. Dr Deo was clear in cross-examination that the development of paranoid schizophrenia is "a very linear progression". In our respectful view, the evidence in this case does not in fact support that that is what happened. For example, there appears to be evidence that the applicant was indeed unwell in around 2007 but later recovered.

87. There is also contemporaneous evidence that the applicant's condition deteriorated from February 2013, after he was remanded in custody. That appears to be consistent with the findings of Dr Cree in April 2013, which were that the applicant was suffering from severe depression and also had psychotic symptoms. Dr Cree was well aware that there were symptoms such as auditory hallucinations while the applicant was in prison on remand.

88. When these points were put to Dr Deo in cross-examination, he accepted that there are of course fluctuations and the development is not a completely linear one.

89. Dr Deo was circumspect in the evidence he gave about the applicant's ability to form an intention to act dishonestly at the time of the fraud offence on 4 October 2010. His evidence was that he would have specifically wished to know what was in the applicant's mind when he took the wallet. He would have wanted to explore this but this did not happen. That was the thrust of his concern. In our respectful view, that evidence does not come close to establishing an arguable nexus between the medical condition that the applicant was suffering from (even taking Dr Deo's evidence at its highest) and the question whether the applicant was able to act dishonestly when he took the wallet.

90. Similarly, we do not consider that Dr Deo's evidence comes close to establishing an arguable case that the applicant was unable to form the intention to pervert the course of justice in 2012 and 2013. All that Dr Deo was able to say to this court in cross-examination was: "I think that you would need to ask Dr Choudhuri those specific questions with a clinical focus; and at risk of repeating myself, my concern is those questions were not asked."

91. Later in his evidence, Dr Deo told this court that it is difficult to comment further without having some psychiatric focus on what lies behind the applicant's motivation for saying the things he was saying. "Was he saying the things he was saying because he was dishonest, or was he saying the things he was saying because he was in the midst of a paranoid deluded world and in that prism was he coming out with things which made little sense, for example running various defences? But my concern was, as a psychiatrist, I do not think that was dealt with clinically; it was not addressed early on."

92. When he was asked by Mr Douglas-Jones the direct question:

> "How could his illness have impacted on his beliefs in the context of these two (one protracted) offences of perverting the course of justice?"
> Dr Deo answered:
> "Well that is my point, we do not know."
> And:
> "My concern is it is difficult to answer because there it was never explored in any shape or form."

93. In relation to the question of fitness to plead and stand trial in 2013, and by reference to Dr Cree's report, Dr Deo's evidence was that he accepted the applicant was "cognitively able". He said that his schizophrenia was not detrimental at that stage of the illness but it had affected those areas. Particularly Dr Cree's report had picked out paranoia, paranoia regarding the police but we did not know to what this extended:

> "So yes, he could put one thought behind another, he could follow through on his thoughts in a seemingly logical manner, but that does not mean that there was not paranoia driving much of his thinking; we do not know."

94. In our respectful view, that evidence does not come close to establishing what needs to be established in this court, or even that there is an arguable case that the applicant was unfit to plead or stand trial in 2013.

95. **The evidence to Dr Cumming**
The evidence of Dr Cumming consists of a report dated 10 July 2018. We also heard live evidence from him in this court.

96. Dr Cumming accepted that sometimes it is necessary and possible to form a retrospective diagnosis about a person's mental health. However, he considers that it is highly problematic making decisions about capacity and fitness to plead retrospectively.

97. Secondly, Dr Cumming stated that people do function with schizophrenia quite ably. That is a common finding of people when they get arrested. We find they have been suffering from illness for years but it has gone undetected. They can be fit to plead and they can have capacity.

98. Furthermore, we found impressive Dr Cumming's evidence that, as an expert, he regards the issue of whether a defendant had the requisite intent to commit an offence as being essentially for the jury. He considers that experts can contribute to that but he has always been very cautious about saying that somebody could not form the intent with any degree of certainty because there are so many things that need to be taken into

consideration.

99. In relation to fitness to plead and stand trial, we found impressive Dr Cumming's evidence that the applicant was "a man really on form. He was really dealing with evidence, cross-examination ... really, really well". That accords with our own impression, having read the transcripts of the applicant's evidence at his trial.

100. We were also impressed by the fact that Dr Cumming appeared to give evidence which was specifically directed to the Pritchard criteria. He was clearly familiar with those criteria.

101. There could be no doubt that, by 2016, when the applicant was in the clinical care of Dr Butt, the diagnosis is one of paranoid schizophrenia. So much is common ground between the various expert witnesses.

102. We were also impressed with Dr Cumming's evidence as to what he would have done had he been in Dr Cree's position in April 2013. Whatever his instructions had said, he would have explored the person's fitness to plead if he had any concerns about that.

103. In our view, that accords with what most responsible experts can be expected to do and would do.

104. Dr Cumming gave clear evidence in cross-examination that his opinion is that the applicant was fit to plead and stand trial from the information that Dr Cumming had seen. The applicant knew what he was charged with, he knew how to enter a plea, he could instruct counsel, he understood the evidence, he did give evidence, and he could follow proceedings.

105. **The evidence of the applicant and his wife**

We would note that the applicant's own evidence at his trial about the events in Starbucks on 4 October 2010 was vague and lacking in detail (see the transcripts of his evidence [the Applicant's File 3, Tab 7], pages 6G-H, 7D-E, 8A-B and 14B-C). In that last passage he said that he had "a vague recollection of what happened at the time".

106. The applicant's wife, Dr Fatima Choudhuri, was not called to give evidence on behalf of the defence at the trial. Nevertheless, she appears to have had detailed, although sometimes differing, recollections of the events of 4 October 2010.

107. She gave a detailed account of the incident to Dr Cumming (see Respondent's

Core Bundle page 180, at paragraph 196). She claimed that she had told the solicitor this. Mr Smith said in terms (in answer to a question from Spencer J) that she did not give any such account. Interestingly it is very similar to the account which she gave in the conference with leading counsel (Mr Daw) on 27 October 2015, and as recorded in an attendance note at pages 6-7.

108. She gave a different account of the incident to Dr Deo. In that account (see Respondent's Core Bundle page 144 at paragraph 65) she claimed that the tourist from Singapore was sitting alongside them in Starbucks for one-and-a-half hours afterwards, which is a bizarre account and plainly untrue.

109. More generally, if she had this detailed recollection of the events in Starbucks, she should have given it at the time. By contrast, the applicant himself said, when cross-examined at his trial, that his wife had no more recollection of the events in Starbucks than he himself had and that was why she was not called (see the Applicant's File 3, Tab 7, page 31). This in itself suggests that they had at least discussed the matter between themselves.

110. It is very difficult after so many years have passed to be confident that Dr Fatima Choudhuri is reliable as to the applicant's state of mental health in the 2 years or so prior to October 2010. For example, as Dr Cumming highlighted in his report, she did not mention in December 2014 to Dr Junaid (a consultant psychiatrist) the applicant's strange behaviour (for example suspicion that his food was tampered with or that he did not want his things touched): see the Respondent's Core Bundle page 174, at paragraph 148. That strange behaviour has now emerged as an important part of the information relayed to Drs Ho and Deo.

111. We would also observe that Dr Fatima Choudhuri was quite happy to suggest that Dr Cree should beef up his report. However, she did not at that stage make the points which have now been made on the applicant's behalf.

112. Finally, we would observe that Dr Fatima Choudhuri was quite prepared to make ethically dubious suggestions to the applicant's solicitors in the lead up to the trial, as attendance notes show. For example, on 5 July 2013, she asked what would happen to the applicant's sister (who was then suffering from a terminal illness and sadly died in late 2013) if she were to admit making the phone call to Lisa Wright and in particular, would she go to prison (see the Smith Bundle at page 86). Also on 5 July 2013, in the same bundle at page 88, she asked whether the applicant could plead guilty now and allege later that he was under duress so have his plea overturned.

113. All in all, we note that the witness statements from people such as Dr Fatima Choudhuri are not adduced before this court directly under section 23 of the 1968 Act.

Nor could they be, since the witnesses would have had to be called to give live evidence and be tendered for cross-examination. As they stand, the witness statements constitute hearsay evidence. Nevertheless, Mr Daw relies on them as being part of the documentation which was taken into account by the expert witnesses in particular, Drs Ho and Deo.

114. We are content to look at the statements on that basis and for that limited purpose. Nevertheless, we have come to the conclusion that they do not assist for the fundamental reason that the evidence, in particular of the applicant and Dr Fatima Choudhuri is unreliable. That evidence formed an important part of the picture that was taken into account by the expert witnesses Drs Ho and Deo. This makes a material difference to whether we can reliably accept the evidence of those experts as well.

115. **Conclusion**

Having considered both the submissions and the evidence before this court, which includes live evidence over the course of one-and-a-half days, we are satisfied that the convictions in this case are safe. It is not properly arguable that they are unsafe.

116. For the reasons we have given this application for leave to appeal against conviction is refused, as are the application for an extension of time and the application to adduce fresh evidence.

117. LORD JUSTICE SINGH: Is there anything else?

118. MR JOHNSON: My Lord, I appear instead of Mr Douglas-Jones for the respondent. The only matter I am instructed to raise is to make an application for costs against the applicant under section 18 of the Prosecution of Offences Act 1985, and the sum in which the application is sought is a sum of £20,052. I have a short schedule that I can hand up to your Lordships and to my learned friend **(Same Handed)**.

119. Your Lordships can see it includes the costs of the instruction of Dr Cumming in addition to the fees of Mr Douglas-Jones and the time spent by the two reviewing lawyers who were successfully engaged to dealing with the matter.

120. LORD JUSTICE SINGH: I see, yes. Is there anything further you want to say before we hear ...

121. MR JOHNSON: My Lord, no.

122. LORD JUSTICE SINGH: What do you say Mr Daw?

123. MR DAW: My Lord, the quantum of course has only just been brought to my attention. My Lord, the position is that the applicant's means are a matter which I would need to explore in more detail. As I understand it, they are very limited in any event; he is not in employment and has not been for some time as you may appreciate.

124. Secondly, this is an application that was referred by the Registrar to the Full Court for the permission application and therefore of course had to be dealt with on its merits. Thirdly, the question of Dr Cumming's instruction and no doubt a significant element of the claim, as I say which I only have in front of me for the first time, they arise from the fact that you may recall my Lord we appeared in this case before you in March 2018 for a hearing of this application. The respondent, despite having been invited to obtain an expert report within the notice of appeal having not done so, and the case then had to be adjourned and instructed in the later part of last year, despite the filing of the appeal in September 2016. So it took the prosecution well over 2 years to, as it were, to get round to instructing an expert at all. So there was both significant delay and duplication of costs as a result of those matters.

125. So, my Lord, in terms of means I cannot hand to you, as it were, at this moment, a detailed breakdown. I do not know whether you might think it appropriate, not least because we have had an opportunity to consider the detail –

126. LORD JUSTICE SINGH: Had you been given any notice that there might be an application for costs?

127. MR DAW: No, nor had we been given, as I say, the schedule itself. So I am not being critical about that at all, but the only observation I make I would appreciate the opportunity to consider it properly and also to perhaps dealt with by brief submission of no more than a page or something like that, for your Lordships, as it were, to finally determine the matter with the benefit of any schedule of income and expenditure that the applicant may be able to provide. That is all I can ask at this stage.

128. LORD JUSTICE SINGH: Do you want to say anything in reply?

129. MR JOHNSON: My Lord, no.

130. **(The Bench Conferred)**

131. LORD JUSTICE SINGH: In the circumstances which have arisen, we intend to take the following course. Given the time of year Mr Daw, we will give you until Friday 10 January to file a brief submission. We will take you at your word that it will be no more than one page.

132. MR DAW: With not too small font to try to bypass the direction, my Lord.

133. LORD JUSTICE SINGH: Any evidence that you want to file in support of that submission, in particular as to the applicant's means, and then we will give the Crown 7 days, if they are so advised to respond (in other words by 17 January). Thereafter, we direct that this court, which will include of course Spencer J, will make a decision on costs in writing so there is no need for further attendance. I should say in case it was not already apparently that the judgment which I read out earlier today was the judgment of the Full Court including Spencer J. He has other commitments in the civil jurisdiction which is why he could not sit with us today. Is there anything else?

134. MR DAW: No, thank you.

135. LORD JUSTICE SINGH: Thank you both - Mr Johnson in particular - for attending today in place of Mr Benjamin Douglas-Jones.

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