Neutral Citation Number: [2021] EWCA Crim 3

Case No: 2020/01396/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM STAFFORD CROWN COURT
SIR RICHARD TUCKER (Sitting a Deputy Judge)
T.20037280

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/01/2021

Before :

LADY JUSTICE MACUR
MR JUSTICE WILLIAM DAVIS
and
MR JUSTICE MURRAY

- -

Between :

REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION UNDER S.9 OF THE CRIMINAL APPEAL ACT

GARY WALKER

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.
IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

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Ms Rachel Brand QC (instructed by the CPS Appeals Unit) appeared on behalf of the Crown
Mr David Emanuel QC (instructed by Birds Solicitors) appeared on behalf of the Appellant

Hearing date: 10 December 2020

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Judgment Approved by the court
for handing down

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Lady Justice Macur:

Introduction

1. This is an appeal against conviction upon reference by the Criminal Cases Review Commission (CCRC), pursuant to section 9 (1) of the Criminal Appeal Act 1995. The appeal relies upon 'fresh' medical evidence, for which there is an application to adduce the same pursuant to section 23 of the Criminal Appeal 1968 Act, in the circumstances we describe below. The respondent does not object to our receipt of the evidence de bene esse but contends that it does not afford a ground of appeal and so contests the appeal.

2. The appellant is represented by Mr Emanuel QC. The respondent by Miss Brand QC, who appeared for the prosecution in the court below.

3. The appellant was convicted of the murder of Audra Bancroft on 22 October 2004. He was sentenced to life imprisonment with a recommendation that he serve a minimum term of 12 years and 27 days before release. He is still a serving prisoner.

4. In July 2006, the single Judge refused permission to appeal conviction. A renewed application was heard by the full court on 5 March 2007 but permission to appeal conviction was refused.

5. In 2014 the appellant applied to the CCRC for a review of his conviction. His application was based on written documents from a pathologist and two neuropathologists, one of whom had given evidence at trial. In 2017 the CCRC decided not to refer the conviction. The appellant successfully applied for permission to judicially review that decision. Consequently, the CCRC agreed to carry out a second review and then decided to refer the conviction of the appellant to the Court of Appeal on the basis that there is a real possibility that this court will find (a) that if the expert evidence, as now articulated, was presented to the jury in a fair and balanced way, the jury might have returned a not guilty verdict; (b) that the Judge's direction on causation failed to adequately draw the jury's attention to the implications of the evidence suggesting that the appellant had taken steps to ensure that he placed the deceased in a safe recovery position.

Background facts in summary.

6. The deceased, Audra Bancroft, was 36 at the time of her death. She had been in a relationship with the appellant for several years and they lived together, close to the deceased's ex-husband with whom she shared the care of their three young children.

7. On 7 December 2004, the appellant and deceased had been seen together in the Blacksmith's Arms pub. The deceased had been drinking heavily. She was due to have a termination of her pregnancy the following day. They travelled home by taxi at 11pm and the deceased was uninjured at that stage.

8. The deceased telephoned her ex-husband at 11.20pm and attended at his address nearby just after midnight. She asked if she could stay the night, he refused and asked her to leave, which she did at about 12.40 am on 8 December. Her ex-husband described her as steady on her feet, not drunk and with no visible injuries.

9. Various neighbours heard or saw the deceased returning to her own address, at which point she was in the company of the appellant. She was unsteady on her feet and the appellant was holding her up under her armpit, seemingly dragging her along.

10. Paramedics attended upon the deceased twice at her home address during the early hours of 8 December. On the first occasion, at 2.35am, the appellant told the emergency services she had been drinking heavily all day. She had gone to see her ex-husband and he, the appellant, had found her in the street later with a couple of large lumps on the back of her head and bleeding from the nose. A paramedic attended, he examined the deceased and concluded that she was intoxicated. He told the appellant to telephone 999 again if her condition deteriorated.

11. On the second occasion, at 6.45am, the appellant told the emergency services that his partner had been drinking, she had visited her ex-husband then came home and had fallen over. He told them she had a bruised back and was susceptible to bruising because she had leukaemia. At this time, the deceased's condition had deteriorated, and she was taken to hospital by ambulance. Despite medical efforts, she died at hospital later that morning. Blood-alcohol analysis suggested that she would have been significantly intoxicated at about 2am in the morning.

12. The appellant was arrested on suspicion of murder later that day; he denied murder. He said he had found the deceased collapsed in the street. In his initial police interviews, the appellant maintained that he did not know how the deceased had sustained her injuries. When asked about the marks on her neck, he eventually stated that he may have held her around the neck to support her after finding her collapsed in the street. In a subsequent interview the appellant told police that the deceased had attacked him with a potato peeler, and he had acted in self-defence. He had no intention to kill her or cause serious injury.

13. The prosecution case at trial was that the appellant murdered the deceased in the early hours of Monday 8 December 2004. He had assaulted her in the street and at home, most probably with punches to her body, head, and face, and by manual strangulation. The consequence of her injuries, taken together, had been death.

The trial

14. The prosecution called medical evidence from attending paramedics, two forensic pathologists and a neuropathologist. Their evidence as summed up to the jury was as follows.

15. The paramedic who responded to the first 999 telephone call was Wildman. He observed that the deceased was intoxicated and had small lumps at the base of her skull but no other facial injuries. There was bruising on the top of her body and one arm. He advised the appellant to keep an eye on her and a pillow was placed beneath her head. In cross-examination, he agreed that this was an inappropriate position in which to place the deceased because there was a risk she could have vomited and blocked her airways. He had no recollection of seeing any evidence that she was bleeding from the nose and did not recall her eyes being wide open and staring. He maintained that she was not totally unconscious but rather that she was mumbling and "rousable".

16. The paramedics answering the second 999 telephone call were Tabbenor and Gaunt. At this time, the deceased was observed as breathing with a snoring sound and totally unresponsive. There was dried blood on her pillow but none coming from her mouth or nose at that time. She had marks on her face and head, including a lump on her forehead, bruising on her face and a large bruise on her chest and along her left arm. Whilst waiting for an ambulance, her condition deteriorated, and she suffered cardiac arrest. During chest compressions, the deceased vomited. There was a significant amount of blood in the fluid and in her airways, which were obstructed. She was re-intubated on the journey to the hospital, and an amount of red liquid, enough to block the airways, was removed.

17. Professor Rutty, a forensic pathologist, conducted the post-mortem and recorded 26 areas of fresh injury, including extensive bruising to the face and head, a cut lower lip, possible fracture of the nasal cartilage, deep bruising to the neck, bruising to the arms, legs, back and buttocks, swelling of the brain and bleeding of the surrounding membranes. There was blood on the deceased's face, which had trickled from the left side of her nose, and in the

left angle of her mouth onto her chin. There was bloodstained fluid in the trachea and air passages, including some blood in the air passages of the lungs.

18. He concluded that the fresh injuries were likely to have resulted from blunt trauma. The facial injuries were in keeping with punches or being banged against something, and the bruises to her arms indicated that she had been gripped. Dot-like haematomas were indicative of asphyxiation and taken together with the bruises on her neck, were entirely in keeping with manual strangulation.

19. He said the bleeding he saw inside the skull was because of a traumatic head injury, but not because of a simple straight backwards fall. If the deceased fell straight backwards then the point of impact would be at the back of the head with localised areas of bruising and a splitting or deep injury, which were not present. There would also be bruising and injuries to the front of the brain where it would be shaken, in effect, against the front of the skull, known as "contrecoup". There were no injuries to the front of the brain so there were no features to support a fall causing the head injuries.

20. In his view, the deceased had been assaulted and had suffered an episode of manual strangulation. She had then lain unconscious for some time before she died. That could have been either because her brain swelled, and she suffered a heart attack or because her airways were blocked. Asked about the effect of an accumulation of material at the back of her throat which restricted her airways and whether she would have died if she had not been assaulted, he said: "If she hadn't been assaulted and received these injuries, she'd still have been alive today."

21. In cross-examination he said that although she had been manually strangled, that was not the cause of death. There may have been an accumulation of material at the back of her throat which restricted her airways, but he did not believe that the head injury was caused by a simple fall in the street. She had undoubtedly been assaulted.

22. Professor Milroy, forensic pathologist, agreed that the arm injuries were consistent with gripping. Bruising on the neck together with the petechiae to the eyes indicated compression on the neck due to manual strangulation. The evidence suggested that two hands had been used. He agreed with Professor Rutty that the pattern of injuries did not arise from simple falls, certainly not the neck injury. Neither was the brain injury from a simple fall onto the back of the head, which commonly would have caused a contrecoup injury to the opposite side of the brain, and nor was the "extent of the scalp bruise typical of a simple fall. There may be an element of fall, but it does not go beyond that." The facial injuries were most likely to have resulted from punches. His opinion was that death was caused by head injury in combination with manual strangulation.

23. In cross-examination he said that if the deceased had suffered injury which caused bleeding from the nose and had been left lying on her back, there was a possibility that blood had got into the back of her mouth. Someone with a head injury and who had been strangled may get fluid in her airways, he thought

that strangulation was part of the cause. Professor Milroy said that the most significant factor was hypoxic injury (oxygen starvation) in the brain. The three possible causes were: (i) direct injury to the head; (ii) manual strangulation preventing blood reaching the brain; and (iii) obstruction of the airway through injury or fluid from the lungs.

24. Dr. Squier, a neuropathologist, found mild swelling and a considerable film of blood beneath one of the membranes upon examination of the deceased's brain. When sliced, she found fresh bruising over the temporal lobe of the right side and a small amount of haemorrhage "consistent with injury." There were signs of a lack of oxygen in the brain. There was considerable axonal injury in many areas of the brain, in a pattern that was suggestive that there had been failure of oxygen and blood supply to the brain tissue. She said there was nothing specific to the tearing of the nerve fibres which led her to the conclusion that a lack of oxygen caused the axonal injury. There was evidence consistent with head trauma, however, whatever the trauma was it had been relatively minor and may not even have resulted in unconsciousness. The starvation of the brain through lack of oxygen would account for all her findings, except external bruising. Having considered the evidence of the paramedics she concluded that the deceased was on her back for some time during which it was likely that she bled into her airways and this caused oxygen starvation to the brain. On re-examination she said it was extremely difficult to tell whether the brain swelling was caused by lack of oxygen or by trauma. She added that in the present case she felt that most of the axonal damage was because of lack of blood supply or oxygen, which could have been due to trauma or due to primary failure of the heart, or the circulation. She did not find any significant objective clear evidence of definitive traumatic axonal tearing in the brain but could not rule out brain swelling starting because of trauma. After the trial Dr Squier had sent two letters to Mr Walker and one to Birds Solicitors, dealing with various aspects of the case. These are referred to in [36] below.

25. The appellant gave evidence. He said that the deceased drank a lot and often fell over when drunk. On 7 December, the deceased was very drunk. They left the pub after 11pm and when they arrived home she continued drinking. She was speaking on the telephone and sounded angry. She decided to go to the former matrimonial home and collect the children and bring them back with her. The appellant was concerned, particularly as she had drunk so much, but he could not prevent her from going.

26. While she was gone, he attempted to call her mobile phone. She did not answer, except on one occasion when he could hear her arguing with her ex-husband. He explained that her purse and Barclaycard had previously gone missing but that he had found it hidden in her room. He had discovered that money was missing from the account. He telephoned his own mother because he expected trouble that night and wanted a witness.

27. The appellant had said he would meet the deceased, so he set off along the road and found her lying on the pavement with her leg on the grass and blood pouring out from her nose. She was obviously drunk and as he tried to pick her up, she said, "I fell". He denied that he hit her at all or caused any of her

injuries there in the street. When they got home, he attempted to assist the deceased by sitting her on a stool, tilting her head back and trying to clear her nose. She slid down the wall onto her backside, so he took her into the kitchen where she stood near the microwave but was unsteady on her feet. Then she grabbed a potato peeler from a hook on the wall. He told her not to be stupid, but she was about one foot away and tried to push the peeler into his face. He raised his left hand and sustained a cut from the peeler. He knocked her away with his right arm, which struck her chin and mouth. Nevertheless, she came at him with the peeler a second time, so he grabbed her right arm and tried to push her away with his open hand against her head. She tried to bite his hand, so he grabbed her around the throat with his right hand whilst he tried to squeeze the peeler out from her hand. During this struggle, the blade broke. He thought he held her throat for about 10 or 15 seconds. She was shouting at him and he was pushing her away. She staggered and fell against the hall wall. There was no further physical violence that night.

28. He accepted he had not mentioned this attack upon him when he gave his initial police statement and explained that he had been afraid. He did not believe he had harmed her in any significant way and did not intend to harm her. His actions were purely to stop her coming at him. He described how he helped her upstairs to bed and that she did not appear to be badly hurt at that time. He called the ambulance at 2.35am because she was breathing heavily, and he wanted to get help. He took her downstairs at that time and put her in the recovery position. The first paramedic just said she was drunk and that she would be all right.

29. At the commencement of his summing up the judge posed the question:

> "Have the prosecution proved that her death was caused by the defendant or may it have been caused by some extraneous factor, for example by an accidental fall on the pavement which caused brain damage or by her being drunk and being – by being left in an inappropriate position whereby she choked on her own blood and vomit and suffered asphyxiation.? Obviously if that is the case you will acquit the defendant." In subsequently directing the jury on the medical evidence, he told them it "is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence, namely in particular the cause of death…. we have to grapple with the medical evidence, and I'll do my best to take you through it and explain it. It is by no means as conclusive as you might wish…" He reminded the jury of the evidence of Professors' Rutty and Milroy at some length as regards the unlikelihood of a 'simple' fall accounting for the "head injuries", and that "I asked him [Professor Rutty] about the effect of an accumulation of material at the back of her throat which restricted her airways and whether she would have died if she had not been assaulted. His answer was: "If she hadn't been assaulted and received these injuries, she'd still have been alive today." …. He said the head injury was insufficient to cause death on its own, but that blood has entered her airways and, depending on the amount of blood present, it may present problems to the lungs and he agreed that an unconscious person who is laid face up is at risk of having their airways blocked."

The Court of Appeal

30. The decision of the full court is reported at [2007] EWCA Crim 482.There were six grounds of appeal that were sought to be advanced. We note that two of the grounds mirror the case that is pursued before us. That is, it was argued that the medical evidence was insufficient to establish relevant causation to found a conviction for murder, and that the trial judge had failed to adequately direct the jury in relation to substantial cause by virtue of the first paramedic's inept intervention in laying the deceased on her back.

31. The reasons for rejecting the renewed application in respect of these grounds is found at [28] to [31] and [34] of the judgment. That is:

> "*28. …the Judge gave a clear direction to the jury at the beginning of his summing up. He said:*
>
> *[referring to the passage at [29] above]*
>
> *29. He reverted to this issue right at the end of his summing ups. He said:*
>
> *"So too you should all agree on the cause of death. There is conflicting medical evidence about that which I have already reviewed. How do you approach the question of the cause of death? If you find, so that you are sure, that the defendant did inflict injuries on the deceased, then if at the time of the death (you) find that those original injuries are an operating and substantial cause – would you note that phrase - "an operating and substantial cause", then the death can properly be said to be the result of the injuries, albeit that some other cause of death is also operating. Only if it can be said that the original injuries are merely the setting in which another cause operates can it be said that the death does not result from those injuries. Would you bear that direction in mind throughout, please."*
>
> *30. This was a perfectly adequate direction on the need for the prosecution to establish that injuries caused by the applicant were a substantial cause of the death of the deceased.*
>
> *31. Mr Trimmer's submission that the evidence at trial did not exclude the possibility that the death of Audra Bancroft was due to bleeding caused by her fall on to the pavement, where she was found by the applicant, and her having been left by the first paramedic in an inappropriate position, ignores the medical evidence as to the head injury. It assumes that the jury accepted as a reasonable possibility the applicant's story that he had found the deceased lying on the pavement, and that that was the cause of her head injuries. It is clear from the jury's verdict that they rejected his evidence. Professor Rutty and Professor Milroy were agreed that the deceased's head injuries did not arise from simple falls. The jury clearly concluded that the deceased suffered no significant injury before she met or was found by the applicant. It was open to the jury to find that all her*

> *head injuries were due to an assault by him. On this basis, it mattered not what the precise cause of death was, provided it resulted from an injury inflicted by the applicant. That is what the jury must have found. (Underlining provided)*
>
> *32….*
>
> *33….*
>
> *34. The fact that the first paramedic left the deceased in an inappropriate position may have contributed to her death. However, it was not such as would have so broken the chain of causation, if at the time he found her she was already injured, as to remove the applicant's criminal responsibility. It was sufficient for the prosecution to prove that the injuries inflicted by the applicant were a substantial cause of her death. Given the clear directions of the trial judge, the jury must have so concluded."*

32. Significantly, we find, the Court of Appeal concluded as it did reliant upon the evidence of Professors Rutty and Milroy regarding causation of the head injuries as summed up at trial, as indicated by the underlined passages above.

The CCRC

33. The application to the CCRC in October 2014 to review the conviction was supported by reports/letters from Dr Allen Anscombe, consultant forensic pathologist, Dr Istvan Bodi, Consultant neuropathologist and Dr Waney Squier, neuropathologist, who had given evidence at trial on behalf of the prosecution.

34. Dr Anscombe reported on 5 May 2010. He considered that there were injuries to the back and top of the head which were consistent with a fall. There did not have to be a contrecoup injury present if there had been a fall, but it was possible to detect one in this case in any event. It was impossible to say that the trauma to the head had caused significant brain injury. It was uncertain what contribution the injuries occasioned by the deceased during the subsequent assault had on the brain injury. Death was the result of positional asphyxiation.

35. Dr Bodi reported on 14 March 2011. He did not consider that the head injury was directly linked to death. The most likely cause of death was the slow or gradual prolonged suffocation due to blood aspiration which would explain the brain swelling and the hypoxic-ischaemic brain injury of the deceased. He agreed that contrecoup injuries were not diagnostic of falls and could not exclude the very mild brain contusions he saw as having been caused by a fall.

36. Dr Squier's letters are dated 8 June 2012, 23 April 2013, and 8 November 2013. In the letter dated 8 June 2012 Dr Squier stated that she agreed with the conclusions of Dr Bodi and Dr Anscombe. She agreed with Dr Bodi's

conclusions that the traumatic brain injury was mild and did not play a significant part in the Ms Bancroft's death.

37. In her letter, dated 23 April 2013, she stated that if the jury were left with the impression that the cause of death was trauma rather than hypoxia then this was misleading as the true position was more complex, "... the circumstances of this case are complex. It is not possible to say that the brain would not have swelled without the airway obstruction. The relationship of brain swelling to degree of trauma is very complex and idiosyncratic. It is not possible to predict how much brain swelling will result from a given degree of head trauma in any given individual." "The bleeding described in the temporal lobes may not even fall into the definition of 'contusion' as it is not on the brain surface, but it is within the cortex and underlying white matter. Typically, both coup and contrecoup contusions involve the outer surface or cortex of the brain. The bleeding seen here may be a secondary phenomenon due to alterations in blood flow through the tissue and brain swelling; these have many causes including trauma and hypoxia."

38. In her letter, dated 8 November 2013, she clarified what she meant by this, saying: "I am not suggesting at all that the head injury had nothing to do with the death. What I said was that the head injury was mild and did not play a significant part in the death. I said this because the more significant finding was of brain damage due to deprivation of blood and/or oxygen supply. There are several factors to consider in this case: the effects of high levels of blood alcohol, of trauma and of subsequent hypoxia. The pathology suggests the traumatic brain damage is mild; while it may not account for death it may be related to the collapse and subsequent hypoxia. Alcohol consumption may have played a significant role both in the vulnerability to a fall, the failure of normal protective reflexes during a fall and in the subsequent pathopsychological responses to trauma." Dr Squier added that in her opinion, "contrecoup injury is not a necessary component of head injury due to a fall and cannot distinguish accidental from inflicted trauma." She said that if the deceased had been appropriately nursed, and not left in an unsuitable position, it is unlikely that she would have suffered airway obstruction and would not have died.

39. The CCRC initially rejected the reference, concluding that the experts at trial had not ruled out the possibility of a fall, and noted that the new expert witnesses did not positively state that the injuries were caused by a fall. That is, the new expert evidence did not in fact differ significantly from the expert evidence that had been given at trial. Further, the criticisms of the judge's direction on causation were not sufficient to establish a real possibility of a successful appeal.

Application for Judicial Review.

40. The appellant's application for permission to seek Judicial review of the CCRC 2017 decision came before Ouseley J on 24 May 2018. He granted permission with a comprehensively reasoned judgment, which is reported at [2018] EWHC 1373 (Admin).

41. Against this background and "guided" by the reasons given by Ouseley J in his judgment, the CCRC reviewed the appellant's case again and concluded that the new evidence may afford a ground for allowing an appeal. Noting that this is not "a pure fresh evidence case in which new expert opinion is advanced, in simple and direct contradiction to expert evidence presented at trial", the CCRC were persuaded by Ouseley J's judgment which emphasised the importance, in this "highly complex and difficult case, of placing every element of the evidence accurately and fairly before the jury. It appears to the CCRC that the expert evidence now available suggests that the science is not as clear-cut as the jury were led to believe. If the expert evidence, as now understood in its totality, had been accurately placed before the jury, it is not fanciful to think that a different verdict could have resulted. Accordingly, the CCRC considers that there is a real possibility that the Court of Appeal would (a) admit the new evidence, in the interests of justice, and (b) not reject it on the basis that there was no reasonable explanation for the failure to adduce it at trial. "

The appeal

42. This court had previously directed that a schedule of agreement/ disagreement should be prepared on the medical issues relevant to the appeal. The expert witnesses, Dr Squier, Professor Rutty and Professor Milroy, who were called at trial, and Dr Anscombe and Dr Bodi, the experts commissioned on behalf of the appellant, all participated. We have been considerably assisted by the document. Neither Mr Emanuel QC nor Ms Brand QC requested any of the witnesses to attend for cross examination.

43. From that document we deduce that there is broad agreement between the neuropathologists that "mild" contusions were present in the brain which resulted from external trauma. There were subarachnoid haemorrhages present which were probably of traumatic origin, but which may have resulted from hypoxia and brain swelling because of positional asphyxiation or strangulation. The contusions and/or subarachnoid haemorrhages were not the cause of death or likely to be responsible for the observed brain swelling and increased intracranial pressure. A fall onto a pavement with the head striking the ground cannot be ruled out as their cause. There was hypoxic-ischaemic injury to the brain which may overlap with increased intracranial pressure. It is not possible to distinguish hypoxic-ischaemic injury arising from an episode of external neck pressure or from an accumulation of blood and fluid in the airways.

44. Professor Rutty identified bruising to the deceased at post-mortem including to the frontal aspect of the scalp, left ear and adjacent area as well as diffuse

bruising to the top of the scalp extending backwards, most pronounced to the left side of the head above the left ear. Professors Rutty and Milroy consider the bruising is more extensive than attributable to a simple fall but agree it could represent the head striking a hard surface such as a wall. Dr Anscombe considered bruising to the top and back of the head to be a part of the head commonly injured in falls.

45. As to the causation of the hypoxic ischaemic injury, Professors Rutty and Milroy recognise the two mechanisms of depriving the brain of oxygen to be compression of the neck or upper airway obstruction but did not distinguish between them. Dr Anscombe noted that the second paramedic had aspirated 200ml of blood or bloodstained fluid from the deceased's airway which meant that "her major air passages were in effect flooded…These circumstances alone are a sufficient and compelling reason to account for the hypoxic-ischaemic brain injury present." He considered that since the deceased had "survived earlier neck compression", the possibility that this caused some degree of hypoxic ischaemic injury can only be speculative. Professor Milroy and Dr Anscombe considered the only source of the blood was the injuries to the nose and mouth, although Professor Milroy agreed with Professor Rutty that compression of the neck and injury to the brain can cause pulmonary oedema which can result in blood-stained fluid coming up into the airway, albeit not in the quantities seen in this case.

46. Professor Rutty considered there to be no single pathological process to have caused death and said "It is the brain's reaction to trauma, enhanced by the effect of alcohol intoxication …and added to by the lack of oxygen (hypoxia) that causes death, either through disruption of normal cerebral neuronal function and/or brain swelling. Swelling can affect the base of the brain where the control systems for the heart and lungs are found. If these are adversely affected by the presence of a surface irritant such as subarachnoid haemorrhage or compression due to brain swelling, death may occur."

47. Mr Emanuel QC submits that the prosecution expert witnesses have changed their opinions on key issues. The pathologists gave evidence regarding the causation of the brain injuries which were beyond their expertise, as they now acknowledge by "deferring" to the neuropathologists. The possibility that the deceased had fallen accidentally and received the contusions in the fall were dismissed by the pathologists in the absence of contrecoup injuries, but they now accepted that a fall could have caused injuries. The prosecution's own neuropathologist disagrees with the way that cause of death was presented to the jury and disputes the evidence that was given about brain injury. She now doubts whether there were traumatic brain injuries, and even if they were present, she does not now regard them to be a significant cause of death. The fresh evidence raises the realistic possibility that there was an accidental fall which could have caused bruising to the forehead and therefore could

obviously have caused the injury to the nose. If, the prosecution seeks to uphold the conviction on the basis that the appellant gave the deceased a nosebleed and this was what caused her death, then this raises questions about the necessary murderous intent. Fairness demands the admission of the fresh evidence of Dr Bodi, Dr Anscombe and Dr Squier, and the responses of Professor Rutty and Professor Milroy. We should, "*in the exercise of [our] discretion whether to receive evidence or not … be guided above all by what it considers necessary or expedient in the interest of justice." See R v Steven Jones [1997] 1 Cr.App.R. 86, C.A., Lord Bingham CJ in (at 92G).* The fresh evidence draws into focus the issue of causation. If the central question is whether a nosebleed could have led to the deceased's death, the possibility of positional asphyxiation caused by the paramedic changing her position is highly relevant.

48. Miss Brand QC submits that the relevant core issues on cause of death were fully explored during the trial. The pathologists have since "adjusted" their evidence, but it is still not possible to describe the exact mechanism of death. There was ample evidence from which the jury could be sure that the appellant first assaulted the deceased in the street, then took her home and continued to assault her with blows to the face and head, and by manual strangulation. There was evidence which the jury could be sure indicated an intent to do grievous bodily harm: Professor Rutty catalogued some 26 areas of fresh external injury during the post-mortem examination as indicated in [17] – [19] above. Dr. Anscombe has agreed with Professors Rutty and Milroy that the multiplicity of the facial injuries and their distribution indicated that they could not all have been caused by falling, and the pattern suggests at least some were inflicted by punching. The medical evidence produced for the appeal confirms that external trauma to the head can give rise to brain swelling, which can in turn lead to hypoxic-ischaemic injury to the brain. The issue of airway obstruction had been fully explored at the trial, as had the suggestion that the contusions had been caused by an accidental fall hitting the back of the head on the pavement. The appellant's credibility was undermined in several significant respects and this would rightly be considered by the jury alongside the pathologists' evidence when considering whether he had found the deceased prone in the street. So, it was open to the jury to conclude that even if the pathologists were unable to be precise about the mechanism of death, they were sure that all injuries sustained by the deceased had been caused by the appellant during a sustained and violent attack with the relevant intention for murder. The evidence regarding the possible adverse intervention by the first paramedic was a "central part" of the trial, and the judge had adequately summed up the points made about positional asphyxiation.

Analysis

49. This is not a reference which is made because "scientific advances" now provide a missing link in the medical evidence or otherwise incontrovertibly undermines a previous medical orthodoxy. This was, and remains, a case with

inconclusive, complex medical evidence as the judge acknowledged in his summing up to the jury in 2004. Whilst it appears clear from the evidence that the cause of death was triggered by the hypoxic-ischaemic insult to the brain and swelling, it is still not possible to be sure on the medical evidence of the precise mechanism which led to the fatal condition. It seems to us that we are left with the same three options that were posited by Professor Milroy in [23] above.

50. In the circumstances, we understand the CCRC's initial decision not to refer this case on appeal and, despite the compelling judgment of Ouseley J, have questioned whether we are in any different position to that when the jury were directed in 2004, or when this court determined the appellant's renewed application for permission to appeal in 2007. Ultimately, we have decided that the crucial question raised for us by this reference which constitutes the appeal, is whether the fresh perspective to be derived from the evidence now changes the landscape to such a degree that significantly compromises the summing up and thereby undermines the basis of the Court of Appeal's decision not to grant permission to appeal in 2007.

51. We note from the joint schedule of agreement/disagreement (See [41] – [45] above) and their previous responses to the CCRC, that Professors Rutty and Milroy defer to the neuropathologists on questions which they had answered during the trial without such qualification, and Dr Squiers' views have crystallised. In fairness to them, we note the characteristically straightforward and volunteered concession by Miss Brand QC, that they were witnesses answering the medically inexact and generalised questions of advocates who did not sufficiently distinguish between "head injuries", "brain injuries" and "insults to the brain", nor necessarily pay sufficient regard to the boundaries of the different fields of neuropathology and pathology. We think the witnesses' re-evaluated opinions are probably more accurately described as refined rather than, as Mr Emanuel QC would have it, completely changed. However, this refinement, together with the evidence of Dr Bodi, which provides important neuropathological context, and Dr Anscombe, which raises issues as to the previous interpretation of some external bruising to the head and gives a definite view as to the obstruction of the deceased's airways, enhances the evidence to a degree that cannot be described as mere 'repackaging' of that which was summed up to the jury.

52. We are satisfied that it is necessary in the interests of justice to admit the 'fresh evidence' in the appeal. We are satisfied as to its admissibility at trial, credibility, and expert provenance. Whilst it appears that this genus of evidence could have been adduced before the jury in 2004, and in some cases it would be entirely appropriate to reject the application to admit 'fresh' evidence on that basis alone, we are in little doubt that whatever the reason for, or oversight in, not doing so, it cannot be laid at the door of the appellant

and should not be refused if it would be to penalise him from pursuing a viable ground of appeal.

53. To be clear, the 'fresh' evidence relating to absence (if it was) of contrecoup injury does not establish that a fall did occur, but importantly, it does not rule out an accidental fall as causative of the 'minor' brain contusions, subarachnoid haemorrhage, and nosebleed. These were not a direct cause of death but cannot be definitively excluded as causing some swelling in the brain, and/or cumulative blood pooling and obstruction of the upper airways. But, potentially, this evidence has wider ramifications, since the pathologists' evidence as summed up by the judge, would certainly be capable of discrediting the appellant's account of finding Ms Bancroft after a fall and potentially thereafter as to the nature, extent, and circumstances of his subsequent and admitted assault upon her.

54. The necessity to direct the jury with especial care as to intent in relation to the injuries of which they were sure the appellant had inflicted unlawfully, and whether those injuries were an operating and substantial cause of death, or rather were the context in which the act of another, namely the first paramedic, exacerbated the effect of accidental injuries and unwittingly led to the fatal condition will be crucial. The direction given in 2004 (see first italicised passage in [29] and that represented in paragraph 29 of the 2007 Court of Appeal decision included in [31] above) as to intervening act, would be insufficient in the light of the alternative possibilities of causation that the medical evidence now admits, and in the words of Mr Emanuel QC, was without any "meat".

55. The context against which the medical evidence was and is to be judged is inherently complicated by several factors. There is little doubt that whether she had previously fallen in the street, the deceased received injuries at the hands of the appellant and had been gripped by the throat, she was extremely drunk and at some stage she became unconscious, whether initially through drink, and at what stage from injury or the effect of positional asphyxiation, is unclear. In these circumstances, the necessity for a detailed and careful exposition of the medical issues was unavoidable. Regrettably, as the presentation of the fresh perspective upon the same evidence reveals, the trial judge's well-intentioned attempts to assist the jury in seeking to clarify the position regarding causation of hypoxic-ischaemic injury with the pathologists, (see last italicised passage in [29] above) led to an imprecise and too generalised answer, and a summing up that must now be regarded as inevitably flawed

56. We recognise that another jury, accurately directed on all the available medical evidence, may still be sure that if there was a fall in the street it did not result in any injury that became relevant in the medical chain of events that resulted in hypoxic-ischaemic insult to the brain. In that case, if they are sure that the trigger injury which led to brain swelling, either through trauma or eventual asphyxiation, is attributable to the appellant's assault which was unlawful and with necessary intent they will re-convict of murder.

57. Noting, Miss Brand QC's arguments as to the appellant's lack of credibility, as effectively did Mr Emanuel QC in his submission to the CCRC, when describing the appellant's demonstrable lies when first taxed by the police and his unusual stage setting of various phone calls as "unattractive", we remind ourselves that we are not required to determine whether the appellant is guilty, but whether in all the circumstances, the conviction is safe. We conclude that we are unable to be so satisfied. The new perspective which the combined medical expert evidence now brings to the case militates against the broad-brush approach essentially advocated by Miss Brand QC, reveals the summing up as insufficiently nuanced to the detriment of the appellant, and would not support the approach taken by the Court of Appeal in 2007. That is, we endorse the CCRC reasoning which led to this reference. (See [40] above.)

58. We allow the appeal and quash the conviction.

59. We have heard from the parties on the question of retrial. We are satisfied for the reasons we give in [55] that it is in the public interest for this matter to be retried and see no impediment to fair process regardless of the passage of time. We therefore direct that: the appellant may be retried for murder; a fresh indictment be served in accordance with Crim PR 10.8(2) upon the Crown Court officer not more than 28 days after this order; the appellant be arraigned upon the fresh indictment within two months; the retrial to take place at a Crown Court and before a Judge to be determined by the Presiding Judge of the Midland Circuit; the appellant be remanded in custody pending the retrial subject to any release from his sentence directed by the parole board, but otherwise that any application for bail be made to the Crown Court; and, that any application for representation order in respect of proceedings in the Crown Court be made in writing to the Legal Aid Agency CAT, level 6 . Further we make an order under s 4(2) of the Contempt of Court Act 1981 postponing publication of any report of these proceedings until the conclusion of the retrial to avoid a substantial risk of prejudice to the administration of justice in those proceedings.