Neutral Citation Number: [2025] EWCA Crim 639

Case No: 202401211B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON CRIMINAL COURT
HIS HONOUR JUDGE MAYO
Ind. No. T20217325

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2025

Before :

LADY JUSTICE ANDREWS
MRS JUSTICE MCGOWAN
and
MRS JUSTICE FOSTER

- -

Between :

REX

- and –

YING ZHANG

- -
- -

Katy Thorne KC (instructed by **Sonn Macmillan Walker**) for the **Applicant**

Hearing date: 1 May 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15th May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE ANDREWS:

INTRODUCTION

1. On 31 January 2023, following a trial at the Central Criminal Court before the Honorary Recorder of Northampton, HH Judge Mayo, and a jury, the applicant, Dr Ying Zhang, ("Dr Zhang") was convicted of the attempted murder of his estranged wife, Dr Hannan Xiao, ("Dr Xiao") and of having a bladed article in a public place. On 11 April 2023, he was found by the judge to be a dangerous offender and sentenced to imprisonment for life, with a minimum term of 22 years less time served on remand. He renews his applications for an extension of time of 339 days in which to seek leave to appeal against his conviction and leave to adduce fresh evidence, following refusal by the single judge. He also renews his application for leave to appeal against sentence, following refusal by a different single judge.

2. As the grounds of appeal against conviction involve criticisms of trial counsel and solicitors, Dr Zhang has waived privilege. The Court has had the advantage of a detailed response to those criticisms by trial counsel, who explained that he was hampered by being unable to refer to the original file because both solicitors involved in the case have since left the firm concerned. However, he has done his best to gather information from attendance notes and emails as well as his own recollection of events.

3. Having carefully considered that response, and the submissions of Ms Katy Thorne KC on behalf of Dr Zhang, we are satisfied that trial counsel and solicitors were fully justified in taking the tactical decisions that they did, and that they acted throughout in the best interests of their client, in what Ms Thorne accepted were extremely challenging circumstances.

4. For the reasons set out in this judgment, we refuse the application to adduce fresh evidence and dismiss the renewed applications for an extension of time and for leave to appeal against conviction. There is nothing in the proposed grounds of appeal which might arguably give rise to any concern about its safety. The evidence against Dr Zhang was compelling, and there is nothing in the medical evidence upon which he seeks to rely which comes close to affording him a defence.

5. We also agree with the single judge that in the light of the evidence, including but not limited to the evidence of Dr Xiao, helpfully summarised in the sentencing note prepared by the prosecution, and the information in the pre-sentence report, the trial judge was justified in reaching the conclusion that the offence was committed for financial gain and therefore in placing it in Category A (very high culpability) under the Definitive Guideline for offences of attempted murder, instead of in Category B. We will set out our reasons on this aspect of the appeal against sentence more fully later in this judgment. No complaint is made about the judge's finding that it fell within Category 2 for harm.

6. The judge was entitled to find Dr Zhang dangerous for the reasons that he gave; Ms Thorne did not formally abandon that ground of appeal but realistically accepted that it was not her strongest point. The judge properly directed himself in accordance with the guidance given by this Court in *AG's Reference (No. 27 of 2013) (R v Burinskas)* [2014] 2 Cr App R (S) 45 at [22]. There was no reliable estimate of the time when he would cease to pose a danger to the public, in particular to Dr Xiao, and therefore the judge

was justified in deciding to pass a sentence of imprisonment for life rather than an extended determinate sentence.

7. However, the judge did fall into error in one important respect, in that the starting point for Category A2 is one of 30 years' custody with a range of 25-35 years and not, as he said, a starting point of 35 years' custody with a range of 30-40 years. Unfortunately, that error appears to have been overlooked by counsel who appeared on his behalf at the sentencing hearing, the late Ms Isabella Forshall KC, and was not raised in the grounds of appeal against sentence that she settled. Ms Thorne drew the error to the attention of the court in the course of the hearing of the renewed application. Since it plainly was a mistake, and the wrong starting point was taken in consequence, we consider that it is in the interests of justice to permit Ms Thorne to amend the grounds of appeal to raise it.

8. We give leave to appeal against sentence on the amended ground that the judge took too high a starting point before weighing up the aggravating and mitigating features that he identified, and that in consequence the sentence (and thus the minimum term) was manifestly excessive. We refuse leave to appeal against sentence on all other grounds.

FACTUAL BACKGROUND

9. Dr Zhang and Dr Xiao met in 2004, when they were both University lecturers. They both specialise in the field of cyber security. They married in 2006 and have a son and a daughter, both of whom are, like their parents, high achievers. The union was not a happy one. It was marred by domestic violence and controlling behaviour on the part of Dr Zhang almost from its inception. As is sadly all too often the case in such toxic relationships, the complainant withdrew her support for the prosecution of her abuser on a number of occasions. In her victim personal statement she described him as controlling and manipulative. A recurring theme of the disagreements was their financial arrangements, with Dr Zhang expressing the wish to be the sole owner of the matrimonial home, despite expecting his wife to bear the major share of the responsibility for their household expenses.

10. In 2005 Dr Zhang accepted a caution for assault occasioning actual bodily harm following an argument at the family home. He was charged with an offence of assault occasioning actual bodily harm relating to another argument in December 2006 caused by his attempts to pressurise his wife to sign over her interest in the matrimonial home to him. She subsequently withdrew her support for the prosecution, and the case was discontinued. In May 2008 Dr Xiao reported to the police an argument between herself and Dr Zhang about his not paying his way. He said to her: "if you go to the police again I could kill you with this knife. I'm not scared of going to prison". After a further argument he threw a lunch box at her head, and hit her on the head numerous times. He repeated the threat that he would kill her if she went to the police. He was arrested and charged with common assault and making threats to kill, but the case was again discontinued after Dr Xiao withdrew her support.

11. Dr Zhang was arrested and charged with assault occasioning actual bodily harm relating to a further incident in June 2012 when he came into the bedroom where his wife was sleeping with the children, climbed on top of her, restrained her, twisted her arm and

punched her on the shoulder. Again Dr Xiao withdrew her support for the prosecution and the case was discontinued.

12. The incident which led to the final breakdown in the marital relationship occurred on 22 August 2020, when Dr Zhang accused his wife of having an affair with a work colleague. He demanded to see her emails and when she refused, he assaulted her by punching her in the arm, grabbing it and twisting it causing bruising. The following day he threatened to kill her, saying: "I will kill you one day". He took her iPhone and Laptop and threw the phone at her head. In a statement to the police in which she detailed those incidents Dr Xiao stated: "I am very frightened of Zhang due to his escalation in behaviour and increased paranoia with regard to his constant accusations of infidelity". The couple separated after this incident. Subsequently Dr Zhang pleaded guilty in the Magistrates' Court to an offence of battery, and was made the subject of a community order with an unpaid work requirement of 200 hours.

13. On 20 October 2020 Watford Family Court granted Dr Xiao a non-molestation order for 12 months restraining Dr Zhang from going within 100 metres of the family home. He then moved into a flat which the couple jointly owned in Watford. However he breached the order repeatedly, including by booking himself into a guest house on the opposite side of the road from the family home on numerous occasions, always staying in bedrooms directly overlooking it. He took photographs of the family home from the guest house, which were recovered from his mobile phone following his arrest. He also made observation notes in Mandarin in a notebook which was found at the Watford flat. He gained access to Dr Xiao's departmental timetables at the university where she worked and spent hours monitoring them, apparently trying to work out what she was doing and with whom. At the time of the attack Dr Xiao had commenced divorce proceedings and intended to ask for an extension of the non-molestation order.

14. Shortly before the attack on Dr Xiao, Dr Zhang changed the amount he was paying by standing order as a contribution to the mortgage on the family home and for child maintenance from £1500 per month to £10.

15. On 7 September 2021 a letter was sent by email to Dr Zhang and to Dr Xiao from their son's school, informing them of an event at the school on the evening of Tuesday 21 September for parents of children about to enter the sixth form. The school expressly requested that only one parent of each child should attend, in order to enable them to maintain social distancing. Dr Xiao therefore did not expect her estranged husband to be there. On the evening of the meeting she drove from her home and parked her car close to the school, arriving at around 6.30pm.

16. There is CCTV footage which shows that Dr Zhang also went to the school that evening. He drove there in his own car, which he parked in a different road, and went into the school after Dr Xiao. He came back to the car at one point to retrieve a small rucksack. After the event, Dr Xiao returned to her car at around 8.30 pm. She was followed and approached by Dr Zhang, who tried unsuccessfully to get into the back of her car on the passenger's side. He pretended that his car had broken down and asked her for a lift to the station, which she refused, telling him that she was scared of him and that she was going to call the police. He told her not to call the police. As she went round the car to get into the driver's seat, Dr Zhang physically prevented her. She ran away from him into the road and he ran after her. He then took out a kitchen knife and

stabbed her repeatedly in the chest, neck and back. She sought to protect herself by curling up, and shouted for help.

17. The attack was witnessed by several members of the public. Two men got out of their cars to try and stop it. Their initial attempts to restrain Dr Zhang were unsuccessful. The attack only came to an end when one of the men kicked Dr Zhang to the side of his face, at which point he slumped to the ground and the knife fell from his hands. The man then dragged Dr Zhang away and restrained him until the police arrived. That witness commented that Dr Zhang seemed "relentless" in his attack and that he appeared to be using as much force as he could to stab the victim. He thought that she would die if he did not stop him. The police arrested Dr Zhang at the scene and recovered the knife.

18. Dr Xiao was rushed to hospital and underwent emergency surgery which saved her life. The evidence of an expert pathologist was that there were six stab wounds to the chest, one to the neck, four to the upper back, one to the right arm pit, and a defensive laceration to the right hand. In his opinion the most significant injuries were to the victim's anterior chest. One stab wound had entered the pericardial sac surrounding the heart, another had injured the lung; both these wounds were immediately life-threatening. At least moderate force would be necessary to cause the stab injuries; in addition there were fractures to the victim's ribs which the pathologist attributed to knife wounds requiring moderate to severe force. This medical evidence was consistent with the level of force which eyewitnesses described being used by Dr Zhang during the attack.

19. Dr Xiao's path to recovery has been difficult and at the time of the trial she was suffering from serious shoulder, arm and neck pain. She was diagnosed with PTSD and was suffering from flashbacks. Her injuries had severely impaired her ability to look after herself and to work.

20. Dr Zhang was taken to a different hospital. He was assessed to have a nasal bone fracture and a subarachnoid haemorrhage. During his time in hospital he remained non-verbal, but nodded or shook his head in response to questions. A week later, on 28 September 2021, he was assessed fit for discharge and taken from hospital to the police station. Notes which he made during his time in hospital were recovered from him when he was taken into custody. In interview the same day he answered "no comment" to all questions. He was charged with the index offences in the Magistrates' Court on 29 September 2021.

21. In his defence case statement Dr Zhang stated that he had little memory of the events of 21 September 2021 either in the hours before it or afterwards, and that his earliest memory was of being in hospital following the incident. The Crown was put to proof that he was in possession of the knife. He denied that he intended to kill his wife.

22. The question of Dr Zhang's fitness to plead was canvassed by those who were then representing him in early 2022, but he initially appeared reluctant to undergo the necessary psychiatric assessment. Eventually a report was obtained from a forensic psychiatrist, Dr Galappathie, who interviewed the applicant on 14 April 2022. Dr Galappathie was asked to assess whether the applicant was fit to plead, provide instructions and participate in the trial. He was also asked to express a view about whether at the time of the attack he suffered from a mental illness, mental impairment

or diagnosable psychiatric condition and, if so, to consider whether the elements of a defence of insanity were made out. Finally the doctor was asked whether it was likely that any such health condition "affected his ability to form the requisite intent for the alleged offences at the time of the incident."

23. It is apparent from Dr Galappathie's initial report that there was nothing in the health records that he saw to indicate that Dr Zhang had ever been prescribed anti-depressant medication or diagnosed as suffering from a mental health condition prior to 21 September 2021. The nearest one gets is a note of a consultation with a GP in July 2017 in which Dr Zhang was described as a "difficult historian". He told the doctor on that occasion that he had been experiencing the symptoms of a cold for two days, and that he thought he may be depressed. He was diagnosed with low mood and given some advice about depression, but he does not appear to have booked a follow-up appointment as suggested. Dr Galappathie surmised that that initial episode may have resolved given that there was no further input from the GP.

24. The only information to suggest that Dr Zhang had ever been seen by mental health services or prescribed antidepressant medication prior to the incident came from Dr Zhang himself, whose accounts varied. Following his remand into custody, the custody risk assessment indicated that he reported as suffering from severe depression and panic attacks. He was assessed by Dr Mohammed, a consultant psychiatrist, who recorded him as stating that he had been feeling low and depressed for many years but did not see the GP for this. The record of that assessment states: "no mental health history". He was prescribed antidepressants. Dr Galappathie noted that this medication had led to his condition improving significantly.

25. Dr Galappathie considered that Dr Zhang was fit to plead. He noted that he said he could not recall what had happened, but that he believed that the Dean had hosted an event at the university where he worked and that he "drank a lot" at that event. Contrary to what he told Dr Mohammed, Dr Zhang told Dr Galappathie that he had been taking medication for releasing anxiety and stress since July 2020 (though he was unable to identify what it was) and that his mood was low. His appetite and weight had changed and he did not enjoy anything in life. He had also had panic attacks and recalled hearing voices. He had good short-term memory.

26. The doctor was of the view that at the time of his examination in April 2022 Dr Zhang had single episode depressive disorder, moderate, without psychotic symptoms. In the period leading up to the offence he was of the opinion that Dr Zhang was suffering from moderate depression which was likely to have been severe at times, with paranoid thoughts, which were a facet of his depressive illness. His depression would have clouded his judgment and impaired his problem-solving skills. He would have known that using a knife to attack his wife was morally and legally wrong. "He is likely to have been vulnerable to acting without fully thinking about the consequences and implications of his actions and this would have reduced his level of intent, however, he would still have been aware of the nature and quality of the act being done". In his concluding paragraph, Dr Galappathie expressed the opinion that Dr Zhang's mental health problems would have a "significant impact" upon his thoughts, actions and behaviours and that his depression "would have significantly reduced his intent for the alleged offences at the time of the incident".

27. Dr Galappathie produced an addendum report dated 13 November 2022, in which he was asked to comment further on what he meant by "significantly reduced his intent". His explanation was that people with depressive symptoms make decisions that are less likely to further their interests, and that Dr Zhang is likely to have been "unable to fully process the implications of allegedly taking a knife and his alleged subsequent actions in relation to the alleged offences. He is likely to have had difficulty processing what the implications would be for his wife and himself of the potential outcome of his actions in relation to the alleged offence in that his wife could suffer serious injury and that he may be charged with offences and remanded to prison". Dr Galappathie said that if Dr Zhang was not suffering from depression he was likely to have been able to rationally consider the implications of taking a knife and would have been able to consider better problem-solving solutions that did not involve the alleged offence occurring. He would have been aware of the nature and quality of his actions but "his capacity to form intent to want to kill his wife or cause serious injury is likely to have been significantly reduced as a result of his depression and paranoia."

28. In his third and final report, dated 13 March 2023, Dr Galappathie expressed the view that if Dr Xiao had died, in his view the partial defence of diminished responsibility would have been open to Dr Zhang. He said that his ability to make rational judgements would have been substantially impaired, but that depression and paranoia would not have impaired his ability to understand his actions. It would have led to abnormalities in terms of his mental functioning in how he processed and dealt with his emotions and what the implications of taking a knife in order to assault his wife would be. However his ability to exercise self-control would not have been substantially impaired.

29. Dr Galappathie's reports were not adduced in evidence at the trial. This was the result of a decision taken by the defence legal team after careful consideration of the advantages and disadvantages of relying upon them. After he was convicted, Dr Zhang instructed new solicitors and counsel, and his new legal team sought to rely on Dr Galappathie's evidence at the sentencing hearing. The judge found Dr Galappathie's evidence of limited value because he had not commented on any evidence given at the trial and he had not re-examined Dr Zhang since April 2022. He encouraged the new legal team to have Dr Zhang assessed by a different psychiatrist, but Dr Zhang failed to co-operate and the judge refused an adjournment of the sentencing hearing to give him another opportunity to do so. He commented in his sentencing remarks that it was apparent that "once again Dr Zhang was using his deliberate manipulation to avoid the consequences of his actions and no such assessment has taken place… there has been plenty of manipulation". This appears to have been a reference to Dr Zhang's previous behaviour in causing delays to the trial, which included his refusing to come to court on the first day, and even telling his legal representatives that he had suffered a heart attack after a fall (which was untrue).

30. The judge took what he described as "strong account" of the evidence which Dr Zhang himself gave at trial before he chose to cease doing so after having been given the appropriate warning in front of the jury. He noted in particular the absence of any suggestion by Dr Zhang of any mental disorder, or any seeking of medical assistance, diagnosis or treatment for depression in the period up to 21 September 2021, and that the only reference to any adverse mental state was in a document from Dr Zhang's sister in China who stated that in 2020 and 2021 his mental state was "very bad."

31. Dr Zhang's original defence solicitors also instructed a Neuropsychologist, Dr Mullin, to consider whether the brain injuries sustained by Dr Zhang on 21 September 2021 may have affected his memory of the events. Of course it was not suggested, nor could it be suggested, that a failure to recall the events would afford him a defence, but it was the reason he had provided in his defence statement for his failure to answer questions in interview or to give an explanation for his behaviour on the evening of 21 September 2021.

32. Dr Mullin said he would defer to the views of a neurologist as to whether the brain injuries sustained were likely to have resulted from the kick to the head. It was difficult to ascertain the presence or absence of post-traumatic amnesia, because Dr Zhang did not speak whilst in hospital. Taken at face value his poor performance in psychometric tests conducted by Dr Mullin could not be explained by his brain injury nor by the presence of anxiety or depression. The possibility of intentional exaggeration or feigning of cognitive impairment could not be excluded. A brief period of retrograde amnesia was likely to have occurred due to the head injury, though given the nature of the injury this was unlikely to be longer than several minutes at most. He may have had a longer period of post-traumatic amnesia, but his behaviour whilst at the hospital was not typical of a person in a state of post-traumatic amnesia and his pattern of responses to the psychometric tests conducted by Dr Mullin could not be explained by the injury sustained. Dr Zhang had indicated to Dr Mullin that he had been drinking beer prior to the incident and Dr Mullin was of the view that this may have had an impact on his memory unrelated to the trauma.

33. In the light of Dr Mullin's report Dr Zhang's solicitors subsequently instructed Dr Mavroudis, a consultant neurologist, to carry out a neurological assessment. Dr Mavroudis found that on the balance of probabilities the cause of the intracranial bleed and the haemorrhagic contusions was the blow to the head. He stated that a moderate/severe traumatic brain injury (as this injury was) may be associated with loss of consciousness, and/or peri-traumatic amnesia, anterograde and retrograde. Patients in that case are not able to recall any details for many hours before and after the head impact. He said he "found it completely reasonable" that Dr Zhang had developed peri-traumatic amnesia and that he could not recall any details from the events that lead to the alleged offence and for some time after the head injury. He also said that memory loss after such an injury can be total or partial and can extend up to or even more than 24 hours before and after the brain injury.

34. It is fair to say that Dr Mavroudis did not explain why he reached the conclusion that he did. He failed to address Dr Zhang's behaviour in hospital or to provide any explanation for the psychometric test results. There were obvious tensions between his conclusions and those of Dr Mullin. One of the reasons why the defence team had decided not to call Dr Galappathie to give evidence was a concern that the prosecution might adduce evidence from an expert who took a similar view to Dr Mullin.

THE PROPOSED APPEAL AGAINST CONVICTION AND APPLICATION TO ADDUCE FRESH EVIDENCE.

35. In summary, it is contended that Dr Zhang's conviction is arguably unsafe because the jury was not told that he suffered from a mental disorder, nor that there was pertinent medical evidence going to the central issue in the case, namely intent to kill; there is fresh medical evidence from a professor of forensic psychiatry, Professor Forrester,

which strengthens that point, and there is fresh medical evidence from Professor Forrester that when Dr Zhang chose to stop giving his evidence, that was due to his mental ill-health and should have been dealt with accordingly. The defence legal team at trial were wrong not to call Dr Mavroudis, who would have been able to provide a medical explanation for the amnesia, which was critical to Dr Zhang's credibility. Finally it is said that the judge was wrong to direct the jury that they could draw an adverse inference from Dr Zhang's silence in interview (including the absence of any explanation for his presence at the scene) and his decision to cease giving evidence at trial.

36. In her oral submissions, Ms Thorne accepted that the defence legal team at trial were dealing with a very difficult client (from whom it had proved difficult to take instructions) and a challenging case. The evidence against Dr Zhang was very strong and the medical evidence they obtained would not have provided him with a defence to the charge of attempted murder. Diminished responsibility is only available as a partial defence if the victim dies. However, she submitted that Dr Galappathie's evidence that Dr Zhang was suffering from a depressive illness which would have impaired his judgment and problem-solving skills and "would have significantly reduced his level of intent" was the only barrier to his conviction, and the defence legal team were not justified in taking the tactical decision to keep that evidence from the jury. The decision led to an unfair trial.

37. Ms Thorne contended that trial counsel's concerns about aspects of Dr Galappathie's report which highlighted Dr Zhang's consumption of strong alcohol prior to the incident and his paranoid belief that his wife was having an affair were not a sufficient justification for the decision not to adduce his evidence. There was no evidence that Dr Zhang was or appeared intoxicated at the time of the attack, and that was not the Crown's contention. The jury knew about his bizarre behaviour in watching the family home and monitoring his wife's movements. They would be told by his wife of his belief that she was having an affair. Indeed it became an agreed fact that this was the cause of the argument which led to their separation. Those difficulties for the defence were already present in the evidence that would be adduced at trial, and could not have been exacerbated by Dr Galappathie's evidence.

38. Ms Thorne explained that the decision of Dr Zhang's new solicitors to instruct Professor Forrester to provide a second opinion was driven by a concern to ascertain whether Dr Galappathie's views were "out on a limb" or whether there was support for them. This was not a case of "expert shopping". Professor Forrester shared Dr Galappathie's view that Dr Zhang's "capacity to form the relevant intent was significantly reduced as a result of the illness with which he presented, albeit not entirely removed." This was because his behaviour was "likely driven by the abnormalities he experienced in his mind (including persecutory beliefs and auditory hallucinations) and as a result it was unlikely that he was in a position where he was able to make decisions as he would were he not mentally ill."

39. Professor Forrester also ascribed Dr Zhang's decision to cease to give evidence (which he communicated to the judge in a polite and lucid note) to his underlying mental illness, and said that he required further psychiatric assessment at that time. This was based upon what Dr Zhang told Professor Forrester, which included describing a fear that "his wife and the other man" might kidnap him or poison and kill him. It was not

the explanation which he gave to his trial counsel after he was able to speak with him, which was that he was "not a good witness, timid. I was scared standing there."

40. Professor Forrester had the assistance of an interpreter on the second occasion when he assessed Dr Zhang, which he found made an appreciable difference to his ability to make an assessment. His two reports are based on more extensive material than Dr Galappathie's reports, because he took into account information obtained after the trial. This included healthcare records in which some of the treating clinicians expressed strong doubts about the genuineness of the symptoms Dr Zhang was describing to them. At least one of them suspected that he was trying to manipulate a move from prison to hospital. Professor Forrester acknowledged the range of psychiatric opinions that had been described in this case, but adhered to his original diagnosis that Dr Zhang was suffering from recurrent depressive disorder and (contrary to the views of Dr Galappathie) a primary psychotic disorder at the time of the offence.

41. Ms Thorne told the court that Professor Forrester was not the main reason for the appeal; he was the counter to the point taken by the original defence legal team that Dr Galappathie's evidence was insufficiently robust. When asked whether, if leave were given and the appeal succeeded, it would be the intention of the defence to call Dr Galappathie, Professor Forrester, or both at any re-trial, Ms Thorne indicated that no decision had yet been taken in that regard, and that this would depend on the stance taken by the prosecution.

42. Ms Thorne accepted that there are occasions on which a defendant decides not to come back into the witness box after starting to give their evidence in chief, simply because they realise that there is nothing they can say which will change the outcome of the trial, or because they fear being cross-examined. However, she submitted that in this particular case, the defence legal team were aware from the medical reports which they had obtained (which the judge had not yet seen) that Dr Zhang was vulnerable, and that he had been diagnosed as suffering from depression. Therefore, even though he was not outwardly displaying signs of any mental health issues at the time, it was incumbent on them to at least raise the possibility that this was the explanation for his ceasing to give evidence. They could have done so informally with the judge, and asked for a short adjournment to enable Dr Zhang to undergo a further psychiatric assessment.

43. Had that happened, Ms Thorne submitted it was likely that the Court would have explored whether there were measures that could be taken to help him to give evidence. In any event, had the judge been made aware of Dr Zhang's mental health issues, Ms Thorne submitted that he would not have been justified in making a direction under section 35 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") arising from Dr Zhang's failure to give evidence despite the clear warning that was given to him about the consequences.

44. Ms Thorne also criticised the defence decision not to call the evidence of Dr Mavroudis; he provided the jury with a medical explanation for Dr Zhang's claimed amnesia which she submitted was critical to his credibility. The judge in his summing up specifically told the jury that although the injury to the brain "may have had a bearing on what Dr Zhang can genuinely recall" they had heard no medical evidence about the potential effects of the kick to the head. The fact that defence counsel had persuaded the Crown to include as an agreed fact that on 21 September 2021 Dr Zhang was assessed to have a "subarachnoid haemorrhage [which] is a type of stroke caused by bleeding on the

brain" and made submissions as to the inferences that could be drawn from this as to the cause of his claimed memory loss, did not make up for the absence of medical evidence on the point. Any perceived deficiencies in Dr Mavroudis' reasoning were curable by the service of an addendum report. The jury never knew that there was medical support for the amnesia and they should have been told there was.

45. Finally Ms Thorne criticised the judge's adverse inference directions. She submitted that this was not a case for a direction under section 34 of the 1994 Act, because the inference could be drawn from Dr Zhang's notes written in hospital that he could not remember the incident. Therefore it was wrong to suggest that he had raised the issue of amnesia for the first time after his police interview. Nor was it properly a case for a direction under section 36 of the 1994 Act because there was no dispute that he was present at the scene, that there was blood on his clothing, and that he was injured by the kick to the head.

46. Ms Thorne submitted that the judge should have told the jury that they *must not* draw any adverse inferences from Dr Zhang's silence in interview and that if the proper procedure had been followed when he decided to cease giving evidence at trial, an adverse inference direction under section 35 would not have been given. All these matters, taken separately or in combination, arguably made the conviction unsafe.

DISCUSSION

47. Section 23(1)(c) of the Criminal Appeal Act 1968 empowers the Court of Appeal, if they think it necessary or expedient in the interests of justice, to receive any evidence which was not adduced in the proceedings from which the appeal lies. In exercising its discretion, the Court is obliged to take into account the factors listed in section 23(2), namely:

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;

d. Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

However, it is well established that the overarching consideration is by reference to what is necessary or expedient in the interests of justice.

48. In *R v Foy* [2020] EWCA Crim 278 the appellant, who was intoxicated by a cocktail of alcohol and drugs, stabbed a stranger to death on a public street. It was agreed that he was suffering from a psychotic episode at the time. The sole defence advanced at trial was a lack of intent to kill or cause really serious injury. On appeal it was sought to adduce expert psychiatric evidence to the effect that a defence of diminished responsibility was available to him. The question of diminished responsibility had been expressly considered at the time of trial, and an unfavourable report had been obtained

from a different expert psychiatrist. In the light of that opinion the decision had been taken not to pursue that line of defence. The Court of Appeal refused to admit the fresh evidence on the basis that to do so would be wrong in principle. There was no question of any legal oversight or legal error at trial. Davis LJ, who gave the judgment of the court, said that a defendant must bring forward his whole case at trial, and, as a general approach, an appeal cannot be treated as means of having another go.

49. That was a case where the expert consulted at trial took a different view from the expert whose evidence the appellant now sought to rely upon, and was therefore described by Davis LJ as a case of "expert shopping". In the present case, the fresh evidence on which the appellant seeks to rely is a mixture of evidence that was available at the time of trial (the evidence of Dr Galappathie and Dr Mavroudis) and evidence of a further expert which, rather than contradicting that evidence, largely supports it, though it also seeks to surmount some of the deficiencies observed in the original evidence, to provide an additional diagnosis of an underlying psychotic disorder which Dr Galappathie eschewed, and to bolster or support the original psychiatric evidence by reference to information which was not available at trial. That is equally objectionable. As the single judge said when refusing leave, it is not unusual for different psychiatrists to have different opinions of an individual's case, but an appeal is not a second chance at a trial, or a chance to re-run the trial with different evidence.

50. It is not suggested that Dr Galappathie overlooked any relevant information or misunderstood it. It is clear that an express tactical decision was taken by the defence legal team not to adduce his evidence, after balancing the positive and negative aspects which they identified; and it was taken in the best interests of the defendant on the basis that they considered (for understandable reasons) that it would not advance his case, and indeed had the potential to do him more harm than good by highlighting that he had a likely motive for killing his wife. Whilst Dr Zhang's belief that she was having an affair was something the jury would find out about whether Dr Galappathie was called to give evidence or not, Dr Galappathie gave it a prominence in explaining his mindset at the time which was very unhelpful.

51. We take the view that Dr Galappathie's evidence would probably have been inadmissible on the question of whether Dr Zhang intended to kill his wife even if the defence legal team had taken the decision to seek to adduce it. Expert psychiatric evidence is admissible when a defendant may have been suffering from a mental illness which would potentially afford him or her a defence to the charge against him; but Dr Galappathie's evidence did not support a defence of non-insane automatism (nor any other defence, given that diminished responsibility is not a defence to attempted murder). Dr Galappathie did not say that a person suffering from moderate to severe depression who was displaying signs of paranoia could not form the intention to kill someone. Taken at its highest, Dr Galappathie's opinion was that Dr Zhang's capacity to form an intent to kill his wife was substantially impaired, but the only reason he gives for that opinion is that Dr Zhang's depressive illness would have impaired his ability to take rational decisions. That reasoning arguably mixes up his ability to come up with a rational solution to a perceived problem with his ability to form a deliberate intention to act in a particular way (which could be completely irrational). Moreover, as the Crown have pointed out in the Respondent's Notice, the question whether he formed such an intent at the time was a matter for the jury, based on such inferences as they were able to draw from his behaviour at the time and other evidence, such as the history

of the couple's relationship. It was something on which the jury could form a view without expert assistance.

52. But even if his evidence had been admissible, Dr Galappathie accepted that Dr Zhang (a highly intelligent individual) would have known what he was doing when he stabbed his wife repeatedly with a kitchen knife which he had taken to the scene, and that he would have known that this was legally and morally wrong. One can well understand why trial counsel took the view that adducing evidence that because he was depressed and suffering from paranoid beliefs, Dr Zhang may not have appreciated that stabbing his wife multiple times was not the optimal solution to his marital difficulties, that the consequences for him were likely to be arrest and incarceration, or even that he might actually succeed in killing her, would not have helped his case. It provided no support for his claim that he did not intend to kill her because "we were a happy family".

53. Dr Zhang now complains that he was told about the decision not to adduce the evidence of Dr Galappathie, rather than consulted, but even if that is right, it does not arguably make his conviction unsafe. This is the type of decision which is not ultimately a matter for the lay client. The decision not to seek to adduce that evidence, which was both understandable and justifiable, does not afford any basis for allowing the appeal. It casts no doubt on the safety of the conviction.

54. Everything said about Dr Galappathie's evidence on the question of intent applies with equal force to Professor Forrester's evidence on that topic. We read Professor Forrester's reports *de bene esse* but it is plain that they fail to satisfy the test under section 23(1) of the Criminal Appeal Act. It is neither necessary nor expedient in the interests of justice to admit any of the evidence which it is sought to admit under that section. Despite Ms Thorne's explanation for seeking a further opinion, the proposed reliance on Professor Forrester goes well beyond using his evidence as support for the view that Dr Galappathie was not "on a frolic of his own" and that his opinion about the impairment of Dr Zhang's capacity to form the necessary intent is credible. Although this is not a case of trying to find an expert who will give a helpful opinion when the original expert did not, it is still a case of expert shopping, since Professor Forrester is being used to shore up the perceived deficiencies in the original report and to add to the original mental health diagnosis.

55. We also agree with the single judge that, irrespective of Professor Forrester's views based upon what Dr Zhang has now told him, when the decision was taken by Dr Zhang to cease giving evidence there was nothing to suggest that he had done so because of any mental health issues. He had been examined by Dr Galappathie and Dr Mohammed, and he was considered to be fit to stand trial. As the single judge said, their opinions were not such as to suggest that the court either should or could now try to look behind his decision to leave the witness box.

56. Trial counsel has confirmed that throughout the time when he and his instructing solicitors represented Dr Zhang, his client never said anything to them about auditory or visual hallucinations and there was nothing that suggested he experienced any during their conferences at trial, including at a time prior to going into the witness box when he was considering pleading guilty. Dr Zhang has now elaborated on what he meant when he said he was "scared," but trial counsel had no reason to believe that he meant anything other than that he was scared by the experience of giving evidence (and this

would have been reinforced by the other things he said about his performance in the witness box).

57. As the Crown has pointed out in the Respondent's Notice, this ground of appeal is speculative. Professor Forrester's opinion that Dr Zhang's decision to cease giving evidence was "influenced by experiences arising from underlying illness" does not provide a clear explanation for that decision, nor does it overcome the problem that it was not the explanation Dr Zhang gave at the time, when to all outward appearances he was mentally capable of making that decision and of understanding the consequences of doing so. He had plenty of time to reflect on his choice, because before he had finally committed himself to that course of action, one of the jurors was taken ill and the trial was paused until they were fit to resume. The judge gave him an appropriately adapted warning in front of the jury and he confirmed that he understood it and that his decision remained that he did not wish to continue giving evidence.

58. The single judge rightly observed that on the evidence existing at the time there was no sufficient basis for the defence to ask the judge to stop the trial to enable a psychiatric assessment to take place. In any event, it cannot be reliably predicted what would have happened had they done so; the judge may well have refused the adjournment, and even if he had agreed, no-one knows whether Dr Zhang would have been compliant, let alone what he would have said to the psychiatrist on that occasion or what view the doctor would have formed. It is also difficult to see how any of these matters could have been managed at a time when Dr Zhang, being partway through giving evidence, was prohibited from communicating with his legal team.

59. As the single judge said, there is no reason to suppose that the court would have decided that it was now "undesirable" for Dr Zhang to give evidence under section 35(1)(b) of the 1994 Act. Dr Galappathie took the view that Dr Zhang was fit to plead and to give instructions, and that his depression was being adequately managed by the medication prescribed by Dr Mohammed. In those circumstances, a suitably modified direction under section 35 was both apposite and inevitable.

60. As to the directions given in relation to the inferences to be drawn from the failure by Dr Zhang to raise the topic of amnesia when the police interviewed him, there was discussion of the legal directions before they were given, in the usual way. The judge gave modified directions to the jury in terms that we consider were both balanced and fair. Although some judges may have decided not to give a section 34 direction, we agree with the single judge that it was appropriate for the trial judge to direct the jury on how to deal with Dr Zhang's silence in interview and his explanation for it, and that there is no basis for complaining about the terms in which that direction was given. In any event we are satisfied that the direction would have made no difference to the outcome, and is not a basis for questioning the safety of the conviction.

61. There is no merit in the suggestion that it was unfair to have given the section 34 direction because Dr Zhang's scribbled notes whilst he was remaining mute in hospital might possibly have been interpreted as indications that he had no recollection of the incident. Those notes do not explain why Dr Zhang did not simply tell the police that he was unable to answer their questions because he could not remember what happened.

62. Finally, we consider the criticism of the decision not to call Dr Mavroudis to give evidence. It is possible that a different legal team would have taken a different view

about whether the advantages of adducing such evidence outweighed the disadvantages, but that does not mean the decision was unjustified or mistaken. Trial counsel has explained how he and his solicitors weighed up the pros and cons, and of his particular concerns that Dr Mavroudis would not stand up to cross-examination. In our judgment they were entitled to take the decision which they did. As the single judge observed, the conviction is not arguably rendered unsafe by the absence at trial of evidence which would have weakened Dr Zhang's case on the charge against him (because it contained references to his drinking strong spirits on the day of the attack) but strengthened his case on the amnesia issue, which was no answer to the charge against him but at most provided an innocent explanation for his failure to give his own account of events on 21 September 2021.

63. Having decided against calling Dr Mavroudis, counsel did well to persuade his opponent to agree to the admission concerning the brain injury. That, coupled with the evidence of the man who kicked Dr Zhang that he was wearing steel toe-capped boots, allowed counsel to say in closing that the jury may not find it difficult to accept that Dr Zhang's memory was impeded "given our everyday experience of head injuries in life". The judge's summing up to the jury on this matter, quoted in Ms Thorne's Advice and Grounds, was scrupulously fair. He reminded the jury that Dr Zhang had told them that the reason for his "no comment" interview was that he could not remember what happened and properly directed them that if they were to conclude that this may have been or was the case, and that this was the reason why he maintained his silence, they should not hold it against him. The direction also contained all the usual appropriate safeguards including warnings that the jury should not convict wholly or mainly on the basis of an adverse conclusion on that issue.

64. In the light of those matters, even if we had been persuaded that it was a mistake to have decided not to call Dr Mavroudis, we are not persuaded that this caused Dr Zhang any material disadvantage or rendered his trial unfair.

65. For all these reasons, none of the grounds advanced gives rise to an arguable basis for impugning the safety of the conviction. In those circumstances there is nothing to be gained by granting the requisite extension of time. The renewed application for leave to appeal against conviction is therefore refused.

THE APPEAL AGAINST SENTENCE

66. We have already explained why we have granted leave to appeal on the amended ground and why we have refused leave on the issue of dangerousness and on the basis that this was not an appropriate case for a discretionary life sentence. We have considered carefully whether this was a Culpability A case. It is not a paradigm example of a case in which a murder is planned for financial gain. However the fact that Dr Zhang may have had another motive to seek to murder his wife (namely his suspicion that she was having an affair) does not mean that this was the exclusive impetus behind his actions. The trial judge had the advantage of seeing and hearing all of the evidence and forming his own views about it. It is clear from his sentencing remarks that he was alive to the danger of placing too much weight on Dr Xiao's own perceptions that Dr Zhang's attack on her was driven by a desire to get his hands on the family home and on her pension. The fact that those were her subjective beliefs does not mean they were unjustified.

67. By the time he was interviewed by the probation officer for the purposes of the pre-sentence report Dr Zhang was able to give her a detailed account, via an interpreter, of what occurred on the evening of 21 September 2021, up to the point of approaching his wife, even to the extent of explaining that he had gone back to his car to retrieve his laptop because he felt it was not safe in the boot of the car, which he said had a broken lock. He told the probation officer that he had approached his wife because he wanted to discuss the mortgage as well as the non-molestation order and the divorce. Dr Zhang told the probation officer that he did not want the divorce and that his wife "wanted the big house" leaving him the flat, which was worth much less, so he felt this was unfair. She said in the report that it was evident that he was displeased with the proposed financial split in terms of the divorce.

68. The Judge's assessment was that there was a longstanding failure by Dr Zhang to accept his wife's entitlement to a greater share of the joint finances and that this was entrenched in his mind long before any decision to separate was made. The evidence that some years earlier, Dr Zhang sought to persuade Dr Xiao to sign over her share of the matrimonial home to him and assaulted her when she refused to do so, supports that assessment. He had also decided not to continue to pay his share of the mortgage and his agreed contribution towards the maintenance of the children. He had a history of not paying his share of the family outgoings.

69. In the light of all these factors, and Dr Zhang's expressed resentment about his wife wanting the matrimonial home which was worth more than the flat, the Judge was entitled to reach the conclusion that Dr Zhang had a desire to benefit financially from his wife's death, even if someone of his intelligence should have realised that if he killed her in a public street in front of witnesses there would be little prospect of his doing so. As the probation officer and Dr Xiao both pointed out, who knows what might have happened had he succeeded in getting into the back of her car, armed as he was with a knife.

70. However, the starting point for a category A2 offence is 30 years' imprisonment, not 35 as the judge said. The judge indicated that he was not going to treat as aggravating factors certain of the matters which he had taken into account in reaching the conclusion that Dr Zhang was a dangerous offender, because he regarded this as double counting. That was wrong in principle, and the error favoured Dr Zhang. In consequence, the notional determinate sentence reached by the judge was two years below what he erroneously believed to be the correct starting point under the guidelines. The previous acts of hostility towards the victim and the breaches of the non-molestation order were aggravating factors which could and should have elevated the sentence from the starting point before the matters of mitigation identified by the judge were taken into consideration.

71. We consider that once the aggravating and mitigating factors are properly weighed against each other, the notional determinate sentence would have been one of 30 years' imprisonment, which means that the minimum term of the sentence of life imprisonment would have been 20 years less time spent on remand, which was 559 days (1 year and 194 days). In the light of the guidance given by the Court of Appeal (Criminal Division) in *R v Sesay* [2024] EWCA Crim 483 at [12], it is now incumbent on the court passing a life sentence to announce the minimum term as a specific period expressed in years and days, and not in the manner expressed by the judge, which

accorded with the previous practice. Accordingly, the minimum term is one of 18 years and 171 days.

72. We therefore quash the sentence imposed on Count 1 and substitute for it a sentence of imprisonment for life pursuant to section 285 of the Sentencing Act 2020 with a minimum term of 18 years and 171 days. The concurrent sentence of 2 years' imprisonment on Count 2 is unchanged. To that extent the appeal against sentence is allowed.