Neutral Citation Number: [2020] EWCA Crim 1093

Case No: 201901214C4 & 201901215C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WINCHESTER
The Hon. Mr Justice Goose
T20187042

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 August 2020

Before:

THE RT HON. THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HON. MR JUSTICE SWEENEY
and
THE HON. MR JUSTICE MURRAY

- -

Between:

CEON BROUGHTON	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Stephen Kamlish QC and Richard Thomas
(instructed by **Birnberg Peirce**) for the **Appellant**
Annabel Darlow QC and Simon Jones (instructed by **CPS**) for the **Respondent**

Hearing date: 3 June 2020

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Approved Judgment

Covid-19 protocol: This judgment will be handed down by the Judge remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be 18 August 2020 at 11.00am. The Court Order will be provided to Winchester Crown Court for entry onto the record.

The Lord Burnett of Maldon:

Introduction

1. This appeal concerns causation in gross negligence manslaughter. Louella Fletcher Michie ("Louella") was pronounced dead in the early hours of the morning of Monday 11 September 2017 at the Bestival Music Festival at Lulworth Castle. She had taken a controlled Class A drug, namely 2C-P as well as ketamine and ecstasy. The appellant, who was her boyfriend, had supplied the 2-CP and "bumped" it up either by giving her an increased dose or mixing it with ecstasy or ketamine. The pair had left the grounds of the festival for nearby woodland at about 16.30 during the afternoon of Sunday 10 September. There, Louella experienced a trip. It was intense, involving a bad reaction to the drugs. The prosecution case was that having supplied the drugs and remained with her, the appellant owed Louella a duty of care to secure medical assistance as her condition deteriorated to the point where her life was obviously in danger. He was grossly negligent in failing to obtain timely medical assistance, which failure was a substantial cause of her death.

2. On 28 February 2019 the appellant was convicted of manslaughter and of supplying Louella with the 2C-P. He had earlier pleaded guilty to supplying both her and a friend with 2C-P on another occasion at a different festival. He was subject to a suspended sentence for possession of two knives. He was sentenced to a total of eight and a half years' imprisonment; seven years for the manslaughter, thirteen additional months for the drugs offences, and five more on activation of part of the suspended sentence.

3. The appellant appeals against conviction by leave of the single judge on the ground that the prosecution failed to adduce evidence from which the jury could be sure that the appellant's negligence was a cause of Louella's death. He renews two grounds on which leave was refused, first, that the judge misdirected the jury on causation and secondly that no duty of care arose on the facts of the case.

Gross Negligence Manslaughter

4. The ingredients of the offence were set out in *R v. Adomako* [1995] 1 AC 17. At 187 Lord Mackay of Clashfern LC explained:

> "In my opinion, the law as stated in [*Bateman* (1925) 19 Cr. App. R. 8 and *Andrews v DPP* [1937] AC 576] is satisfactory as providing a proper basis for describing the crime of involuntary manslaughter. Since the decision in *Andrews* was a decision of your Lordships' House, it remains the most authoritative statement of the present law which I have been able to find and ... it is a decision which has not been departed from. On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed

> by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

5. Gross negligence manslaughter has since been considered in this court on many occasions, particularly within the last four years. The context has frequently been the alleged gross negligence of medical professionals. The appeals include *R v. Rudling* [2016] EWCA Crim 741, *R v. Sellu* [2016] EWCA Crim 1716, [2017] 4 WLR 64, *R v. Bawa-Garba* [2016] EWCA Crim 1841, *R v. Rose* [2017] EWCA Crim 1168, [2018] QB 328, *R v. Zaman* [2017] EWCA Crim 1783, *R v. Winterton* [2018] EWCA Crim 2435, *R v. Pearson* [2019] EWCA Crim 455, *R v. Kuddus* [2019] EWCA Crim 837 and *R v. Broadhurst* [2019] EWCA Crim 2026. The result of this consideration is that six elements have been identified that the prosecution must prove before a defendant can be convicted of gross negligence manslaughter:

   i) The defendant owed an existing duty of care to the victim.

   ii) The defendant negligently breached that duty of care.

   iii) At the time of the breach there was a serious and obvious risk of death. Serious, in this context, qualifies the nature of the risk of death as something much more than minimal or remote. Risk of injury or illness, even serious injury or illness, is not enough. An obvious risk is one that is present, clear, and unambiguous. It is immediately apparent, striking and glaring rather than something that might become apparent on further investigation.

   iv) It was reasonably foreseeable at the time of the breach of the duty that the breach gave rise to a serious and obvious risk of death.

   v) The breach of the duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim.

   vi) In the view of the jury, the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

   The elements found in (iii) and (iv) will not need separate consideration or articulation in many cases.

6. The formulation of a "serious and obvious risk of death" can be found in the judgment of this court in *R v. Gurphal Singh* 1999 Crim LR 582 approving the direction of the trial judge. It has been affirmed on many occasions (e.g. in *Rudling* at paragraph 18; *Rose* at paragraph 77(2)). In *R v. Evans* [2009] 1 WLR at paragraph 31, Lord Judge CJ used the term "life threatening" in this context but it does not suggest a different test. In *R v. Misra* [2004] EWCA Crim 2375 (a medical case) Judge LJ (as he then was) had considered the nature of the risk needed to engage the duty and, in particular, whether the risk should be of death rather than serious injury. At paragraphs 49 to 52 he cited the test in *Gurpal Singh*, the practice of the Director of Public Prosecutions to apply

that test and the concurring views of the editor of Blackstone's Criminal Practice, all without adverse comment, before concluding that the risk must be to life.

Causation

7. At trial, the prosecution proceeded on the basis that it was for the Crown to prove that timely medical intervention would have saved Louella's life. In the course of his summing up the judge said:

> "To prove this element of the offence the prosecution must make you sure that the failure to obtain medical help by the defendant was a substantial contribution to the cause of death. The prosecution's case is that by failing to obtain medical help in time, his breach of duty was a substantial contribution to the cause of death, in short had she been treated by a medical practitioner in time, she would have lived. The defence case is that by the time there was any breach of duty, it was already too late, in short it would have made no difference, it was not a substantial contribution to the cause of death. You will have to assess the time from which he was in breach and medical aid was needed, what was the likelihood of survival. Are you sure that the failure to obtain medical help at that time was a substantial cause of her death?"

8. Mr Kamlish QC has no quibble with this part of the summing up but submits that what followed diluted what was a simple proposition: in a case concerning a negligent lack of medical attention (just as in a case involving negligent medical attention) to establish that the breach of duty (lack of treatment of wrong treatment) was a substantial cause of death the prosecution must prove to the criminal standard that the person concerned would have lived.

9. For the purposes of the appeal, Miss Darlow QC (who did not appear at trial) contends for a different test. She submits that the correct test is "whether [the jury was] sure that the defendant's negligence deprived the victim of a significant or substantial chance of survival that was otherwise available to the victim at the time of the defendant's negligence."

10. In support of that submission Miss Darlow relies on an extract from the summing up of Nicol J quoted by Sir Brian Leveson P in *Sellu:*

> "You may decide that, even if an earlier operation would not have been bound to succeed, the effect of Mr Sellu's negligence was to deprive Mr Hughes of a significant chance of survival and in that sense was a significant contributory cause to Mr Hughes' death. Once again, how big a contribution has to be to qualify as significant is left to your good sense. So, if you decide that Mr Sellu was grossly negligent in his care of Mr Hughes, you must ask yourselves whether the failure to treat him in a proper way significantly contributed to Mr Hughes' death."

11. Thus, Miss Darlow submits, *Sellu* had clarified that in cases involving gross negligence by omission, the requirement that the breach of duty caused or made a significant

contribution to death is met if the effect of the breach was to deprive the deceased of a significant (as opposed to certain) chance of survival. In contrast, requiring proof of certainty of survival was unsupported by general principles of causation and would, if implemented, render many cases where death had ensued after gross negligence, medical or otherwise, impossible to prosecute because of the difficulty of proving that there was no possibility of the victim dying if treated. In short, she submits there is no need for the prosecution to establish to the criminal standard that the deceased would have lived.

12. Mr Kamlish submits that the prosecution argument misunderstands *Sellu* in which, in any event, the President made the position clear in paragraph 127:

> "What was critical was that the jury reached conclusions as to such findings as they were sure constituted gross negligence and, in the light of those findings, went on to consider the question of causation, understanding that causation would not be established if the gross negligence was after the time they could be sure that Mr Hughes would have survived."

13. He submits that the sweep of earlier cases supports the submission he makes on behalf of the appellant. They were reflected in the summing up of Langley J in *Misra*, which was approved by this court. It was, like *Sellu*, a medical case. The judge directed the jury in these terms:

> "The last element is the element of causation. If the prosecution has made you sure that either or both of the doctors did fail so grossly in their duty of care, then you must consider whether it has also made you sure that the failure or failures were a substantial cause of Sean Phillips' death. If you are not sure that Sean Phillips would have survived at all, either however well he had been treated or because he might not have received appropriate treatment, then the prosecution has failed to prove its case on this aspect and that is the end of the matter. You must find both defendants not guilty. Equally, if at some point of the events of the Saturday or the Sunday you reach the conclusion that you are not sure that Sean Phillips would have survived beyond that time, then from that time onwards the prosecution will fail to prove that anything Dr Misra or Dr Srivastava did or failed to do was a cause of Sean Phillips' death and, whatever you may think of the subsequent events, they cannot lead you to a verdict of guilty. If you have any reasonable doubt about when Sean's condition became irreversible, I repeat that you must give the defendants the benefits of those doubts".

14. The test for causation in homicide cases has long been that it is sufficient for the prosecution to prove that the act (or omission) of the accused was a significant contributory cause of death, rather than the sole or principal cause of death. That reflects the obvious reality that there can be concurrent causes of death. In most cases the issue will not arise. Most homicides resulting from an assault provide no difficulty because the injury is the undoubted cause of death. That will be true also in gross negligence manslaughter cases where the deceased suffers a traumatic death.

Nonetheless, even in cases of assault causing injury there may be examples of concurrent causes of death. They include an assault which provokes a fatal heart attack or an assault from which the victim dies in circumstances where medical treatment should have saved him but did not because it was negligently administered.

15. In cases of gross negligence manslaughter which arise in the context of medical treatment there will frequently be an underlying condition which causes death. The issue will be whether the breach of duty was also a substantial cause of the death. The same will apply when the allegation at the heart of the prosecution of manslaughter is that the health professional failed to provide treatment that should have been provided or a person who owed the deceased a duty of care failed to secure medical treatment.

16. The approach to causation in such cases was settled by Lord Coleridge CJ in *R v Morby* (1882) 8 QBD 571. The prosecution concerned a father who, in conformity with his religious views, did not employ a doctor to treat his son. The boy later died of smallpox. The medical evidence at trial had been that proper medical attention might have saved or prolonged the child's life, and would have increased his chance of recovery, but might have been of no avail. Following a conviction for manslaughter, the case was referred to the Queen's Bench Division, as a Crown Case Reserved. This question was put to Doctor Sharpe. "In your opinion do you think the life of the deceased might have been probably prolonged if medical skill had been called in?" to which he answered, "Probably, but I would rather put it in this way, that the chances of the boy's life would have been increased by having medical advice." He was later asked, "In your judgment if medical advice and assistance had been called in at any stage of this disease might the death have been averted altogether?" The doctor answered

> "I can only answer that by saying that it might have been. Ours is not a positive science. It might have been averted if medical aid had been called in at any earlier stage. I am unable to say whether it probably would. I might say probably, as to whether life might have been prolonged. I cannot say that death would probably have been averted. I think it probable that life might have been prolonged. I can only say probably might, because I did not see the case while living. I am unable to say that life would probably have been prolonged, because I did not see the case during life, had I done so, I might have been able to answer the question."

17. The trial judge left the issue to the jury asking them, would the life of the child have been prolonged? The defendant was convicted.

18. Quashing the conviction Lord Coleridge explained in his two-paragraph judgment:

> "It is not enough to shew neglect of reasonable means for preserving or prolonging the child's life, but to convict of manslaughter it must be shewn that the neglect had the effect of shortening life. The medical witness called for the prosecution gave his evidence clearly and well, and under a high sense of his duty and responsibility, and what he stated was, that in his opinion the chances of life would have been increased by having medical advice, that life might possibly have been prolonged

> thereby, or, indeed, might probably have been, but that he could not say that it would, or indeed that it would probably, have been prolonged thereby. In order to sustain the conviction affirmative proof is required.
>
> This the skilled witness called, and upon whose evidence the matter rests, cannot, from the nature of the case, give and, indeed, properly declines to give. The direction of the learned judge, though right in point of law, is not applicable to the facts proved. The conviction cannot be sustained."

19. Grove J, in an even shorter concurring judgment pointed to the impossibility of the jury answering the question which the doctor could not. Stephen J added "to convict of manslaughter you must shew that he caused death or accelerated it." Mathew and Cave JJ agreed.

20. These judgments are inconsistent with the submission advanced by the Crown in this appeal. When deciding that the prosecution must "shew" that the defendant's breach of duty caused death or that "affirmative proof is required" the context was a criminal prosecution where the criminal standard of proof thus applied. The court expressly rejected that it was sufficient to show that there was a significant chance that life would have been preserved. That, after all, was precisely the evidence of the doctor. Nor should it be thought that the references to probability can be taken as suggesting that the civil standard of proof is sufficient. Those references followed from the evidence given by the doctor.

21. The principle established by *Morby* has not been abrogated in the intervening 140 years. In *Misra* at paragraph 70 Judge LJ (as he then was) expressly approved the passage from the summing up of Langley J which we have quoted and Sir Brian Leveson P used similar language in *Sellu* at paragraph 27.

22. The passage from the summing up in *Sellu*, upon which Miss Darlow relies, needs to be read in the context of the way in which the prosecution put its case against the doctor. There was a series of alleged failings, each of which needed to be judged by reference to the proper yardstick for gross negligence. The steps which it was suggested Mr Sellu should have taken included arranging for the administration of antibiotics, ensuring that tests were undertaken, or obtaining the services of an anaesthetist and embarking on an earlier operation. The prosecution adduced evidence which suggested a diminishing chance of survival as time went by. There was no ground of appeal which attacked the overall way in which the judge had summed up causation. The argument was that because there was a series of alleged failures, each of which was grossly negligent, the jury needed an express direction linking each alleged failure with causation. The essence of the grounds is found in paragraph 121 of the judgment of Sir Brian Leveson P:

> "On appeal, Mr Ellison argued that some jurors might have been sure of gross negligence only at such a late time in the chronology ... that the conviction might have been returned without a consideration of the fact that, by then, the likelihood was that Mr Hughes would still have died. Thus, it was left open to them to convict in relation to a failure to act at a stage in the

> chronology where they were no longer sure that Mr Hughes would have survived in any event i.e. when causation could no longer be proved. Furthermore, he contends that the judge erred in not directing the jury in accordance with *Brown* (1984 79 Cr App R 115) that they must all agree as to any particular negligent act or omission before they could move on to decide whether there was gross negligence causative of death."

23. *Sellu* is not authority for the proposition advanced by the Crown that in cases of gross negligence manslaughter the limit of the obligation on the prosecution is to prove that the failing in question deprived the victim of a significant or substantial chance of survival that was otherwise available at the time of the defendant's negligence. The prosecution must prove to the criminal standard that the gross negligence was at least a substantial contributory cause of death. That means that the prosecution must prove that the deceased would have lived in the sense that life would have been significantly prolonged. It is well established that being "sure" is not the same as scientific certainty. See, for example, the discussion in *R v. Gian, Mohd-Yusoff* [2009] EWCA Crim 2553 at paragraphs 22 to 24. That case concerned a suggestion that there were theoretical or hypothetical possible causes of death which could not be excluded as a matter of theory but were entirely unrealistic. The jury must make judgements on "realistic not fanciful possibilities". To be sure that the gross negligence caused the death the prosecution must exclude realistic or plausible possibilities that the deceased would anyway have died.

The Facts

24. The prosecution case was that the appellant had "bumped up" the 2C-P that he supplied to Louella (whether by increasing the dose, or by mixing it with another drug); that she had consumed the drug(s) in the afternoon of Sunday 10 September 2017; that they had then spent some hours together in a dense wood just outside the festival site. Louella's condition deteriorated and ultimately, she died. The prosecution case was that despite being urged to do so in telephone calls and text messages from members of Louella's family, the appellant had failed to take reasonable steps to save her life. Louella was formally pronounced dead at the scene at 01.10 on Monday 11 September 2017 (her 25th birthday) although there was evidence that she had died over an hour before. Traces of 2C-P, MDMA (Ecstasy) and ketamine were later found in her body. Traces of 2C-P, MDMA, ketamine, diazepam and the breakdown product of cocaine were later found in the appellant's samples, and 44mgs of 2C-P were found inside the back of his iPhone. In interview, the appellant denied that he had ever supplied drugs to Louella or to anyone else. He claimed that he had not taken any drugs at the festival. Nevertheless, prior to the trial, he pleaded guilty to two offences of supplying 2C-P at the Glastonbury Festival in Somerset in June 2017 to Louella and a friend.

The outline chronology

25. Louella arrived at the festival on Saturday 9 September 2017. In two texts at 14.04 that day she informed the appellant that security had taken her drugs, and that she just wanted "that big one". The appellant replied that he would bring some, and that "Sam T will have them". The appellant arrived in the early hours of Sunday 10 September, accompanied by his friend Ezra Campbell and another man.

26. At around 16.00 on Sunday 10 September, the appellant, Louella, Ezra Campbell and the other man were in the vicinity of a toastie van on the edge of the festival site. Ezra Campbell observed that the appellant and Louella were giggling and thought that they may have taken some drugs. Thereafter the appellant and Louella indicated that they were going to "the forest", which Ezra Campbell wrongly thought to be the "Ambient Forest" within the festival site, which later led to confusion when people were trying to find them.

27. In fact, the appellant and Louella made their way to a wood just outside the site. They were last caught on camera at 16.29 as they walked towards it. Inside the wood there were thick brambles, dense undergrowth, and logs. The appellant had his iPhone, but mobile telephone reception was poor, which later caused problems with making and receiving calls and the sequence in which text messages were received and sent. The appellant and Louella ended up about 30 metres into the wood, and thus some 85 metres from a telegraph pole at the edge of the festival site, and some 400 metres (as the crow flies) from the festival medical tent.

28. Thereafter, using his iPhone, the appellant took a number of live photographs of Louella and also videoed her. This was consensual and designed to record her trip. At 17.16 and 17.17 live photos showed Louella sitting on a branch.

29. At 17.53 the appellant began filming the first video, which lasted for just over 50 minutes. The video was later viewed by Dr Morley, who observed that, at the outset, Louella was animated and shouting at the appellant and the world in general. She was aware of the appellant, but not necessarily of her surroundings. She repeated herself a lot. By around 18.03 Louella became more aggressive and began to slap herself. By around 18.13 she developed a screeching quality to her voice. She did not seem to react when the appellant said her name. Finally, by around 18.33, Louella sounded more confused and was slapping her body and legs more frequently.

30. At 18.43 (very shortly after the end of the first video) the appellant began filming another video, which lasted for some two-and-a-half minutes. Dr Morley observed that the appellant and Louella were still in the same positions, and that Louella was still agitated – but now more confused. She was conscious, but not necessarily aware of her surroundings, and was slapping herself almost continually.

31. At 18.47 the appellant tried to ring Louella's mother. At 18.48 Louella's mother rang back and there was then a conversation lasting eleven minutes. Louella's mother described how she could hear Louella in the background, and that she sounded like a wild animal, saying "I don't trust you; I hate you" to the appellant, who was trying to calm her down. Louella's mother said that she repeatedly told the appellant to get help for Louella, and to go to the medical tent. The appellant said: "Don't worry I will look after her".

32. Immediately after the call Louella's mother contacted the organisers at festival explaining that she believed her daughter was having a bad trip. That resulted in a search of the "Ambient Forest" and a consequent failure to find Louella and the appellant. In a statement read to the jury a member of staff from the festival said:

> "... the information I had did not raise any immediate concerns for her. In my experience the majority of people who have a bad trip recover quite quickly, so I did not instigate anything further."

33. In the meantime, Louella's mother and father had set off by car to the festival site at Lulworth.

34. At 19.00 Louella's brother texted the appellant imploring him to take Louella to the medical tent. He added that she needed to be near a professional. At 19.04 the appellant took a series of live photographs of Louella, who was sitting in the woods shouting incoherently. At 19.07 Louella's brother telephoned the appellant, who told him that he had supplied Louella with 2C-P and that he had "bumped it up a bit". At 19.13 Ezra Campbell rang the appellant, who told him to "get the medics" to the forest. At 19.28 Louella's mother (on route to the festival) rang the appellant. At 19.30 Louella's brother (who had been in contact with Ezra Campbell) texted the appellant asking him to send his location to Ezra Campbell, who could help. Sunset was at 19.33.

35. At 19.38 Louella's father texted the appellant, asking him to look after Louella. At 19.54 Louella's brother texted the appellant asking if he had got her to the medical tent. At 20.09 Louella's brother texted again, asking how Louella was doing and for the appellant to call him. The appellant tried unsuccessfully to ring Louella's mother. At 20.11 the appellant tried to call Ezra Campbell and from 20.14 to 20.16 Ezra Campbell tried to call the appellant, all without success.

36. At 20.18 the appellant made a 15 second video of Louella in the dark. There had been a significant deterioration in her condition. She was lying on her back, her head and jaw were moving, and she was making animal like noises, rather than any coherent speech, and was not aware of her surroundings. In his evidence, Professor Deakin said she was seriously unwell and in need of urgent medical care. He did not say that she was at serious and obvious risk of dying.

37. At 20.22 Louella's mother texted the appellant imploring him to message her that Louella was all right. At 20.23 the appellant responded in an incoherent text which was the result of predictive text. At 20.24 Louella's mother texted again, asking for the location of Louella and the appellant. At 20.25 Ezra Campbell texted the appellant to say that Louella's mother was coming to get her, and at 20.26 the appellant replied in two texts: "Na, say cool off" and "Send med tho". At 20.29 the appellant sent a Google map pin of his location to Ezra Campbell, and the message "See me on Google Maps!". Ezra Campbell replied asking what the pin was, and the appellant explained that it was where they were. Ezra Campbell replied again at 20.34, saying that he had not got Google Maps on his phone.

38. At 20.45 the appellant made a 2 minute 55 second audio recording in which he could be heard calling out to Louella, asking whether she could hear him and telling her to stop eating thorns (brambles), because she was just going to cut herself in the process. Louella was groaning and moaning and was not responding to the appellant. She appeared to lack any coherent awareness of her surroundings.

39. At 20.49/20.50 the appellant sent Ezra Campbell a series of texts: "If u could go … G ... send meds … To that location", to which Ezra Campbell replied in two texts: "I don't have google maps" and "Can't download it don't let me see it". At 20.52 and 20.53 the

appellant replied in two texts: "I can't get bagged" (i.e. arrested) and "Ukno Feds on them tings round here". Ezra Campbell replied at 20.55: "Fam just act like you don't know her", and there was then a two minute call between the two of them, during which the appellant tried to explain where they were, but the only landmark that Ezra Campbell was able to glean was barbed wire at the edge of the wood.

40. Louella's sister texted the appellant asking him to let her know that Louella was ok, and at 20.54 Louella's mother texted the appellant imploring him to let her know whether he had got to a medical tent. At 20.58 Louella's father also texted to ask whether the appellant had got Louella to a medical tent. Then at 21.04 Ezra Campbell texted the appellant and told him that the medics were coming to the Ambient Forest (where, as indicated above, he had erroneously assumed from the outset that the appellant and Louella had gone).

41. At 21.07 the appellant sent an audio recording of Louella to Ezra Campbell and then, between 21.09 and 21.13, took some live photographs of her which showed the top of her forehead and nose. There were scratches on both that had not been present in the first video and she was still making unintelligible noises as he tried to rouse her. Having eventually received the audio recording, Ezra Campbell texted the appellant at 21.17 saying: "Just get to the ambient forest bruv", then "If it's that urgent there's nothing else I can do" and then "It sounds bad though g WTF".

42. At 21.22 Louella's brother texted the appellant asking if there was any news, and at 21.46 Ezra Campbell asked him whether he was with the medics yet. At 22.16 Louella's mother texted Louella, imploring her to let the family know that she was OK. At 22.30 the appellant sent two texts to Ezra Campbell saying: "She just kooled Down" and "So Ima carry her", followed at 22.31 by "If the fam ask say a ra don have us 2cb". At 22.32 the appellant recorded a note on his phone which read:

> "She layed benive wit. ME,
>
> nettles n thorns,
>
> Enteral bled,
>
> we're her Heart was torn."

At 22.41 and 22.42 the appellant took more live photographs of Louella which showed that her hands were covered in scratches which had not been present in the first video that he had recorded, that she was still making unintelligible sounds, and that her condition appeared to be deteriorating.

43. At 22.45 the appellant sent Ezra Campbell a series of texts repeating things he had said a little earlier: "It's prohibited off .. Ima try carry her ... If the fam say … say a random gave her 2cb".

44. In the period from 22.47 to 22.56 the appellant was variously in contact with Louella's brother and father – indicating that he was going to carry her down (as others could not find them); that she would be fine; that they would sleep it off "after meds deal did herself"; that he would make sure that she got medical help; and that he did not want to leave her. Thereafter the appellant sent his pin location to Louella's mother – though

again there were problems in opening it after receipt. At 23.20-23.24 Louella's father texted the appellant telling him that he and Louella's mother had arrived at the White Gate and to send the Google Maps location to him – which the appellant later did. Thereafter, another search began.

45. At 23.24 and 23.25 the appellant took more live photographs of Louella. She was lying down and covered by a black coat. Professor Deakin considered that she was most likely dead in the 23.25 photograph.

46. At around 23.30-23.45 the appellant emerged from the wood and told the two guards that he encountered that his girlfriend (who was in the wood) had taken an overdose. They had torches and accompanied him back into the wood but were unable to find Louella at that stage. The appellant continued to search alone, but without success. However, Louella's body was eventually found at 00.59 on 11 September 2017. She was lying on her back, with her head on her chest, and had scratches and bruises to the body. Empty packaging for Valium, and a small bag containing 218mgs of ketamine, were recovered from her outer clothing which was discarded nearby. The lights at the adjacent festival site were readily visible from where she was.

The interviews

47. The appellant's account given in a series of interviews contained much which was untrue, for example that he had never supplied drugs to anyone or consumed drugs himself at the festival. He said Louella had purchased the drugs (untrue) and had starting tripping after taking some acid (a partial truth). He explained that he had called her mother because he was worried and she told him to get help from someone in a 'high vis'. That was essentially true, but he then said he had covered Louella with his jacket, found help but that they could not find her. As we know, that happened hours after his attempt to call Louella's mother and their subsequent conversations. He spoke of another call from Louella's mother, who had again asked him to get assistance. So he had gone off again and had found the same man. He would have carried Louella himself, but her mother had said to find a 'high vis'. He had sent a pin location to Louella's parents to let them know where he and Louella were, and he had then covered Louella and had run to get help. At best, this was a conflation of a series of events but it was inaccurate.

48. The appellant described holding Louella's arms and torso towards him to stop her from harming herself with the nettles that she kept eating and scratching against her face. She had many bruises on her hands and he had tried to rip thorns from her hands – which had resulted in cuts to his own hands. At first, he had thought that she was joking (as she had "done stuff" like that before) but when she had carried on it had started to worry him. He had been fully in control of himself and did not think that "it would be such a life and death situation".

49. In what was likely to be a reference to Ezra Campbell, the appellant said that a friend had said that he would get help, which he thought would arrive within five to ten minutes. When that did not happen, he tried to contact other people. He had ensured that Louella had got the medical attention that she needed and had tried to give her good medical care. He had not called 999 because others had said that they were sending help, but then said that he had not done so because there was no signal. However, he

agreed that he had had enough signal to send a pin to Ezra Campbell. He said that Louella was still breathing when he left her.

50. His account included that Louella only took drugs (Ecstasy and LSD) at parties. She went to events and raves nearly every weekend. She must have taken 2C-P.

The expert evidence

51. The prosecution relied on the evidence of four experts: Dr Delaney (a pathologist); Dr Morley (a consultant in clinical biochemistry and toxicologist); Miss Pagdin (a forensic toxicologist) and Professor Deakin (a consultant in anaesthetics and critical care, and Professor of resuscitation and prehospital emergency medicine at Southampton University). Dr Morley identified the drugs traces of which had been found in Louella's body, but explained that it was not possible to calculate how much of each she had taken. That was confirmed by Miss Pagdin.

52. Dr Morley explained that the traces of drugs found in the appellant's system were consistent with recreational use and, so far as the traces of 2C-P were concerned, all he could say was that they were indicative of the ingestion of either a small amount several hours before the samples were taken, or larger amounts over the preceding days. Indeed, Dr Morley accepted that the appellant may not have been under the influence of 2C-P at the time that the video footage was recorded, and that his demeanour and toxicology results may have reflected 2C-P use prior to 10 & 11 September 2017.

53. Dr Morley explained that 2C-P was a stimulant drug, about which relatively little was known. He had not found any recorded case of 2C-P causing death, but some evidence of potentially fatal outcomes being avoided by medical intervention. He referred to a newspaper article from the United States that said that people had presented at hospital after they had taken 2C-P. They were reported as having been given cardiopulmonary resuscitation, which, he accepted, was weak or "soft" evidence, and he was ultimately happy for it to be ignored. He also referred to two peer reviewed papers which concerned a total of six patients who had taken 2C-P. The symptoms described were agitation and hallucinations, making repeated statements, very fast heart rates, high temperatures in some and dilated pupils. None required any significant medical intervention, rather they were variously given Valium or advised to rest. Only three had had fast heartbeats which did not result in any cardiovascular instability. Such symptoms were typical of the group of stimulant drugs from which 2C-P came and were reflected in how Louella presented in the video footage taken by the appellant. Drugs in the group might, Dr Morley continued, cause seizures but there was no reported evidence of seizures from 2C-P. The effects of a drug from the group would start after 30 to 60 minutes, with a peak between three and five hours (or possibly longer), and with the overall effects possibly lasting for 20 to 24 hours.

54. Dr Morley said that at low concentration ketamine might have had a stimulatory effect whereas at high levels it would have had an anaesthetic effect. It was, however, impossible to tell how much of it that either Louella or the appellant had taken. MDMA (Ecstasy) looked very similar to 2C-P, and taken with it was likely to increase the stimulant effects of hallucinations, high temperatures, faster heart rate etc. In any event, it was possible that, with a sufficiently large dose, 2C-P alone could cause an abnormal heartbeat, but he could not say that had happened in this case. He also accepted that he

had largely relied on the known effects of other drugs in the same group as the basis for his evidence as to the likely effects of 2C-P.

55. Miss Pagdin confirmed that 2C-P was closely associated with MDMA, and that both were in a group known for its hallucinogenic properties. She further confirmed that there was very little literature on 2C-P as it was not commonly abused. Anecdotal evidence (the danger of which the judge warned the jury about) indicated that its effects included potent hallucinations, agitation, and hypotension – with higher doses being thought to lead to a fast heart rate.

56. Her evidence initially was that she believed that 2C-P could have played a role in Louella's death, by increasing both heart rate and blood pressure. But in cross-examination, she accepted that she could not say that 2C-P had actually played any role in causing Louella's death.

57. As to MDMA, Miss Pagdin said that the reported effects included euphoria, benevolence to others, heightened perception of visual and tactile sensory stimuli, hyperactivity, and increased heartbeat; that after the stimulant effects subside, excess fatigue and anxiety can occur; and that toxic effects can include elevated body temperature, seizures and kidney failure leading to death, although there was no evidence that that was the cause of Louella's death.

58. Finally, considering the combination of 2C-P and MDMA, Miss Pagdin said that they could have a more prolonged and pronounced effect.

59. Dr Delaney (the pathologist) explained that his Post Mortem examination on Louella's body did not reveal the cause of her death. Therefore, he had sought the opinions of Dr Morley and Miss Pagdin, and had thereafter relied on Dr Morley's opinion as to the effects of 2C-P.

60. Dr Delaney continued that, whilst it was not possible to determine the precise mode of death, it was likely to have involved a number of factors. The use of drugs, and in particular 2C-P, had been a significant contributory factor, and had been the precipitant factor for Louella's prolonged agitated behaviour. That prolonged behaviour and the effects of the stimulant drugs would be expected to be associated with physiological responses of increased heart rate, increased body temperature and increased blood pressure. Over a prolonged period that would result in fatigue, decreased effectiveness of breathing, decreased oxygen availability and metabolic complications such as lactic acidosis. The admitted period of restraint would have resulted in increased oxygen demand due to physical exertion and may also have reduced Louella's ability to breathe properly at a time of increased oxygen demand. The eventual position of her head on her chest may have compromised her airway, and further reduced her ability to breathe effectively. Together those factors would have pre-disposed her to cardio respiratory arrest.

61. The definitive cause of death could not be established save that it flowed from the ingestion of the combination of drugs found in her system. Dr Delaney settled on the following narrative:

> "Sudden unexpected death following the use of 2CP, ketamine and MDMA (Ecstasy), with a subsequent prolonged episode of

> altered behaviour including agitation, physical exertion, restraint and possible positional airway compromise".

62. Only Professor Deakin dealt with causation. He said in his statement:

> "In view of the lack of previously documented deaths from 2CP, the combined effect of three stimulant drugs and the unknown mechanism that resulted in Louella's death, it is not possible to state beyond reasonable doubt that earlier medical intervention would have been able to save Louella's life once she had ingested the 2CP."

In his first report he had put it in similar terms but added "I do believe however that on the balance of probabilities, medical intervention at any time prior to 21.10 is likely to have saved Louella's life." He maintained that position in cross examination but added various descriptions on the chances in answer to questions. He said:

> "I say in that report that before 21.10 she had a very good chance of survival, but I wasn't saying that after that time there wasn't. I say that there was still a good chance of survival after that time, I confirmed that that was my opinion. At 21.10 she was still making noises, she was not unresponsive at that point. In my second report I sought to clarify this. In my opinion whilst she was still breathing there was a good chance of survival with treatment."

63. He had clarified his view in his second report. The clarification was prompted by a reminder from a police officer of what he had said in a discussion. He put the chance of survival at 21.10 at 90% and "certainly on the balance of probabilities". He said variously that "had the deceased received appropriate care earlier that evening … she would have recovered"; that "so long as she was breathing her chances of survival are very high or very good"; but stated that "it is not possible to be certain beyond reasonable doubt as to whether medical intervention could have reversed [Louella's] demise". His observation that "on the balance of probabilities" medical intervention at any time before 21.10 was likely to have saved her life was not accompanied by evidence of when Louella's condition clearly became life-threatening and thus the appellant had a duty to act. He added that whilst on the balance of probabilities earlier medical intervention could have saved her life general experience with other recreational drugs indicated that survival was by no means guaranteed even with "timely" medical intervention.

64. The relevance of 21.10 was the recording showing Louella at that time.

Submission of no case to answer

65. At the conclusion of the prosecution case, the appellant submitted that there was no case to answer in respect of all four core issues: duty of care, breach of duty, causation, and gross negligence. On causation, the appellant submitted that in the light of Professor Deakin's evidence, in particular his first report from which we have quoted, any breach of duty by the appellant could only safely be regarded as having been a cause of Louella's death before 21.10, and that given that the jury could not be sure that

there was an obvious risk of death until 21.10, there was no point at which the existence of duty was coterminous with causation. More generally, it was submitted that the various descriptions given by the Professor were such that the jury could not be sure that any alleged gross negligence was a cause of death. Moreover, that changes in the Professor's opinion meant that his evidence could not assist the jury.

66. In reply, the prosecution pointed to Professor Deakin's evidence that Louella would have stood a very good chance of surviving if she had received medical care, and his comment that as long as she was actually breathing when found, the chances of her surviving would be very high. The camera footage at 20.18 showed that Louella was making incoherent noises, was not aware of her surroundings and was (in Professor Deakin's opinion) seriously unwell and in need of urgent medical care. She appeared to him to be dead at 23.35. The prosecution argued that the appellant's negligence over five to six hours provided an explanation for Louella's death, the root cause of which was the drug consumption and then the resulting effects. It was submitted that causation was properly a matter for the jury who should have the final decision on issues in relation to which expert evidence had been given. The respondent relied on *Misra* which was said to be similar (albeit in the context of medical negligence) in that the experts could not (as Professor Deakin could not in the appellant's case) definitively exclude the possibility that the patient would not have died even with appropriate medical care. This court concluded in *Misra* that there was a case to answer.

67. The judge rejected the submission of no case to answer. He acknowledged that Professor Deakin could not say beyond reasonable doubt that Louella would not have died in any event, but he did not think that her death was inevitable. She had a very good chance of surviving if she received medical help before she became unresponsive. The judge noted that the Professor had thought that it was very likely that Louella would have survived if she had received medical treatment before 21.10 and likely thereafter. He added:

> "The co-existence of a likelihood that the deceased could be saved with medical assistance and a breach of duty will be for the jury to decide. There is sufficient evidence of both a breach of duty before 21.10 and after that time; there is sufficient evidence that it was likely that the deceased could be saved both before and after that time.

68. With respect to the submission that causation could not be proved because Professor Deakin, adopting the criminal standard of proof, was unable to rule out that death would have supervened anyway, the judge accepted the prosecution submission that it was contrary to the decision in *Misra*. He concluded that the submission suggesting the Professor's evidence was unreliable given the changes in his opinion was a matter for the jury.

The summing up

69. The judge explained the ingredients of the offence which the prosecutions had to prove. On causation the judge directed the jury as follows:

> "…The breach of duty must have been a substantial contribution to the deceased's death. It doesn't have to be the only cause of

death, there were different concurrent causes for the death of the deceased in this case. According to the evidence of the pathologist, Dr Delaney, it was drugs toxicity with a subsequent prolonged period of altered behaviour, including agitation, physical exertion, restraint, and possible positional airway compromise. It was the opinion of Professor Deakin that intervention before it was too late might have saved her, therefore this means that there were several different factors in play, which caused the death of the deceased.

To prove this element of the offence the prosecution must make you sure that the failure to obtain medical help by the defendant was a substantial contribution to the cause of death. The prosecution's case is that by failing to obtain medical help in time, his breach of duty was a substantial contribution to the cause of death, in short had she been treated by a medical practitioner in time, she would have lived. The defence case is that by the time there was any breach of duty, it was already too late, in short it would have made no difference, it was not a substantial contribution to the cause of death. You will have to assess the time from which he was in breach and medical aid was needed, what was the likelihood of survival? Are you sure that the failure to obtain medical help at that time was a substantial cause of her death?

You will recall also, ladies and gentlemen, that Professor Deakin could not say beyond reasonable doubt that the deceased would not have died anyway. He said that at its highest her chances of survival were at 90%, but this was if she had received medical help before 21.10. However, this does not mean that you can't be sure that the breach of duty was a substantial cause of death. As I've already directed, to prove this element of the offence the prosecution must make you sure that the breach of duty was a substantial cause of death, not the only cause. Professor Deakin's opinion was that up to the point of unresponsiveness there was a very good chance of survival, after that time there was still a good chance, but it would have reduced quickly.

You will need to consider his expert evidence with care on this important issue. You will appreciate that Professor Deakin's opinion was strongly challenged by the defence, I will remind you of this when I summarise the evidence. You should also consider the circumstances of how easy or difficult it was to obtain medical help, if it was difficult due to phone signal problems or the layout of the ground, then it may reduce the contribution to the cause of death by the breach of duty, the reverse may be the case if it was easy to obtain medical help. Whilst this is relevant to whether there was a breach of duty, it may also be relevant to the cause of death, if it was very difficult to obtain medical help as opposed to being very easy, the

> contribution to the cause of death by the breach may become less significant, if it was very easy it may become more significant."

70. The judge gave an expert evidence direction, during the course of which he said that the experts had not given evidence as witnesses of fact, but of their expert opinion based upon their experience and expertise; and that it followed that they were unlikely to be able to express their opinion in terms of being sure or beyond reasonable doubt. At the end of his summary of the evidence of the four experts, he added:

> "Well, ladies and gentlemen, you should also bear in mind that, as an expert, Professor Deakin, as indeed of all experts, are not seeking to give evidence of which they are 100% sure or 95% sure, although Professor Deakin referred to 90%. They're there to tell you what their opinion is, and it's for you to decide whether you're sure that, that you can accept that evidence or not. And so it's not simply taking that the expert says that he is not 100% sure so I can't be, you consider this as all expert evidence against all the other evidence that you consider and come to a decision as to whether you are sure that it was a substantial contribution of death or not".

71. At the conclusion of the summing up, Mr Kamlish invited the judge to clarify his directions on causation by giving a further direction addressing the issue that, even taken at its highest, Professor Deakin's evidence was that there was a 10% possibility that medical intervention could never have saved Louella's life, and that unless there was evidence to fill the (arguably wide) gap between that and the jury being sure that a breach of duty by the appellant had caused or significantly contributed to Louella's death, the appellant was entitled to be acquitted. The prosecution submitted that no further direction was required. In the result, the judge declined to give any further direction.

The appeal

72. In granting leave in relation to causation, the single judge noted that the test applied by the judge was whether or not Louella would have lived had she been treated in time by a medical practitioner, and observed that the material question was whether the appellant's breach of duty had caused or made a significant contribution to the cause of death. That had to be answered by reference to a time when Louella's condition was already clearly life-threatening. The evidence in support of the prosecution case could only come from the experts, and the evidence of Dr Morley and Ms Pagdin went to the effects of 2C-P and the other drugs that Louella had ingested, rather than to causation. Equally, Dr Delaney's evidence did not identify when Louella's condition would clearly have been life-threatening, or what the effect of the breach of duty to which the appellant had then become subject may have been. The critical and only evidence on those issues was therefore that of Professor Deakin. The single judge continued:

> "In the light of this evidence, I consider it to be reasonably arguable that the jury could not be any more certain than Professor Deakin and, that being so, causation could not be established to the criminal standard. In my judgement, the evidence in this case is at least arguably distinguishable from the

> evidence summarised in *Misra*; and *Misra* does not establish a principle that causation is always a matter for the jury, whether or not there is evidence to support a finding adverse to the defendant".

Summary of the submissions

The appellant

73. Mr Kamlish submits that the judge should have acceded to the submission of no case to answer. The jury had to be sure that the evidence, taken at its highest, established that a breach of duty by the appellant had caused, or made a significant contribution to, Louella's death. In *Misra,* upon which the prosecution and judge relied, there was expert evidence to support a finding that causation was established to the criminal standard of proof. The serious infection from which the victim was suffering would have been obvious to a medical student. Up to a certain time the expert was sure that the victim would have survived if the requisite steps had been taken, but that after that time he could not be sure that the victim would have survived. The court had rejected the suggestion that a submission of no case should have succeeded, saying (at paragraph 22) that "the causation issue was entirely for the jury." That observation presupposed that that there was evidence which would enable a jury to be sure.

74. The causation question must be asked by reference to a time when Louella's condition was already clearly life-threatening. It was not sufficient that she needed medical intervention but that there was a serious and obvious risk of death. The timings must take into account the natural delays that would inevitably have occurred even if the appellant had acted appropriately and promptly once Louella's condition had clearly become life-threatening.

75. On the most optimistic view of Professor Deakin's varying opinions, there was a realistic possibility that, even from the time of ingestion, Louella would not have survived with medical attention. There was no evidence on which the jury could reach a different conclusion from the Professor on the issue of whether Louella would have survived with medical intervention. As the single judge rightly pointed out, the critical (and only) evidence in relation to causation was the Professor's, and neither the newspaper report nor the two small peer reviewed papers provided any independent or additional support for a conclusion adverse to the appellant.

76. The position in the appellant's case was different as (in contrast e.g. to the expert evidence about the infection in *Misra)* little was known about 2C-P. None of the experts could talk about it with any sense of authority or clarity, and thus any conclusions about survivability were little more than speculation.

77. In addition, Louella had consumed other drugs, and Dr Delaney had concluded that it was "not possible in this case to definitively determine the precise mode of death" and had instead provided a narrative summary.

78. Dr Morley had agreed that the US newspaper report should be ignored. Equally whilst, by reference to the effects of other stimulant drugs, Dr Morley had suggested that increased heart rate could possibly lead to an irregular heart beat such that there might be a need for defibrillation, there was no reported clinical evidence that 2C-P

consumption had ever needed such treatment. Rather, the clinical evidence related to a total of six patients, some of whom had been given Valium, and others had simply been kept under observation.

79. Miss Pagdin could not say that 2C-P had played a role in causing Louella's death. In his witness statement (which was in evidence) Professor Deakin had said that given the lack of previously documented deaths from 2C-P, and the unknown mechanism that had resulted in Louella's death, it was not possible to say beyond reasonable doubt that earlier intervention would have been able to save her life. In his first report, which was also in evidence, Professor Deakin had expressly disavowed the proposition that causation could be proved to the criminal standard but said that medical intervention before 21.10 probably would have saved her life.

80. In cross-examination, Professor Deakin had repeatedly indicated that he stood by his comment in relation to 21.10, whilst also giving evidence that, up to the point of unresponsiveness, there was a very good chance of survival. However, the only safe conclusion that the jury could draw from his evidence as a whole was that medical assistance prior to 21.10 would probably have saved Louella's life, a conclusion which he had variously described as being "on the balance of probabilities", "very likely" and "90%". In any event, in view of what the Professor had said in his witness statement, and from whenever a duty of care arose, the jury could not be sure that Louella would not have died in any event.

81. Thus, the evidence taken at its highest meant that the jury could not be sure that, even at an earlier stage in the evening, a lack of medical assistance had caused or significantly contributed to Louella's death. Equally, the lack of knowledge about 2C-P meant that there was no evidential basis upon which the jury could reject the possibility (if, as was the prosecution case, Louella had taken a large or "bumped up" quantity of 2C-P) that she would have died, even with medical assistance. Therefore, the jury could not be sure that a grossly negligent breach had caused or substantially contributed to Louella's death.

The respondent

82. Miss Darlow submits that the prosecution had advanced sufficient evidence of causation. To remove the case from the jury would have usurped the function of the jury.

83. We have considered and rejected the submission advanced on behalf of the respondent in the appeal, but not at trial, that it was sufficient for the prosecution to prove that the appellant's gross negligence had deprived Louella of a significant or substantial chance of survival that was otherwise available to her at the time of that negligence.

84. Miss Darlow suggests that *Misra* involved an almost identical expert opinion scenario, albeit consequent upon medical negligence by doctors over a period of two days in the post-operative care of a patient who developed a serious infection, which it was alleged that they had negligently failed to realise. The evidence of the two prosecution experts was summarised between paragraphs 18 and 21 of the judgment. They too used a variety of descriptors of the chances of survival. The circumstances are indistinguishable from those in this appeal yet at paragraph 22 of his judgment, Judge LJ said:

> "In our judgment the submission that there was no case to answer on the causation issue was untenable….The causation issue was entirely for the jury. If the submission was upheld, the judge would have usurped its function".

85. Miss Darlow further submits that the prosecution had relied at trial on a combination of evidence from its four expert witnesses. In refusing the submission of no case the judge had summarised the evidence of Professor Deakin and had indicated that it was for the jury and not the court to assess the experts' evidence. He had thereafter directed the jury correctly and in accordance with *Gian* that juries are not required to assess evidence on the basis of scientific certainty, nor are they bound to consider hypothetical possibilities. Thus, Miss Darlow asserted, whilst Professor Deakin could not with certainty exclude the possibility that Louella would have died in any event, a separate and independent consideration of the issue fell properly within the province of the jury, who had been properly directed as to both the ambit of the relevant evidence and the role of expert witnesses. Indeed, the role of the Professor in giving an expert opinion necessitated taking into account possibilities which the jury, for their part and performing a separate and distinct function, may have considered that they could confidently regard as hypothetical, or so unlikely as being safely and reasonably discounted. So, in analysing the Professor's evidence that: "…Obviously drugs can cause deaths, but thousands of people attend for treatment having taken drugs in general and do not die. Sometimes death is inevitable, but usually lives can be saved", the jury's evaluation of degrees of probability may legitimately have differed from his.

86. She recognises that there were inconsistencies in Professor Deakin's evidence but some reliance could be placed on the American newspaper report (found by Dr Morley on an internet search) that suggested apparent successful resuscitation of those having suffered 2C-P induced cardiac arrest and the profession's clinical ability to provide life-saving intensive care to patients with respiratory or metabolic abnormalities. The inconsistencies, Miss Darlow submits, could be compared with those in the expert medical evidence in *Misra*. Miss Darlow reminds us that Professor Deakin had said that he regarded sure as being "*beyond 95%*". That, she submitted, demonstrated the impossibility of transposing the percentages expressed in medical opinion into the standards that a jury might equate with being sure.

87. The evidence of Professor Deakin that there were no documented deaths from the use of 2C-P was supportive. That evidence could also be put together with the evidence of Dr Morley (the American newspaper report and evidence of the six patients in peer reviewed papers) that, although there were no previous recorded 2C-P fatalities in the literature, there was "some evidence" of potentially fatal outcomes that had been prevented due to medical intervention. Likewise, Louella had MDMA in her system which might have increased the effect, including an abnormal heartbeat. That had a direct and probative relevance to the issue of survivability. Thus, Miss Darlow submits, the additional evidence would have entitled the jury to conclude that Louella would have survived if she had received appropriate medical treatment. The jury was entitled to consider (in conjunction with the evidence of Professor Deakin) the evidence of Dr Morley (with whom Miss Pagdin agreed) that 2C-P had a stimulant effect and could cause an increased heartbeat or heart arrhythmia. That was treatable. Professor Deakin had said that, provided that Louella was actually breathing when found, the chances of

her surviving would have been very high, and the live photograph at 22.42 showed that she was still groaning and thus was still breathing.

88. Miss Darlow concludes by submitting that on the most favourable analysis to the appellant of Professor Deakin's evidence, Louella was deprived, by the appellant's negligence, of a 90% likelihood of being saved.

Discussion

89. To establish the guilt of the appellant the prosecution had to make the jury sure that at the time when Louella's condition was such that there was a serious and obvious risk of death the appellant was grossly negligent in failing to obtain medical assistance and that such assistance would have saved her life. That she was having a bad trip, or the time had come when medical help was needed is not enough. In a case of this sort, as in medical cases involving health professionals, there needs to be a clear focus on when the condition of the deceased reached the threshold of serious and obvious risk of death, what the accused should have done then and the prospects of survival at that point.

90. The prosecution in this case did not fix on a time at which it was contended that Louella's condition posed an obvious and serious risk of death rather, as the judge explained in the summing up:

> "It will be necessary … for you to carefully consider the events, looking closely at the timing of the moving images on the Defendant's phone, between 17.53 and 23.24 and how the deceased appeared. The timing and content of messages between the Defendant and others and evidence of voice calls. It cannot be said that there was a duty of care or a breach of duty at the start, it's the Prosecution's case that as time went on you can be sure that a reasonably competent, prudent and sober person of the Defendant's age and experience would have known that he had created a state of affairs which had become life threatening, and would have appreciated her serious deterioration and obtain medical help for the deceased. It will be for you to decide if or when that time arose. The Defence say that it never arose and that in the circumstances at the time, he did all that was reasonable to help her."

91. In the passages dealing with causation, the judge linked the breach of duty with causation:

> You will have to assess the time from which he was in, in breach and medical aid was needed, what was the likelihood of survival? Are you sure that the failure to obtain medical help at that time was a substantial cause of her death?

92. The task of the jury was far from easy given that they had no help from the experts on the question of when Louella's condition was clearly life threatening (as the judge put it as short-hand for a serious and obvious risk of death). We have noted that Professor Deakin, on viewing the video taken at 20.18, described her as being "seriously unwell and in need of urgent medical care" rather than at serious and obvious risk of death.

Nonetheless, having determined when that state of affairs existed there would have been no difficulty in concluding that the appellant should immediately have tried (or continued to try) to get help. It would necessarily take time to arrive and for treatment to commence. That is when the question of survivability would become relevant.

93. The appellant made attempts to get assistance. He told Ezra Campbell at 19.13 to "get the medics" to the forest and again at 20.25. He sent a Google Maps pin to Ezra Campbell at 20.39. Shortly after 21.00 a search was made of the Ambient Forest where, mistakenly, the searchers thought the appellant and Louella were located. It is not plausible to suppose that the appellant was acting in a grossly negligent way whilst actively seeking help for Louella at that time and it is for that reason that a good deal of attention was paid at trial and in Professor Deakin's evidence about the state of affairs when the video was taken shortly after 21.00. His opinion focussed on survivability at 21.10.

94. We respectfully agree with the observation made by the single judge, reflecting the submission advanced by Mr Kamlish, that the only evidence dealing with causation was that of Professor Deakin. None of the other experts gave evidence which went to that issue. It was not in doubt, even given the uncertainties surrounding the precise mechanism of death and the part played by the different drugs which Louella had taken, that the drugs caused the death and that medical intervention could have saved her. It was Professor Deakin who gave the evidence relevant to the issue of causation. In that he was in a similar position to the doctor who gave evidence in the trial of *Morby* in 1882.

95. Neither did the results of Dr Morley's internet searches add to Professor Deakin's evidence. Experts may, of course, rely upon the work of others in forming their opinions. The two peer reviewed papers dealing with six patients who had consumed 2C-P are examples of the type of material an expert may bring to bear in forming an opinion. But they said nothing about the chances of survival of a 2C-P taker who was at a serious and obvious risk of death. The fact that three of the patients needed nothing more than rest and the other three Valium suggests that the problems were of an entirely different order. Dr Morley was right to disavow reliance upon the newspaper report his searches had exhumed. A report of this nature is far removed from the type of material than an expert could pray in aid to support an expert opinion. Moreover, had it been found by the industry of the prosecution rather than Dr Morley it is inconceivable that it would have been admissible in evidence.

96. Like the jury, we are left with the Professor's evidence which, echoing Lord Coleridge's language in *Morby*, he gave "under a high sense of duty and responsibility". He was careful not to overstate his position. It is striking that in his original report the Professor expressly addressed himself to the criminal standard of proof, rather than scientific certainty, but found the evidence wanting. He was happy with the civil standard of proof, the balance of probabilities. The furthest he would go when pressed further was in suggesting that there was a 90% chance of survival at 21.10 if medical attention had then been provided. He used various epithets to describe the position then and thereafter, but it is abundantly clear that was the high-water mark for survival and that the chances diminished as time went by, albeit remaining good. The diminishing chances of survival were expressly referred to in the opening of the prosecution to the jury.

97. We have referred to *Gian* (paragraph 22 above) and noted Miss Darlow's submission founded upon it that the jury is not required to assess evidence on the basis of scientific certainty, and nor are they bound to consider hypothetical possibilities. The relevant passages from *Gian* are these:

> "21. Dr Jerreat's opinion was, throughout, clear. His opinion was that the victim had died of neck and stab wounds. He said in re-examination:-
>
> > 'My opinion is that she has died of the neck and stab wounds and that the cocaine intoxication is not an event, but there are always cases that you cannot completely exclude and in theory these are possibilities. I do not think that has occurred in this case where you have clear bruising, you have a clear action in the stabbing and the removal of the neck. As I was asked, it was not a clean removal, it was not quick, it was very slow and it would have taken some time and this is all while the person is still alive. So it would be highly unusual that you would perform this process just as they were dying of cocaine intoxication.'
>
> 22. In our judgment, the judge was correct in refusing to withdraw the case from the jury merely on the basis that Dr Jerreat could not exclude a theoretical or hypothetical possibility that the victim had died from cocaine poisoning. There is ample authority for the proposition that the mere fact that as a matter of scientific certainty it is not possible to rule out a proposition consistent with innocence does not justify withdrawing the case from a jury. Juries are required to consider expert evidence in the context of all other relevant evidence and make judgements based upon realistic and not fanciful possibilities. (See Bracewell [1979] 68 Cr App R 44, Dawson [1985] 81 Cr App R 150 and Kai-Whitewind [2005] 2 Cr App R 31 at paragraphs 88, 89 and 90). The Court of Appeal endorsed Boreham J's direction in Bracewell. In that case the defence raised the possibility that the victim had been strangled, recovered and then suffered a heart attack, a sequence of events which could not be ruled out as a matter of scientific certainty. The judge directed the jury not to judge the case scientifically or with scientific certainty but to decide whether, on the whole of the evidence, they were sure. The Court of Appeal endorsed that direction which correctly drew the distinction between scientific proof and legal proof. It pointed out that the medical evidence was only part of the material on the basis of which the jury had to reach a decision."

98. This extract demonstrates the hypothetical nature of the alternative cause of death being considered in *Gian* and also in *Bracewell.* It illuminates the reality that in many homicide cases determining the cause or causes of death does not rely exclusively on expert opinion but can be collected from surrounding circumstances.

99. Professor Deakin was not asked to consider hypothetical alternative causes of death of the sort canvassed in *Gian* and the cases therein cited. There were two concurrent causes of death in issue: first, the effect of the drugs taken by Louella and secondly want of medical attention after the time when her condition became obviously critical. There was no evidence beyond that of Professor Deakin of a non-expert nature which could help answer the relevant question.

100. It is unhelpful to attempt to contrast scientific certainty (put at 100%) with a different figure for legal certainty. Human beings asked the question whether they are sure of something do not think in those terms. In the context of causation in this very sad case the task of the jury was to ask whether the evidence established to the criminal standard that, with medical intervention as soon as possible after Louella's condition presented a serious and obvious risk of death, she would have lived. In short, had the prosecution excluded the realistic possibility that, despite such treatment, Louella would have died?

101. In our judgment none of Professor Deakin's descriptive language achieved that. Even his description of a 90% chance of survival at 21.10, were medical help available, leaves a realistic possibility that she would have lived.

102. *Misra* is a different case. The evidence in support of causation needs careful attention. The case is not authority for the proposition that causation is always a matter for the jury whatever the underlying evidence. No issue should be left to a jury unless there is sufficient evidence upon which it can be satisfied so it is sure. It is true that the two prosecution experts who gave evidence on causation spoke in varying descriptive language, including the balance of probabilities. That said, amongst the evidence by one expert was that he was "as certain as one can be he would have survived". There was evidence of the general statistical chances of dying from the relevant condition even with appropriate medical treatment (contested but coalescing around 5%); but at two points in the judgment (paragraphs 21 and 74) there is reference to the view of one of the experts that the fact that the victim was a 31-year-old man in otherwise good health was a factor which reduced his statistical chance of dying and that he was in fact doing well before the negligence supervened.

103. In our view, this is one of those rare cases (as was *Morby*) where the expert evidence was all that the jury had to assist them in answering the question on causation. That expert evidence was not capable of establishing causation to the criminal standard. Miss Darlow's final submission that at 21.10 Louella was deprived of a 90% chance of survival was an accurate reflection of Professor Deakin's evidence but, for the reasons we have explained, that is not enough. Put another way, if an operation carried a personal 10% risk of mortality, both patient and clinicians would be able confidently to say that the chances of survival were very high or very good (to take two phrases used by the Professor) but none could be sure.

104. In respectful disagreement with the judge, we conclude that the appellant's main argument, that the case should have been withdrawn from the jury, is established. Applying the *Galbraith* test (*R v. Galbraith* [1981] 1 WLR 1039), taken at its highest, the evidence adduced by the prosecution was incapable of proving causation to the criminal standard of proof. The appeal against conviction for manslaughter must be allowed.