Neutral Citation Number: [2024] EWCA Crim 1036

Case No: 202203415 B3

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
MR JUSTICE TURNER
910508

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION,
LORD JUSTICE HOLROYDE
MRS JUSTICE STACEY
and
MR JUSTICE BOURNE

- -

Between:

OLIVER CAMPBELL	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Michael Birnbaum KC and Ms Rose Slowe (assigned by **the Registrar of Criminal Appeals**), and **Glyn Maddocks KC (Hon)** (acting *pro bono*) for the **appellant**
John Price KC and Tim Hunter (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing dates: : 28 & 29 February 2024, 21 May 2024

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Approved Judgment

This judgment was handed down remotely at 10:30 a.m. on 11 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Holroyde:

1. In 1991 the appellant was convicted of offences of conspiracy to rob and murder. In 1994, his appeal against those convictions was dismissed by this court. His case now comes before this court again as the result of a reference pursuant to s9(1) of the Criminal Appeal Act 1995 by the Criminal Cases Review Commission ("CCRC"). By virtue of s9(2) of that Act, the reference takes effect as an appeal against conviction.

The facts:

2. At about 10.30pm on 22 July 1990 two men – alleged by the prosecution to be this appellant, then aged 19 and of previous good character, and an older man Eric Samuels – attempted to rob an off licence shop in Hackney. The prosecution case was that Samuels initially went into the shop on reconnaissance, and then went back outside to ensure that a shop assistant, who was putting up shutters in preparation for closing, did not raise the alarm. The appellant then entered the shop, which was staffed by Baldev Singh Hoondle, the proprietor, and his son Hardip Hoondle. The employee who had been outside was pushed into the shop by Samuels, and Hardip Hoondle – who had sensed trouble – activated the alarm. There was then a struggle between the appellant and Baldev Singh Hoondle, in the course of which the appellant fatally shot Mr Hoondle in the head.

3. Hardip Hoondle gave a description of the man who had shot his father. He said that the man had been wearing a British Knights cap. He subsequently attended an identification parade, at which he did not identify the appellant.

4. An eye witness, Mark Purchase, heard a bang and saw two men fleeing from the shop, one of whom was wearing a black and white British Knights baseball cap. He gave a description of the men, including an estimate of height several inches shorter than the appellant's 6 feet 3 inches. He did not identify the appellant at an identification parade. In 1991 he told the police that he was sure the man who wore the cap had been standing at position 9, which was the position occupied by the appellant. There was, however, evidence that a police officer may have mentioned the appellant's position in the parade to Mr Purchase.

5. Another eye witness, Anne Winter, heard a man (who, on the prosecution case, must have been Samuels) shouting "What on earth have you done? I never dreamed you would resort to that kind of violence".

6. A black and white British Knights baseball cap was found in the roadway near the off licence. Only 188 such caps had been sold in London. Hairs recovered from inside the cap were examined and found not to have come from either the appellant or Samuels.

7. Karla Hills, a witness who worked in a sports shop, stated that the appellant had bought a black and white British Knights baseball cap eight days before the shooting, and had subsequently told her "Someone's been to see me about that hat I bought. I told him I have given it away".

8. The murder weapon was never found. An expert witness who examined the bullet recovered from the deceased opined that it was a lead revolver bullet, more likely to have been fired from a revolver than from a pistol.

Arrests and interviews:

9. On 30 November 1990 the appellant was arrested "for the murder of the shopkeeper at G & H Stores on July 22, 1990". He was given no further detail. The appellant said that he knew nothing about a shooting and "did not shoot the man". Whilst being taken to a police station in Plaistow he said "You mean the Asian man that got shot". When the officer replied "Do I?", the appellant said "I remember all about it from Crimewatch UK".

10. The television programme Crimewatch UK broadcast on 6 September 1990 had carried an item about the shooting. It lasted less than a minute and a half.

11. The appellant was interviewed under caution on a total of 14 occasions, in particular by Detective Sergeant Ellison. Interview 1 took place at Plaistow police station. The appellant said that he did not want a solicitor, and no other independent person was present. He said he may have been to the off licence a long time ago. He denied committing the shooting, saying that it was "both of them". He thought his friend "Derek" had the gun. He mentioned buying the cap which he had seen on television. He said he thought he might have dropped it in the shop. He thought the incident may have happened around 6.30pm. After the interview, however, he said that he thought the incident occurred when the shop was closing and it was late.

12. The appellant was then taken to Hackney police station. En route, he directed the police to Samuels' address. Upon arrival, he said he had told a couple of girls what he had done, and wanted to know if they had "grassed" on him.

13. Medical examination at Hackney police station established that the appellant – who had the misfortune to sustain brain damage in an accident when he was an infant – suffered from a significant intellectual disability. A solicitor Mrs Eldridge and an appropriate adult Ms Marshall were present at interviews 2-9.

14. In interviews 2 and 3 the appellant said that he recognised the cap from Crimewatch UK but did not know where it was: it got lost, he could not remember how. He said that he knew nothing about the shooting. Neither he nor "Derek" had a gun. He had said what he did at Plaistow police station in order to get the officers off his back.

15. In interviews 4-9 the appellant frequently replied "No comment" or exercised his right to silence. He denied having spoken to Karla Hills in the way she had stated. He was told that a sample of his hair would be taken, and the officer suggested it would match hairs found in the cap recovered near the scene. The appellant accepted that it was his cap.

16. In interview 10, on 1 December 1990, the appellant was represented by a solicitor Mr Mullinger. A social worker Ms Yeomans was also present.

17. Later that evening, the appellant's foster mother Jean Jackson – a lecturer in child care, and a magistrate, who became his foster mother in 1986 – attended the police station and spoke to the appellant for about 20 minutes. An officer asked her to act as appropriate adult in a further interview, which she agreed to do. Both she and the appellant signed the custody record to confirm their willingness for the interview to be conducted without a solicitor. The appellant said that he wanted to tell the truth:

"something inside me is wanting to tell the truth. It's like a door opening inside me. I don't want to lie". He also said "I shot the Asian man".

18. At the start of that interview, interview 11, the appellant again confirmed that he was willing to be interviewed without a solicitor being present, saying that he wanted to tell the truth about what had happened. Mrs Jackson also agreed to the interview. The appellant said that it was he who had shot the man: he had pulled the trigger by accident. He said that he had hired the gun, which he described in terms consistent with a revolver, and had practised with it. He said that he used string to make a holster to carry the gun under his left arm.

19. Interview 12 began on the following day, 2 December 1990. However, the appellant requested a solicitor and Mrs Jackson said she wished a solicitor to be present. The interview was therefore stopped.

20. Mr Mullinger and Ms Yeomans attended interviews 13 and 14. Mr Mullinger objected to further questioning, on the ground that the police had sufficient evidence to charge. After consulting with Mr Mullinger, the appellant made no comment to any question.

21. Samuels was arrested on 4 December 1990. He stated that he had not known that the appellant had a gun: he was outside when the appellant shot the deceased, and could not believe it.

22. In a later statement on 15 December 1990, Samuels told a police officer, Detective Sergeant Cater, that it was a man named "Harvey", not the appellant, who was with him during the incident.

The trial in 1991:

23. The appellant and Samuels were charged on indictment with conspiracy to rob (count 1) and the murder of Baldev Singh Hoondle (count 2). Samuels pleaded guilty to count 1.

24. The trial of the remaining charges took place at the Central Criminal Court in late 1991, before Turner J ("the judge") and a jury.

25. The prosecution case against the appellant involved three principal strands: the evidence of identification; the evidence relating to the British Knights cap; and the admissions which the appellant had made to the police.

26. Counsel then representing the appellant applied pursuant to ss76 and 78 of the Police and Criminal Evidence Act 1984 ("PACE") to exclude the evidence of the various conversations between the appellant and police officers outside the formal interviews, and interviews 1 and 11.

27. The judge, having heard evidence on a voir dire, refused that application. He held that, even if there had been inadvertent breaches of the Code of Practice, nothing had been said or done which was likely to render any confession unreliable so as to require its exclusion under s76. He declined to exclude the confession evidence under s78 because, if the appellant were to give evidence and the jury were to be sure he had fired the gun, that evidence may have provided him with a defence to the charge of murder.

28. In the event, the appellant did give evidence. Samuels did not.

29. The appellant's case was that he was not involved in the incident. He had been somewhere else at the time, though he could not remember where. He knew about the case from watching Crimewatch UK. He accepted that he had bought a British Knights cap but said it had been taken from him about two days later when he was with Samuels in Leicester Square. He had told Karla Hills about losing it because he had seen the cap on Crimewatch and thought that the police would trace it to him and would wrongly think he had been wearing it at the time of the shooting. He had made incriminating, but false, statements to the police because they put him under pressure.

30. The prosecution suggested that it was an astonishing coincidence that the man who took the hat from him was six days later wearing that hat when committing a robbery with Samuels, and that the appellant had given an explanation to Karla Hills which differed from his account to the jury.

31. In relation to the appellant's mental condition, agreed facts before the jury include the following:

> "Past psychological testing has shown a low full scale IQ of between 69 and 89. On current testing (November 1991) he achieved a verbal IQ of 72 and a performance IQ of 75. These scores are borderline defective.
>
> There can be no doubt that he suffered severe brain damage (to the left side of the brain more than the right) from his injuries which have caused permanent abnormalities. The most significant consequence is his intellectual function and in this respect he should be regarded as showing significant mental handicap. This is reflected in impaired capacity to process or remember more than the simplest verbal information, severely restricted reasoning skills and poor concentration."

32. Those agreed facts were based upon reports which the defence had obtained from four expert witnesses, one of whom was Professor (then Doctor) Gudjonsson, a forensic psychologist. None of those witnesses was called to give evidence, and Professor Gudjonsson's letter and report dated 14 October 1991 (to which we shall return later in this judgment) were not before the jury.

33. The judge in summing up told the jury that, if the case had rested on the identification evidence given by Mr Purchase, he would have withdrawn it from their consideration. He directed the jury, twice, that what Samuels had said to the police was not evidence against the appellant. He more than once reminded the jury of the evidence as to the appellant's limited intelligence, saying at one point:

> "I reminded you yesterday of something that you had already been told. It was that the key question for your consideration here is the extent to which you may treat what Mr Campbell said there as reliable, and it is only right in this context that I should remind you of the details of his medical background."

34. On 10 December 1991 the jury found the appellant guilty on both counts. They found Samuels not guilty on count 2.

35. On the following day, the judge sentenced the appellant to life imprisonment on count 2, with no separate penalty on count 1. In his sentencing remarks he described Samuels as the "evil genius" behind the scheme to commit the robbery, and said that Samuels had very cynically used the appellant, whom he knew to be vastly inferior in terms of intellect.

36. The Home Secretary later set a tariff of 10 years as the minimum term to be served. We understand that the appellant was released on licence in 2002.

The 1994 appeal:

37. In June 1994 this court heard the appellant's appeal against conviction ("the 1994 appeal"). The judgment is reported at [1995] 1 Cr. App. R. 522.

38. The court refused initial applications to adduce fresh evidence from two witnesses. The first was Lloyd Sanderson, who had met Samuels in prison in August 1991 and stated that he had been told by Samuels that the man with him in the robbery was not the appellant. The court held that such evidence was inadmissible.

39. The second application related to Dr Olive Tunstall, a consultant psychologist who had conducted further tests of the appellant's social functioning and had prepared a report dated 16 June 1994. She opined that the appellant was more vulnerable in the context of police interviews than had been thought by the other experts. In refusing that application, the court observed that the other experts consulted by the defence had plainly been unable to say that there was anything in the appellant's mental condition which made him especially vulnerable to suggestibility or to pressure in police interview. The court held that Dr Tunstall's evidence did not fall within s23(2) of the Criminal Appeal Act 1968 because it could, with reasonable diligence, have been available at trial; but in any event, Dr Tunstall accepted that the appellant was not particularly suggestible or compliant, and she offered no more than the "conceivable possibility" that the appellant may be susceptible enough to influence to have agreed with what had been put to him, and to say what he thought the police thought he should say. The court was satisfied that the jury's verdict would not have been affected if they had heard Dr Tunstall's evidence in addition to, or instead of, the agreed medical evidence.

40. With the leave of the single judge, three grounds of appeal were argued. The first challenged the judge's refusal of an application for the appellant to be tried separately from Samuels. The second challenged the judge's refusal to exclude evidence of confessions pursuant to ss76 and 78 of PACE. The third contended that the judge had wrongly failed to warn the jury of the special need for caution in relation to confessions made when no appropriate adult was present, such a warning being required by s77 of PACE.

41. The court rejected all three grounds.

42. In relation to the second ground of appeal, it should be noted that the appellant had not challenged the judge's ruling that interview 11 on the evening of 1 December 1990

("the Jackson interview") should be admitted in evidence. The significance of that point can be seen in the following passages from the court's conclusions on the third ground:

> "[at p534] The first question is whether the case depended substantially on these confessions, since plainly it did not depend wholly upon them. In our judgment, it did not. The position would have been very different if the Jackson interview had not taken place in the presence of an appropriate adult. But in this case, even if the evidence of the earlier interviews was excluded, the case was equally strong against the appellant. It depended on the identification evidence, confirmed and supported as it was by the evidence relating to the hat and the confession contained in the Jackson interview. The test in our judgment must be whether the case for the Crown is substantially less strong without the confession made in the absence of the appropriate adult.
>
> …
>
> [at pp536-537] Throughout his references to the various conversations and interviews the judge on almost every occasion invited the jury to consider whether the information was reliable or given as the result of pressure. There can be no doubt therefore that the judge plainly left to the jury the questions whether the answers or information given by the appellant were reliable; that his mental capacity had an important bearing on this question and that the defence was that it was unreliable because the appellant was vulnerable to pressure from the police. …
>
> The judge's summing up dealt very fully and fairly with the issue of whether the confessions were as a result of pressure on a vulnerable personality, which was the case made by the defence.
>
> We should perhaps add that even if we had thought there was a technical breach of section 66, in the circumstances of this case we would be very satisfied that there was no miscarriage of justice. The case was a very strong one, resting as it did on the three strands of evidence we have indicated: the identification evidence, coupled with the evidence relating to the hat, together with the spontaneous cell corridor admission and the confessions in the Jackson interview."

43. We turn to the applications made to the CCRC.

The applications to the CCRC:

44. An initial application was made to the CCRC in 1999. The appellant's representatives relied, amongst other material, on a further report from Professor Gudjonsson, and on the evidence of Linda Cowell, a BBC reporter who had covertly recorded Samuels saying in October 2001 that the appellant was not with him on the night of the incident.

45. The CCRC also considered reports from two clinical psychologists, Susan Young and Professor Thomas-Peter.

46. No referral was made at that stage.

47. A further application was made to the CCRC in 2020. The CCRC obtained further evidence from Professor Gudjonsson and from a psychologist Dr Alison Beck. In a commendably thorough report, for which we are grateful, the CCRC decided to refer the appellant's convictions to this court under s9 of the 1995 Act.

The reasons for the referral:

48. In accordance with s14(4) of the 1995 Act, the CCRC gave the following reasons for its decision:

> "(i) There is fresh expert evidence, unknown at the time of trial or appeal, which establishes that there is a real possibility that the Court of Appeal may now find that Mr Campbell's admissions were unreliable. This is given by:
>
> (a) A fresh report by Professor Gisli Gudjonsson who has accepted that at the time he assessed Mr Campbell he did not properly understand the full nature of his vulnerabilities, and accordingly he focused too narrowly on his suggestibility rather than thoroughly examining his compliance, background and communication difficulties.
>
> (b) A fresh report by Dr Alison Beck supports this conclusion by explaining that modern psychological practice would now require Mr Campbell's background to be more rigorously assessed, also taking into account his compliance and memory issues, to examine how this would impact on his behaviour and ultimately his reliability.
>
> (ii) Modern standards of fairness would now apply to Mr Campbell's case as per *Bentley*. Thus, there is a real possibility that the Court of Appeal would find that the modern psychological approach and the fresh evidence that flows from this as to Mr Campbell's previously misunderstood vulnerabilities, undermines the reliability of his admissions. Taken together with the status he would now have as a vulnerable adult, there is a real possibility the Court of Appeal would conclude Mr Campbell's admissions should now be excluded.
>
> (iii) Given the developments in the law, there is now a real possibility that the admissions of Mr Samuels may now be admitted in the interests of justice:
>
> (a) While this evidence may not give rise to a ground of appeal on its own, the CCRC considers there is a real possibility that the

> Court of Appeal may find these comments are supportive of Mr Campbell's position now as detailed by the fresh expert evidence and thus undermine the safety of his conviction.
>
> (b) Also, there is a real possibility that if the *Pendleton* test were to be applied, the Court would conclude that the comments of Mr Samuels could have impacted on the jury's assessment of Mr Campbell, and ultimately their decision to find him guilty."

49. We note here that, so far as is material for present purposes, s14 of the Criminal Appeal Act 1995 provides:

> "(4) Where the Commission make a reference under any of sections 9 … the Commission shall –
>
> (a) give to the court to which the reference is made a statement of the Commission's reasons for making the reference…
>
> (4A) Subject to subsection (4B), where a reference under section 9 … is treated as an appeal against any conviction … the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference.
>
> (4B) The Court of Appeal … may give leave for an appeal mentioned in subsection (4A) to be on a ground relating to the conviction … which is not related to any reason given by the Commission for making the reference."

50. The effect of those provisions is that an appellant who wishes to advance any ground of appeal which is not "related to" the CCRC's reasons for a referral requires the leave of this court.

The grounds of appeal:

51. On behalf of the appellant, Mr Birnbaum KC seeks to advance no fewer than 17 grounds of appeal. He does so on the premise that the CCRC's statement of reasons "is flawed and inadequate". We must set out the grounds in full, substituting "[the appellant]" or "[Samuels]" where counsel has inappropriately referred to those men by their forenames.

52. Ground 1: "The references relied on in the second application are all admissible simply as background evidence, because they suggest the unlikelihood, not only that [the appellant] would commit an armed robbery, but that anyone planning such a robbery would entrust him with a loaded gun. They also support the views expressed in police and probation files as to his naivete, trust in others and vulnerability to exploitation."

53. Ground 2: "The identification evidence was exceptionally weak. Mr Purchase had a fleeting glimpse of the robbers at night across a wide road, when he was understandably in fear having heard a shot. His statements were contradictory and he lied to the jury. [The appellant], at 6 foot 3 inches, was much taller than the shooter, as described by Hoondle, Purchase and (by inference) Gager."

54. Ground 3: "There was no forensic evidence against [the appellant] and unidentified hairs in his hat could have been those of the gunman."

55. Ground 4: "Almost all the details [the appellant] gave the police of the robbery and shooting in his admissions were either contrary to the known facts or absurd. Insofar as they were correct, he could have obtained them without any involvement in the robbery from Crimewatch, the press, Eric Samuels or even the police, with whom he spent long hours when no recording could be made."

56. Ground 5: "All the admissions were made in the absence of a solicitor. Detailed analysis of relevant documentation, including the custody records at both police stations, show that the Crown could not prove that [the appellant's] waivers of his right to a solicitor were 'voluntary, informed and unequivocal'. Hence, all would now be excluded (*Saunders* [2012] EWCA Crim 1380). This is so even if the police conduct of interviews was impeccable."

57. Ground 6: "There is powerful evidence in the prosecution papers that, *pace* the trial judge's approval of his behaviour after a *voir dire*, DS Ellison manipulated events to ensure that the 'Jackson interview' took place in the absence of a solicitor."

58. Ground 7: "At Plaistow Police Station there was no appropriate adult and Mrs Jackson was plainly unfit to fulfil that role at Hackney Police Station."

59. Ground 8: "Police negligence put [the appellant] in a false position. DS Butters, at Plaistow, by clumsy and ill-informed questioning, led [the appellant] into an admission that could not be true: that he had dropped his hat in the shop. DS Ellison, at Hackney, thought that he had admitted dropping it near the scene of the shooting. This misunderstanding led Ellison wrongly to conclude that [the appellant] must have been the gunman (because the gunman had in fact dropped the cap near the scene)."

60. Ground 9: "Much of the police questioning at Hackney was misleading, bullying and unfair. Moreover, from the time of [the appellant's] arrest there were many breaches of PACE Codes of Practice. There were (a) repeated conversations with [the appellant] when no contemporaneous [sic] could be made ('off record conversations'). DS Ellison had at least three such conversations with [the appellant] at Hackney. There is strong evidence that the holding of such conversations with suspects was a deliberate policy of those investigating this case; (b) repeated exaggerations of the strength of the Crown case by DS Ellison and DS Vowden at Hackney, implying that the Crown had numerous witnesses against him, when in fact they had only one (Karla Hills). There is a strong inference that they deliberately lied to him; (c) repeated 'closed questioning' at Hackney on the basis that [the appellant] must have shot Hoondle either deliberately or accidentally, but with no acknowledgement that he might be innocent; repeated breaches of the Codes of Practice in regard to notetaking and the showing of notes."

61. Ground 10: "Even in 1991, and even in the absence of expert evidence, a judge fully acquainted with the matters outlined in Ground 8 and 9(a)-(d) would very likely (a) have excluded all the Hackney admissions under PACE s76 on the grounds of inducement and/or oppression; (b) have excluded all admissions (including those at Plaistow) under PACE s78 on the grounds of unfairness. Alternatively, any judge applying modern standards including the provisions of the 2019 Code would today exclude all the admissions."

62. Ground 11: "There is powerful evidence in the defence files to suggest that DS Ellison had conversations with [the appellant] off record of which he made no note; to support the allegation in Ground 6 that he manipulated events to achieve an interview with no solicitor present; that he misled Mrs Jackson by suggesting to her that Mullinger had been uncooperative; that [the appellant] and [Samuels] could not have colluded to fabricate the Harvey admissions; that over a period of months [the appellant] was unable to recognise the significance of arrest and making admissions to police."

63. Ground 12: "The recent reports and letters from Professor Gudjonsson and Dr Beck provide very powerful expert opinion to support all our criticisms of police conduct of interviews; to demonstrate the need for a solicitor and an effective appropriate adult at all interviews; and for the view that [the appellant's] confessions were made to secure his release from custody, a view first suggested by Professor Thomas Peter [sic] in 2002."

64. Ground 13: "The trial was unfair because the Crown decided at a very late stage not to call DC Cater's evidence that Samuels had exonerated [the appellant] in the 'Harvey admissions' he had made soon after charge. The decision was an error and not in accordance with the Crown's duty as ministers of justice. If that is so, then the burden is on the Crown to establish that [the appellant] would have been convicted even if they had called Cater."

65. Ground 14: "Alternatively, if the Crown were right not to adduce the Harvey admissions at trial we seek to adduce the evidence of Samuel's exoneration of [the appellant] to three independent people, Cater, Sanderson and Ms Cowell as fresh evidence under s23 Criminal Justice Act 2003 [sic]. Whilst there are legitimate concerns about Sanderson's withdrawal of his account, it was clearly motivated by anxiety about his own safety within the prison system (a point not mentioned by the CCRC). It is almost inconceivable that Sanderson could have imagined or fabricated an account of [Samuel's] admissions so like those which he had given to Cater in December 1990 and was later to give to Ms Cowell in October 2021."

66. Ground 15: "The summing up was inadequate and unfair in the following respects: the direction on good character was inadequate; the direction as to lies was misconceived and inadequate; the direction as to the accuracy and reliability of his admissions was inadequate; the direction as to [the appellant's] possible sources of knowledge of the facts of the robbery was inadequate, because it omitted the most obvious one – his friend Eric Samuel; the judge made unfair comments which were the 'stuff of advocacy'."

67. Ground 16: "As the CCRC has recognised, if the trial were to take place today changes in the law and practice regarding vulnerable defendants would enable [the appellant] to have assistance and support before and at trial which simply did not exist at the time of the trial in 1991."

68. Ground 17: "There were two missed opportunities to correct the injustice done to [the appellant]: (a) in 1995 [sic] the Court of Appeal rightly held that, under the law as it then was, [the appellant] could not adduce the 'Harvey admissions' in evidence. The court relied on *Beckford and Daley*. But it failed to recognise that that case was authority for allowing his appeal on the basis that the lack of evidence on those admissions 'affected the cogency' of the Crown case and rendered his convictions

unsafe and unsatisfactory. (b) The CCRC has now recognised that, quite contrary to what it decided in 2003, Samuel's exculpations of [the appellant] to DS Cater and to the BBC reporter Lynda Cowell are credible. But no new material has emerged since 2003 to enhance his credibility. Therefore, the CCRC must have been wrong not to refer the convictions on that basis back in 2003."

69. At a directions hearing on 11 October 2023 the court ruled that leave would be required for all those grounds except Grounds 5, 7, 10, 12 and 16. The court indicated that counsel may argue all points at the appeal hearing, and the court would determine whether to grant leave as part of its judgment.

The legal framework:

70. Before considering the grounds of appeal, it is convenient to refer to the material parts of relevant provisions of the Criminal Appeal Act 1968 and PACE 1984, and to some of the case law which was cited to the court.

71. Section 2 of the 1968 Act provides:

> "**2 Grounds for allowing appeal under s.1**
>
> (1) Subject to the provisions of this Act, the Court of Appeal—
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
>
> (b) shall dismiss such an appeal in any other case.
>
> (2) In the case of an appeal against conviction the Court shall, if they allow the appeal, quash the conviction. …"

72. By s16C of the 1968 Act:

> "**16C Power to dismiss certain appeals following references by the CCRC**
>
> (1) This section applies where there is an appeal under this Part following a reference by the Criminal Cases Review Commission under section 9(1)(a), (5) or (6) of the Criminal Appeal Act 1995 …
>
> (2) Notwithstanding anything in section 2, 13 or 16 of this Act, the Court of Appeal may dismiss the appeal if—
>
> (a) the only ground for allowing it would be that there has been a development in the law since the date of the conviction, verdict or finding that is the subject of the appeal, and
>
> (b) the condition in subsection (3) is met.
>
> (3) The condition in this subsection is that if—

(a) the reference had not been made, but

(b) the appellant had made (and had been entitled to make) an application for an extension of time within which to seek leave to appeal on the ground of the development in the law,

the Court would not think it appropriate to grant the application by exercising the power conferred by section 18(3)."

73. As to fresh evidence, s23 of the 1968 Act provides:

"**23 Evidence**

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

…

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

…

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

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

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

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

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

74. Sections 76 and 76A of PACE provide:

"**76 Confessions**

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, if it is

represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

…

(8) In this section 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).

76A Confessions may be given in evidence for co-accused

(1) In any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where a co-accused proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence for the co-accused except in so far it is proved to the court on the balance of probabilities that the confession (notwithstanding that it may be true) was not so obtained."

75. The principles to be applied by this court, when considering an appeal against a conviction long ago, were considered in *R v Bentley (Derek William) (deceased)* [2001] 1 Cr. App. R. 21. At paras 4 and 5 of the judgment of the court, Lord Bingham CJ said:

"4. … In undertaking that task we conclude:

> (1) We must apply the substantive law of murder as applicable at the time, disregarding the abolition of constructive malice and the introduction of the defence of diminished responsibility by the Homicide Act 1957.
>
> (2) The liability of a party to a joint enterprise must be determined according to the common law as now understood.
>
> (3) The conduct of the trial and the direction of the jury must be judged according to the standards which we would now apply in any other appeal under section 1 of the 1968 Act.
>
> (4) We must judge the safety of the conviction according to the standard which we would now apply in any other appeal under section 1 of the 1968 Act.
>
> 5. Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the Court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases but not, we conclude, in this. Where, however, this Court exercises its power to receive new evidence, it inevitably reviews a case different from that presented to the judge and the jury at the trial

76. In the later case of *R v King (Ashley)* [2000] 2 Cr. App. R. 391 the accused had been interviewed at a time when PACE was not yet in force. At para 49 Lord Bingham CJ said:

> "We were invited by counsel at the outset to consider as a general question what the approach of the Court should be in a situation such as this where a crime is investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that now in force. We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, section 2(1)(a) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute governing police detention, interrogation and investigation, which was not in force at the time. In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy. But this Court is concerned, and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material before it, which will include the

> record of all the evidence in the case and not just an isolated part."

77. In *R v Hanratty (deceased)* [2002] EWCA Crim 1141, [2002] 2 Cr. App. R. 30 Lord Woolf CJ said at para 94:

> "… it is clear that the overriding consideration for this court in deciding whether fresh evidence should be admitted on the hearing of an appeal is whether the evidence will assist the court to achieve justice. Justice can equally be achieved by upholding a conviction if it is safe or setting it aside if it is unsafe."

78. Lord Woolf went on to say, at para 98:

> "For understandable reasons, it is now accepted that in judging the question of fairness of a trial, and fairness is what rules of procedure are designed to achieve, we apply current standards irrespective of when the trial took place. But this does not mean that because contemporary rules have not been complied with a trial which took place in the past must be judged on the false assumption that it was tried yesterday. Such an approach could achieve injustice because non-compliance with rules which were not current at the time of the trial may need to be treated differently from rules which were in force at the time of trial… ."

79. In *R v Hussain (Abid)* [2005] EWCA Crim 31, at para 26, the court quoted the passage we have cited from *King* and said:

> "26. This guidance is far from saying that a contravention of a safeguard which has only become applicable since the time of conviction will be enough to render a conviction unsafe and is, to that extent, a recognition that the principle set out in *Bentley* cannot be taken too far. The essential question is whether the conviction is safe and it would be surprising if the mere fact that (for example) a "good character" or "lies" direction had not been given in the terms which are conventional to−day would be enough to enable a court to doubt the safety of a conviction.
>
> 27. This was also, we think, the approach adopted in *Hanratty*"

80. In *R v Nolan (Patrick Michael)* [2006] EWCA Crim 2983 the court said:

> "23. As has been said in other cases of this kind, the courts are more aware today than they were 20 or 30 years ago of the risk of false confession. The procedural requirements introduced by the Police and Criminal Evidence Act were necessary to protect the vulnerable. Expert evidence is often needed to identify those who are vulnerable and assess the reliability of any confession which they make.

> 24. But even judged by 1982 standards this was a worrying case. Proof of murder depended entirely upon the confession of the 19-year-old illiterate appellant, made in the course of 9 hours of interviews over three days, without a solicitor being present. These interviews were not fully recorded and in them the appellant made, and more than once retracted, admissions which included things which were obviously untrue.
>
> 25. However, judged by modern standards and in the light of the new evidence, we have no hesitation in saying that this conviction is unsafe. By modern standards the interviews were unfair. The Police and Criminal Evidence Act Codes of Practice require that a detained person is advised of his right to consult with a solicitor on arrival at a police station and his right to free legal advice immediate before any interview. Any interview must now be fully recorded. In 1982 the officers' notes of the interviews should have been offered to the appellant for signature.
>
> 26. But even without these safeguards, if the jury had heard expert evidence of the kind we have admitted, it would have been bound to affect their consideration of the reliability of the appellant's confession. At the very least, applying the *Pendleton* test we cannot be sure that they would have convicted if they had heard such evidence. Although the judge gave what we think was, at the time, a perfectly adequate warning about the dangers of false confessions, if expert evidence had been called his warning would inevitably have been stronger, based as it then would have been on cogent expert medical opinion."

81. In *R v Pendleton* [2001] UKHL 66, [2002] 1 Cr. App. R. 34, Lord Bingham stated at para 19 that when this court receives fresh evidence it must make its own assessment of whether the effect of it is to make the conviction unsafe, but must keep in mind that it has not heard all of the evidence:

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

82. The principle was stated in similar terms by the Judicial Committee of the Privy Council in *Dial v Trinidad and Tobago* [2005] UKPC 4, [2005] 1 WLR 1660 at para 31:

> "Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the

> evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused, it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict'. "

83. In *R v Hunnisett* [2021] EWCA Crim 265, the court stated at para 36 that the test to be applied in considering a fresh evidence appeal remains as stated by Lord Bingham in *Pendleton*.

84. Where a convicted person applies for an extension of time to bring an appeal against conviction based on a change in the substantive law, it is well established that the court will not grant leave unless the applicant shows that a substantial injustice would otherwise be done. That requirement is imposed because of the public interest in legal certainty and in the finality of decisions made in accordance with the then law: see eg *R v Jogee; Ruddick v R* [2016] UKSC 8, [2016] UKPC 7, [2017] AC 387 at para 100 and *R v Johnson (Lewis)* [2016] EWCA Crim 1613, [2017] 4 WLR 104 at para 18.

85. It is unnecessary for us to refer to other cases cited to us, all of which we have considered.

The present appeal:

86. The appellant applied for leave to adduce fresh expert evidence from Professor Gudjonsson, Dr Beck, and Professor Brian Thomas-Peter; and from persons to whom Samuels is said to have made statements exonerating the appellant (Sanderson, Ms Cowell, and Samuels' solicitor).

87. The respondent opposed the admission of any fresh evidence, and in the alternative applied to adduce fresh evidence of its own. Mr Price KC for the respondent argued that the proposed evidence of Professor Gudjonsson and Dr Beck was inadmissible because they were both guilty of "expert overreach", and because their evidence in any event did not show any of the appellant's confessions to have been unreliable and so did not afford any ground of appeal. He submitted that the court at trial was aware that the appellant was a vulnerable person, at risk of making unreliable admissions. The proposed witnesses should therefore have focused on factors relevant to the risk of a false confession which were not known at trial, but had instead argued in support of the proposition that the appellant's confessions were unreliable and untrue. Professor Gudjonsson, who had interviewed and assessed the appellant in 1990, and again (for 1 hour 40 minutes) in 2003, had not done so again for the purpose of any of his later reports; and Dr Beck had never assessed the appellant.

88. In the alternative, if this court were to receive any fresh expert evidence on behalf of the appellant, Mr Price applied to adduce fresh evidence, including some which had become available to the respondent following a waiver of legal professional privilege by the appellant in connection with his applications to the CCRC. This included an attendance note recording that on 2 December 1990 the appellant told his solicitor that he thought the gun was empty, and thought he slipped and pulled the trigger; and a note

of a medical attendance in custody on 6 December 1990, recording that the appellant "stated that the shooting was an accident. His co-D had a gun as well and no one was supposed to get hurt".

89. Mr Price submitted that there was no plausible innocent explanation for the combination of three features of the case: the facts that the gunman wore the appellant's cap and that the appellant led the police to the other robber, and the identification evidence of Mr Purchase.

90. As to the evidence of persons to whom Samuels had spoken, Mr Price accepted that that evidence would probably be admitted at a trial held now, but submitted that what Samuels had said to those persons was clearly not capable of belief. He applied if necessary to adduce as fresh evidence Samuels' initial statement on arrest, in which he identified the appellant as the gunman (rightly ruled not to be evidence against the appellant at the trial, but admissible now in response to evidence of different accounts later given by Samuels); Samuels' guilty plea to conspiring with the appellant to rob; and the statement made at trial by Samuels' leading counsel, that Samuels' case would be that the appellant was the gunman.

91. This court agreed to hear the oral evidence of Professor Gudjonsson and Dr Beck, and to consider all the written evidence, *de bene esse*, reserving its decision as to whether their evidence should formally be received under s23 of the 1968 Act.

The expert evidence:

92. In October 1991 Professor Gudjonsson provided the solicitors then representing the appellant with what he described as an interim report. In order to make a psychological assessment of the appellant with regard to the admissions he had made in interviews under caution, he had interviewed and tested the appellant over a period of 2 hours 45 minutes in the presence of Dr MacKeith, a consultant psychiatrist. He had read many documents, including the appellant's proof of evidence and comments on the police interviews, and had listened to the tape recordings of those interviews.

93. Professor Gudjonsson administered the Wechsler Adult Intelligence Scale. He found the appellant to have a borderline full scale IQ of 73. He administered his own Suggestibility Scale and found that the appellant's memory scores were significantly below average, consistently with his IQ. His suggestibility scores, however, were in the middle of the average range for the general population, and much lower than those typically found for persons of his limited intelligence. The acquiescence score was well outside the normal range and typical of persons with the appellant's low IQ.

94. Professor Gudjonsson commented that the appellant had cooperated with the assessment, and he believed the findings to be reliable. He concluded that the testing showed that the appellant was not unduly responsive to leading questions and interrogative pressure. The appellant had considerable difficulty in understanding questions unless they were phrased simply:

> "If the questions asked are not simple then he is likely to give an affirmative answer irrespective of the content. This is not the same as saying that Mr Campbell is highly suggestible in an interrogative situation. Indeed, he appears to be reasonably able

> to resist suggestions when the questions asked are sufficiently simple for him to have understood them."

95. In an accompanying letter to the solicitors, Professor Gudjonsson said:

> "I have concentrated on Mr Campbell's limited IQ, his acquiescence and suggestibility. I have not specifically addressed the issue of his self-incriminating admissions to the police, because Mr Campbell is totally unable or unwilling to provide satisfactory explanations for the admissions made in two of the interviews. His explanations, provided in his recent statement to you, do not make sense if Mr Campbell had nothing to do with the alleged offence, even when his low IQ is taken into account. It is possible to argue, on the basis of the psychological findings, that some of the inconsistencies in Mr Campbell's accounts are due to confusion during the interviews. There may even be grounds to argue that some parts of the interviews were 'oppressive' because of the manner of DS Ellison's interrogation, but this does not apply to the two critical interviews."

96. We have already mentioned the report by Dr Tunstall which was available at the time of the 1994 appeal. We have also noted that, following that appeal, and in connection with the first application to the CCRC, two clinical psychologists provided reports.

97. Professor Thomas-Peter was instructed by solicitors then representing the appellant to consider relevant documents and comment upon the appellant's psychological characteristics. He made a detailed review of the transcripts of police interviews and later listened to the tape recordings. He was critical of the manner and tone of some of the questions asked by the police and, after considering the appellant's psychological profile, he opined that there were "significant doubts about the integrity of the confession".

98. Dr Susan Young was asked by the CCRC to conduct a neuropsychological assessment of the appellant. She considered various materials, including Professor Gudjonsson's 1991 report, and administered tests including revised versions of the Wechsler Adult Intelligence Scale (WAIS-III) and Wechsler Memory Scale (WMS-III) which had not been available at the time of the trial. The appellant's full scale IQ score of 74 was in the borderline range of intellectual ability, but his Working Memory Index score was in the extremely low range, suggesting that his ability to hold information to perform a specific task was well below that of his peers.

99. Dr Young summarised her conclusion as follows:

> "To summarise, Mr Campbell's working memory capacity, immediate and delayed memory performance falls in the Extremely Low range. An analysis of the difference between his WAIS-III and WMS-III scores suggest that these memory capabilities are lower than expected relative to his overall intellectual functioning as measured by his FSIQ. This pattern

> suggests a relative weakness or deficit in both immediate and delayed memory. ”

100. In his oral evidence to this court, Professor Gudjonsson referred not only to acquiescence and suggestibility, but also to compliance, which he defined as a tendency to agree with something for gain, or to please someone in order to escape from a situation. He said that at the time of his 1991 report, suggestibility was regarded as the key consideration, with acquiescence being viewed as rather peripheral. He said that he could at that time have tested for compliance, but did not do so because he was cautious about using his compliance scale, then in its infancy, with someone who also scored high for acquiescence and was therefore likely to answer in the affirmative if he did not understand a question. He now feels that he focused too much on suggestibility and did not understand the full extent of the appellant's vulnerability. He emphasised that his 1991 report was an interim one: he had thought the solicitors might ask him for more, but they did not.

101. The burden of Professor Gudjonsson's evidence was that understanding of false confessions has increased greatly over the last 40 years, and there is now a much better understanding of mental and physical vulnerabilities than there was in the 1990s. He referred in this regard to the contrasting lengths and contents of his own books published in 1992 and 2018. He said that Dr Young's report in 2003 had added substantially to his understanding of the appellant's intellectual and memory functioning.

102. Professor Gudjonsson stated that in the 1980s, only intellectual disability was taken into account as a risk factor when considering the reliability of a confession, whereas now, as a result of research over the years, more factors are considered, including the naivety of an interviewee. He stated that the understanding of compliance has increased, and measures of it have been developed (including by himself). He said that four sets of factors – contextual, situational, personal and protective – are now considered relevant, with a focus on the cumulative effect of such factors.

103. In the appellant's case, Professor Gudjonsson said that what was not understood in 1991 was the importance of the mental state of the individual, and the cumulative effect of factors including in the appellant's case his naivety and eagerness to please. He identified brain damage, cognitive deficits, impaired communication, acquiescence, naivety and an eagerness to please as important features of the appellant's personality. He was critical of the manner in which the police interviews had been conducted, referring to pressures and manipulative police interview tactics. He stated that listening to the tapes of the appellant's interviews showed that it was obviously essential for him to have had both a solicitor and an effective appropriate adult at each interview. He accepted that, if he had been asked to do so in 1991, he would have been able to give some psychological understanding of the interview process; but not as detailed as he could give now. By 2021, he said, there was more factual information about the appellant available than there had been in 1991; but also, “the science had moved on”, and psychometric tests had improved over time. He now took the view that there is a high risk that the appellant's confessions were false.

104. Dr Beck, in her written report to the CCRC, had referred to a psychological formulation which now saw the appellant's confessions as arising because he thought that, if he complied with the police assumption that he was guilty, then he would be able to get

out of the interviews and go home. In her evidence to this court, Dr Beck said she did not feel inhibited by the fact that she had never interviewed the appellant, because she had read a lot about him. She pointed out that Professor Gudjonsson had interviewed the appellant at length, and noted that an important part of the appellant's case is that his intellectual limitations are very apparent. She disagreed with Professor Gudjonsson's 1991 assessment of the risk that the appellant had falsely confessed, but approved his present approach of a broader assessment which takes into account more factors. She said that Professor Gudjonsson could have done more in 1991: it was well within his capability to have produced a more comprehensive assessment. In particular, she said that compliance testing could and arguably should have been done at that time. It would in her view be redundant to carry out such testing now, because it could not provide a reliable indication of the appellant's compliance in 1990.

105. In 1991 Professor Gudjonsson had not been able to say whether the appellant had been unable or unwilling to explain why he had made confessions as he did: Dr Beck said it was not clear to her what new scientific evidence is now available to enable Professor Gudjonsson to express his present view that the appellant was unable to do so.

106. Dr Beck stated that the present approach to assessing the risk of a false confession is not solely the result of a change in the science, but is because clinical psychology now puts more emphasis on an interviewee's personal experience. Dr Beck pointed out, however, that by the time of Dr Young's report, revised Wechsler scales were available which had not been available in 1991. Also, she regarded the cumulative disadvantage framework, proposed by Scherr and others in 2020, as a scientific development. That framework considers a range of factors which might lead an innocent person to make a false confession. Dr Beck summarised by stating that over the years since 1991, the science has improved but there has also been a changed emphasis on different factors.

107. With reference to other reports which she had considered, Dr Beck said that the assessments carried out by Dr Tunstall could have been done at the time of the appellant's trial, but were not. Further, although the improved Wechsler scales later used by Dr Young were not available, other tests were available but were not done because of the inadequacy of the assessment provided. She stated that the importance in this case of the revised Wechsler scales, which are internationally recognised, is that they enabled Dr Young to highlight in her 2003 report that the appellant not only had a low IQ but also, even relative to his IQ, had a much lower ability to process information and to hold information in his working memory. In addition, research by Otgaar and others in 2020 had shown a link between suggestibility, compliance and false confessions.

The submissions:

108. We shall summarise very briefly the key submissions on each side. It is not necessary to mention every point which was argued, but we have considered them all.

109. Mr Birnbaum accepted that the principles to be applied by this court are as stated in *Bentley*, and accepted that it would not be sufficient merely to show that modern standards of practice differ from those which obtained in 1991, modern psychological practice is different, and the trial would be totally different today. He submitted that the court should compare the manner in which the investigation and trial were in fact conducted with what would happen now, and decide whether the absence then of the

improved standards and practice applicable now renders the convictions unsafe. If they are unsafe, he submitted, they must be quashed despite the public interest in finality of proceedings.

110. Mr Birnbaum submitted that the appellant is not relying on any change in the substantive law, and therefore s16C of the 1968 Act has no application. The appellant relies, rather, on modern procedure and standards of fairness in relation to the rights to a solicitor and an effective appropriate adult during police interviews; the conduct and tactics of the police during the investigation; the availability of an intermediary to assist the appellant at trial; and the fairness of the summing up and the trial. He argued that scientific developments in the understanding of false confessions and vulnerability are important, and that the appellant's disabilities and cognitive deficits were not fully appreciated until after Dr Young carried out her tests in 2003.

111. Important factors to be taken into account, in Mr Birnbaum's submission, include the following:

i) At the time of the police interviews, both the police and the appellant's representatives had only limited knowledge of the extent of his disability.

ii) Admissions made by the appellant in the absence of his solicitor were largely inconsistent with the known facts, and in some respects absurd.

iii) The appellant would now have the assistance of special measures and an intermediary at trial, and would therefore be better able to do justice to himself when giving evidence.

iv) The appellant would now be able to rely on the hearsay provisions of the Criminal Justice Act 2003 to adduce evidence that Samuels told DS Cater that he committed the robbery with "Harvey", and of other statements by Samuels exonerating the appellant.

v) In the light of the expert evidence now available, the application of modern standards would result in the exclusion of the evidence of admissions made in the absence of a solicitor (including those made in interview 11, the "Jackson interview").

112. In relation to the grounds for which leave is required, we observe – as will be apparent from the terms of those grounds – that Mr Birnbaum criticised many of those involved in the police investigation and in the appellant's trial. Although he said that he did not specifically criticise the appellant's then legal representatives, he did in fact repeatedly do so.

113. Mr Price, for the respondent, also accepted the relevant principles are those stated in *Bentley* and *Hanratty*. He pointed out, however, that on the judge's findings, there was full compliance with the standards and rules of practice applicable at the time of the trial: this is not, therefore, a case in which the investigation and/or the trial fell short of contemporaneous standards. Mr Price submitted that in a case which does not involve a change in the law, the public interest in finality of proceedings is relevant to the court's consideration of any application under s23 of the 1968 Act to adduce fresh

evidence. He relied in this regard on *R v Erskine* [2009] EWCA Crim 1425, [2009] 2 Cr. App. R. 29 at para 39:

> "The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However, it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore, if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the 'interests of justice' test will be satisfied."

114. In relation to the conduct of the interviews, Mr Price argued that there was no basis on which the findings made by the judge could be impugned: the fresh expert evidence could not bear on those findings about what DS Ellison had and had not done, and about the position of Mrs Jackson. Nor, he submitted, could that evidence engage with the issue of whether the appellant's decision that interview 1 could proceed without a solicitor present was a voluntary, informed and unequivocal waiver of his right. In this regard, Mr Price pointed out that the solicitors who acted for the appellant at the police station had previously acted for him on other occasions: the appellant therefore chose not to have the assistance of <u>his</u> solicitor at interview 1, not just of <u>a</u> solicitor. In relation to interview 11, Mr Price submitted that the fresh evidence could not invalidate the judge's finding that the prosecution had proved that the appellant's confession had not been obtained by improper conduct or by breaches of the Code of Practice. He submitted that the submissions made on behalf of the appellant simply ignored the judge's findings.

115. Mr Price went on to submit that the public interest in finality requires that the "substantial injustice" test must be met by an appellant who, though not relying on a change in the substantive law applicable to the offence(s) charged, relies on a change in practice. He argued that the expert evidence should not be received pursuant to s23 of the 1968 Act because it afforded no ground for allowing the appeal which was not available at the trial.

116. The respondent did not suggest that s16C of the 1968 Act applies in this case.

<u>Analysis</u>:

117. We have reflected on the submissions. Our views are as follows.

118. The length and terms of the many grounds of appeal make it appropriate for this court to begin by repeating what was recently said by the Judicial Committee of the Privy Council in *Ruhumatally v The State* [2024] UKPC 15. The Board said at para 55 that it –

> "… of course understands the difficulties sometimes faced by defence advocates who, trying their best to discharge their

> professional duties towards their lay clients, are anxious not to overlook any point or argument which may assist the defence. It is however an important part of the advocate's role to exercise judgement and discrimination in focusing on the arguable points, rather than obscuring them by a plethora of poor points and weak submissions. No court is assisted by the multiplication of arguments regardless of their merit. Nor is a defendant assisted by such an approach, which runs the risk of undermining the stronger points in the defendant's favour."

119. We consider first the grounds of appeal which are not related to the CCRC's reasons for referral and which therefore require the leave of this court. We can do so briefly, because in our view they are without merit. Most of them are wholly or substantially based on jury points which either were, or could have been, made to the jury at the trial. It is, therefore, not permissible for the appellant to rely on those points now. To take a few examples, the suggested weakness of the identification evidence was clearly considered at trial. The difference in height between the appellant, and the estimate of the robbers' heights given by Mr Purchase, was as marked then as it is now. The features of the appellant's admissions which are said to be inaccurate or absurd were equally inaccurate or absurd at the time of the trial, and appropriate comment could have been made upon them by trial counsel. So, too, could comment have been made in relation to the suggested oppressive nature of the police questioning. The fact that the appellant is predominantly left-handed, so that it would have been difficult for him to draw the gun from a string holster under his left arm, was a point as obvious at the time of trial as it is today. The appellant's assertion that he knew details of the robbery from watching a very short item broadcast on Crimewatch UK nearly 8 weeks before his arrest was clearly considered by the jury; but then, as now, the assertion was difficult to reconcile with the overall case being put forward as to the appellant's intellectual limitations and difficulties in remembering information. Any deficiencies in the summing up could have been raised in the 1994 appeal.

120. Other grounds are put forward without any evidential foundation: for example, the serious allegations of manipulation, deliberate misleading and bullying made against DS Ellison and other police officers, in circumstances where the fairness of their conduct was considered by the judge on the voir dire.

121. Moreover, many of these grounds simply ignore the careful explanation given by the (very experienced) trial counsel when asked to comment upon various aspects of their conduct of the trial.

122. We have not been assisted by the approach of accusing many persons of incompetence and/or impropriety in order to advance grounds which are, in truth, no more than an attempt to re-run the trial in a different way.

123. We therefore refuse leave to argue any of the grounds for which leave is required.

124. We turn to the non-expert fresh evidence which the parties seek to adduce. We accept that the evidence of Samuels' exonerations of the appellant could now be ruled admissible, and we therefore think it right formally to receive that evidence. We also think it right to receive the fresh evidence on which the respondent relies in response. In our view, it is by no means certain that any of the hearsay evidence of Samuels'

statements would be admitted; but even if it was, it could in our view carry very little weight and it cannot afford, or even contribute to, a ground of appeal.

125. We therefore turn finally to the more substantial aspect of the appeal, namely the fresh evidence and the grounds of appeal related to the CCRC's reasons.

126. In *Bentley*, this court recognised that the application of the principles there stated "could cause difficulty in some cases". Particular difficulty arises, in our view, where an appellant relies, as this appellant does, on changes in expert thinking about, and approach to, a relevant topic, rather than on a specific scientific discovery or development. It will in general be insufficient for an appellant to rely on evidence and argument which merely shows that a trial today would look very different from the actual trial which resulted in the conviction. Such comments could be made about almost any case heard many years ago, or indeed about many cases heard before the provisions of the Criminal Justice Act 2003 came into effect.

127. We add that we are inclined to accept Mr Price's submission that an appellant who seeks a long extension of time to advance a ground of appeal based on a change of practice, or on changes in standards of fairness, must satisfy the "substantial injustice" test, as he would have to do if relying on a change in the applicable substantive law. We need not, however, decide that point, because in our view the most important considerations relate not to changes in practice or in standards, but rather to the fresh expert evidence.

128. We see considerable force in the respondent's submission that Professor Gudjonsson went well beyond the proper ambit of his role. In his written reports and his oral evidence, Professor Gudjonsson in some respects engaged in advocacy of the appellant's case rather than focusing on objective assessment and dispassionate opinion. Moreover, his explanations for not having included certain matters in his 1991 report were, with respect, unconvincing: if, for example, he had reservations about using his compliance scale to measure what he accepted was a relevant factor, he could have performed the testing and then expressed any necessary qualifications or reservations about the results. Instead, he chose not to do so, and as the passages which we have quoted show, he expressed opinions which were positively adverse to the appellant.

129. We agree with Dr Beck that it is not clear why Professor Gudjonsson, having interviewed the appellant at length in 1991 and concluded that he was either unable or unwilling to explain his admissions to the police, now feels able to assert that the appellant was unable to do so. Nor is it clear why, if Professor Gudjonsson can now say that the appellant obviously needed a solicitor and an effective appropriate adult at every interview, he did not mention that obvious need in his 1991 report. We note that in his lengthy report to the CCRC in 2003, which included a review of the evidence of Professor Thomas-Peter and Dr Young, Professor Gudjonsson made a number of criticisms of the former, including saying that he did not think Professor Thomas-Peter's profile and analysis of the case "are sufficiently robust psychologically to constitute new important material". He quoted passages from Dr Young's report but did not ascribe to her use of the revised Wechsler scales the importance which he now attaches to those findings. At that time, it remained Professor Gudjonsson's opinion that the appellant was "unable or unwilling to give a satisfactory explanation for various aspects of his behaviour".

130. We therefore have considerable reservations about Professor Gudjonsson's evidence. We think it right formally to receive his evidence as fresh evidence; but for the reasons we have indicated, including the criticisms made of him by Dr Beck, we feel able to attach only limited weight to it. Its importance lies in its confirmation of a number of points made by Dr Beck.

131. We also receive, and attach substantially more weight to, the fresh evidence of Dr Beck. She too is open to some criticism, as Mr Price suggested. However, she points to the importance of the revised Wechsler scales, the reports provided by Drs Tunstall and Young, and the more recent research work of Scherr and Otgaar as collectively providing the basis for a much fuller assessment of the risk of false confession than was possible at the time of the appellant's trial. We accept her evidence that material is now available which is relevant both to the important issue of the reliability of admissions made by the appellant and to the assessment of his oral evidence.

132. We of course have well in mind this court's decision in the 1994 appeal that the prosecution case was a strong one and did not depend substantially on the appellant's confessions. We also have well in mind the powerful arguments of Mr Price based upon the findings made by the judge when refusing the application to exclude evidence of the appellant's confessions.

133. We are nonetheless troubled by one feature of the case. We accept the evidence of Dr Beck and Professor Gudjonsson that, over the years since the trial and the 1994 appeal, understanding of the factors which may contribute to a false confession has increased, and the research which has contributed to that understanding has also led to the development of psychometric tests for measuring relevant factors. There have, of course, also been important developments in the law relating to admissibility of evidence, and in matters of practice and procedure relevant to a fair trial. But in the very unusual circumstances of this case, the principal reason for our disquiet arises from the fact that the fresh evidence would provide a court with the benefit of much more information than was available at the trial about the appellant's mental state when he made his confessions. As a result of the fresh expert evidence, the whole approach to the case would now be informed by a different and better understanding of relevant factors. We agree with Mr Price that there is no basis for impugning the findings made by the judge, or the fairness of the trial, on the basis of the evidence then available; but we accept that the fresh expert evidence, in particular that of Dr Beck, adds material information about the risk of a false confession which was not and could not be known at the time. It follows that the conduct of the trial would have been materially different if that information had been known at the time: to take obvious examples, the submissions on each side about the admissibility of interview 11, and about Mrs Jackson's ability to act effectively as an appropriate adult during that interview, would have been very different. So, too, would have been the decision of the appellant's legal representatives as to whether to call one or more expert witnesses rather than relying on the admissions of fact. The judge would necessarily have been considering submissions in a materially different context. To that must be added the change in practice as to the treatment of vulnerable suspects and defendants and the potential availability of an intermediary to assist the appellant at trial. The arguments skilfully put forward by Mr Price cannot, in those circumstances, deprive the fresh evidence of its impact.

134. We do not accept Mr Birnbaum's submissions to the effect that, in the light of the fresh evidence, all issues of admissibility would inevitably now be decided in the appellant's favour. We are, however, unable to say that the fresh evidence would make no difference to the rulings made by the judge. We accept that, considered in the light of the fresh evidence, the rulings might be different.

135. True it is, as this court held in the 1994 appeal, that the prosecution case did not rest solely on the appellant's confessions. Nonetheless, the real possibility that different rulings as to admissibility would be made if the fresh evidence were available brings with it the real possibility that a jury would be considering a significantly different evidential picture. Even if all the evidence of confessions were admitted, a jury knowing of the fresh evidence would be considering the reliability of those confessions in a materially different context. In those circumstances, we cannot say that the fresh evidence could not reasonably have affected the decision of the jury to convict.

136. On that narrow but very important basis, we have concluded that the convictions are unsafe.

137. We will therefore receive fresh evidence to the extent which we have indicated, allow the appeal and quash the convictions.

Further submissions:

138. A draft of the above judgment was provided to counsel and written submissions were invited as to any consequential matters. Both parties made submissions as to whether this court should exercise its power under section 7(1) of the Criminal Appeal Act 1968, which provides:

> "Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried."

139. Counsel on both sides helpfully confirmed that that issue could be decided on the papers, and did not seek a further oral hearing. They agree that the question whether to order a retrial requires an exercise of judgement by this court, involving consideration of the public interest and the legitimate interests of the appellant. In *R v Graham and others* [1997] 1 Cr. App. R. 302 at p318, Lord Bingham CJ stated:

> "The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged offence, and any penalty the defendant may already have paid before the quashing of the conviction."

140. The respondent applies for an order that the appellant be retried on both charges. It is submitted that a cogent case against the appellant remains, and that there is no good reason why the appellant could not fairly be tried on the basis of the evidence of his various confessions (including those which have become known to the respondent since the trial) and the evidence relating to his British Knights cap. The respondent indicates,

fairly, that it would not seek to rely in a retrial on the evidence of Mark Purchase identifying the appellant. It is acknowledged that the relevant events occurred long ago, that the appellant served a lengthy period in prison and has led a law-abiding life in the many years he has been subject to the conditions of his life licence, and that his disability will increase the stress upon him of a retrial. But, it is submitted, those matters are outweighed by the public interest in resolving this case, having regard to the seriousness of the crimes, the availability of measures to assist the appellant, and the interests of the bereaved family of Mr Baldev Singh Hoondle.

141. For the appellant, it is submitted that a retrial would not be in the interests of justice, because the rights and interests of the appellant outweigh the general public interest in the prosecution of serious crime. It is submitted that five features of the case militate in favour of refusing a retrial: what is said to be the inherent weakness of the prosecution case; the risk that a fair trial will not be possible, because of the appellant's vulnerabilities; the substantial time which has elapsed since the incident; the penalty which the appellant has already served; and what are said to be the appellant's considerable difficulties in understanding and coping with a retrial.

142. We have reflected on the detailed submissions of both parties. We attach little weight to many of the submissions made on behalf of the appellant, some of which strike us as inconsistent with the arguments advanced during the hearing of the appeal. We do not think it appropriate to embark upon an analysis of the various issues of admissibility of evidence which it is said would arise in a retrial: suffice it to say that there are points to be made on both sides of those issues, and the position is not so clear-cut that we can accept that they would probably be decided in a way which would substantially weaken the prosecution case.

143. We do however see force in one aspect of the appellant's submissions. The fresh evidence which we have received in the appeal shows that, at the time of his trial and in the years thereafter, the appellant's ability to process information and to hold information in his working memory was well below what would be expected, even for someone of his low IQ. We have heard nothing to suggest that those deficiencies will be any less serious now. On the contrary, they will be compounded by inevitable effects of the passage of a very long period of time. The appellant's problems in those respects could, of course, be the subject of expert evidence in a retrial. But at the heart of any retrial would be the confessions made by the appellant to the police and others, and there would inevitably be a focus on why the appellant said what he did if he had no part in the crimes. Any defendant would struggle, so long after the relevant events, to explain his thought processes, and the factors which did or did not affect what he said and why he said it. We are persuaded that this appellant would face much greater difficulties than almost anyone else, and much greater difficulties than he faced when he gave evidence during the trial.

144. We have found this a finely-balanced decision. We attach considerable weight to the public interest in a fair trial resolving the issues in this case; but we conclude that that general interest is outweighed by the consideration that the appellant – who has served over a decade in prison and has been subject to licence conditions for more than two decades – cannot have a fair trial in circumstances where he will be so severely handicapped in addressing the matters which he would want and need to address.

145. We are acutely conscious that our overall decision will be a heavy blow to the bereaved family and friends of Mr Hoondle. They have behaved with great dignity during the hearing of the appeal. We sympathise with them in their loss, and trust that they will understand that we must reach our decisions in accordance with the law, uninfluenced by emotion.

Conclusion:

146. For those reasons, we receive the fresh evidence to the extent which we have indicated. We allow the appeal and quash the convictions. We decline to order a retrial.